

Cite as Det. No. 17-0127, 36 WTD 601 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 17-0127
)	
...)	Registration No. . . .
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[1] RCW 82.32.145: RESPONSIBLE INDIVIDUAL OF A CLOSED BUSINESS. The highest ranking executive manager or administrator in charge of the management of a business entity, other than a corporation, is a “responsible individual” for the purpose of imposing personal liability for unpaid trust fund taxes following the issuance of a tax warrant against a business, regardless of whether the highest ranking executive manager or administrator in charge of management is aware of the unpaid trust fund tax liability.

[2] RCW 82.01.060; WAC 458-20-100: SCOPE OF INFORMAL ADMINISTRATIVE REVIEW. The Department of Revenue (Department) may not informally review collection activity undertaken to satisfy a warrant because it lacks the authority under WAC 458-20-100(1)(a).

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Fisher, T.R.O. – A former member of a closed limited liability company seeks a refund of money the member paid arising out of a trust fund assessment based on the closed limited liability company’s unpaid retail sales taxes, asserting that he was not a responsible person for the closed limited liability company. The former member also contests the Department collecting money to satisfy the liability out of a bank account owned jointly by the former member and an unrelated third party. The former member is a former chief executive and is liable for the retail sales taxes assessed in the tax warrant against the closed limited liability company for the portion of the audit period where the former member was the chief executive. The petition is granted in part and denied in part.¹

ISSUES

1. Under RCW 82.32.145(1) and WAC 458-20-217(8), was a member of a closed limited liability company a “responsible individual,” and therefore, personally liable for collected and unremitted retail sales taxes?

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

2. Under WAC 458-20-100, may the Department's Administrative Review and Hearings Division consider a challenge to how funds were seized after a notice of collection action was issued based on an outstanding tax warrant?

FINDINGS OF FACT

In 2010, . . . ("Company"), was formed by . . . [Owner]. Company operated a bar and restaurant called . . . ("Bar").

In 2012, . . . ("Taxpayer") and [Owner] executed several documents. In one agreement, entitled "Agreement (Purchase and Sale of a Business)" ("Purchase and Sale Agreement"), [Owner] warrants that he was the owner and operator of Bar, and sold Bar to Taxpayer for \$ The Purchase and Sale Agreement also indicated that upon closing of the transaction [Owner] would deliver to Taxpayer a Bill of Sale. The Purchase and Sale Agreement also indicates that the Purchase and Sale Agreement represents the entire agreement between [Owner] and Taxpayer, and "that there are no representations, warranties, terms, covenants, or conditions made by any party except as herein expressly contained . . . [, and] no oral agreement or course of conduct to the contrary, shall be deemed an alteration, amendment, or modification of cancellation [of the Purchase and Sale Agreement]." Purchase and Sale Agreement, Section 15, Page 5. In another document, entitled "Bill of Sale of Business" ("Bill of Sale"), Company warrants that it had the full right and title to sell Bar, and sold Bar to Taxpayer; the Bill of Sale does not list a purchase price. Both the Purchase and Sale Agreement and Bill of Sale are dated September 1, 2012. Taxpayer alleges that these agreements were contingent upon Taxpayer obtaining a different kind of visa, [but] nowhere in either the Purchase and Sale Agreement or the Bill of Sale is anything mentioned about a visa contingency.

After executing the agreements, Taxpayer sought to change his immigration status with US Citizen[ship] and Immigration Services. Ultimately, Taxpayer's application was denied. In a letter explaining the decision ("Immigration Notice of Decision"), a representative recited some of the documentation provided by Taxpayer to US Citizen[ship] and Immigration Services: the business license for "[Company], dba [Bar]"; Company's federal tax return forms 941 for payroll taxes; Company's W-3 Forms; Company's corporate income tax return; and Company's bank account statements. The Immigration Notice of Decision also recites that Taxpayer provided documentation of the \$. . . payment to [Owner].

On April 3, 2013, Taxpayer renewed the business registration for Company. On May 30, 2013, Taxpayer formed . . . ("New Entity"), and hoped to operate Bar under New Entity rather than Company. While operating Bar in 2013, Taxpayer used Company's liquor license while waiting for New Entity to be issued a new liquor license.

On July 2, 2014, the Department of Revenue ("Department") contacted Company in order to review Company's records and tax returns to confirm Company was properly collecting and remitting the appropriate taxes from January 1, 2011, through December 31, 2013. The Department learned that Company had collected retail sales tax throughout the period at issue that it did not remit to the Department, and ultimately assessed Company \$. . . in retail sales taxes on

December 10, 2014. The assessment went unpaid, and a tax warrant was issued against Company on February 6, 2015. [T]he Department filed the tax warrant as a judgment on February 19, 2015.

On March 31, 2015, Company's tax reporting account was closed with Company's tax warrant remaining unpaid. On August 28, 2015, the Department issued a Trust Fund Accountability Assessment (TFAA), Document No. . . . , and assessed \$. . . in retail sales taxes, \$. . . in interest, and \$. . . in a substantial underpayment penalty against Taxpayer personally. When this amount went unpaid, the Department issued Tax Warrant No. . . . ("Warrant") against Taxpayer on October 26, 2015. On February 23, 2016, Warrant was filed as a judgment in . . . County Superior Court under Cause No. Once Warrant was filed, the Department served Notices and Orders to Withhold and Deliver to several financial institutions to obtain payment. The Department ultimately collected all of the money owed under Warrant through garnishing Taxpayer's bank account.

Following satisfaction of Warrant, Taxpayer timely sought a refund of the money taken out of the bank accounts. Taxpayer asserts that because it had no intention of taking over Company, and only wanted to operate Bar under New Entity, Taxpayer cannot be held responsible for Company's unpaid tax liabilities. Taxpayer further argues that the Department improperly seized funds out of an account that was jointly owned by Taxpayer and an unrelated third party.

ANALYSIS

RCW 82.08.050 requires businesses that make retail sales to collect retail sales tax from their customers and hold it in trust until they pay it to the Department. Sellers who fail to remit collected retail sales tax to the Department are personally liable to the state for the amount of the tax. RCW 82.08.050(3). When a limited liability business entity is dissolved or otherwise terminated owing retail sales tax to the state, and [the Department issues] a tax warrant . . . for the collection of the unpaid retail sales tax before the termination of the entity, the Department may pursue collection of the entity's unpaid trust fund taxes, including penalties and interest on those taxes,² against certain "responsible individuals," including the imposition of a TFAA. RCW 82.32.145(1). Personal liability under RCW 82.32.145 may be imposed for state and local trust fund taxes. RCW 82.32.145(2).

Here, the Company collected and failed to remit trust fund taxes to the Department, and after the Department issued warrants against the Company, it was dissolved without payment of its trust fund tax liability. Therefore, under RCW 82.08.050(3), the Department properly determined that the entity was insolvent, and that personal liability could be properly imposed under RCW 82.32.145 against any or all of the responsible individuals.

² Taxpayer contends the Department improperly included penalties and interest in its assessment against Taxpayer. Because RCW 82.32.145(1) specifically requires the imposition of penalties and interest assessed on unpaid trust fund taxes against a responsible person, and because we find that Taxpayer was a responsible person, we reject this argument. *Compare* RCW 82.32.145(1) (where the Department issues a warrant for the collection of unpaid trust fund taxes from a limited liability business and the business has been terminated, abandoned, or insolvent, the Department may pursue collection of the unpaid taxes, **including penalties and interest** on those taxes, against responsible individuals) . . . *with* RCW 82.32.140 (a successor to a predecessor business that did not have a warrant issued against it for unpaid trust fund taxes is only subject to the taxes of the predecessor, **not penalties and interest** assessed on those taxes) . . .

A “responsible individual” is “any current or former officer, manager, member, partner, or trustee of a limited liability business entity, with an unpaid tax warrant issued by the department.” RCW 82.32.145(9)(g)(i). RCW 82.32.145 imposes personal liability for unpaid trust fund taxes on those specified individuals, in relevant part, as follows:

For a responsible individual who is the current or former chief executive or chief financial officer, liability under this section applies regardless of fault or whether the individual was or should have been aware of the unpaid trust fund tax liability of the limited liability business entity.

RCW 82.32.145(3)(a). A responsible individual who is a chief executive or chief financial officer is only liable for trust fund tax liability accrued during the period he or she was acting in those roles. RCW 82.32.145(4)(a); *see also* Det. No. 14-0238, 34 WTD 346 (2015).

“Chief executive” means “[t]he president of a corporation; or for other entities or organizations other than corporations or if the corporation does not have a president as one of its officers, the highest ranking executive manager or administrator in charge of the management of the company or organization.” RCW 82.32.145(9)(a).

Taxpayer asserts he never intended to own Company – instead, Taxpayer intended to run Bar under New Entity. Taxpayer argues that because it was not the parties’ intention for Taxpayer to take over Company, Taxpayer is not a responsible individual. Under the terms of the Purchase and Sale Agreement, [Owner] warranted that he was the owner and operator of the Bar, and agreed to sell and transfer the Bar to Taxpayer. Conversely, under the terms of the Bill of Sale, Company purported to sell the Bar to Taxpayer; [Owner] signed for Company. Accordingly, the weight of the evidence shows that Taxpayer purchased Company and that Company operated the Bar. In the Immigration Notice of Decision, U.S. Citizenship and Immigration Services noted that Taxpayer provided the “business license for the previous existing business [Company] dba [Bar]” when applying for a change in immigration status, in addition to Company’s federal tax return forms 941 for payroll taxes, Company’s W-3 forms, Company’s corporate income tax return, and Company’s bank account statements.

Furthermore, Company operated Bar, making it immaterial to distinguish between the two during the period at issue. On August 3, 2013, Taxpayer himself completed the business license renewal for Company. Taxpayer used Company’s liquor license while waiting for the Washington State Liquor and Cannabis Board to issue Taxpayer’s New Entity a liquor license. Taxpayer possessed Company’s confidential tax and financial information, and Company filed all tax returns pertaining to taxable transactions occurring at the Bar. Most importantly, Company collected retail sales tax on retail sales occurring at the Bar and failed to remit all of these taxes to the Department, keeping trust funds for the Company’s use. Based on the facts of this case, we conclude that Taxpayer bought Company from [Owner], and was thereafter in charge of managing Company with the intention of moving all of Company’s assets to Taxpayer’s New Entity.³

³ Taxpayer contends that because Taxpayer’s visa status was not changed, the sale of Bar never was closed. This provision appears nowhere in either the Purchase and Sale Agreement and Bill of Sale. Even if we assume this agreement was made orally, the Purchase and Sale Agreement expressly disclaims any representations, warranties, terms, covenants, or conditions not contained in the Purchase and Sale Agreement, so such an oral agreement was not

As a member of Company, Taxpayer is a responsible person under RCW 82.32.145(9)(g)(i). Because Taxpayer was in charge of managing Company as of September 1, 2012, Taxpayer is also a former chief executive of Company. RCW 82.32.145(9)(a). Because Taxpayer is a responsible person who is a former chief executive, Taxpayer is liable for the unpaid trust taxes, the collected and unremitted retail sales taxes, and the penalties and interest on those taxes, assessed against Company. RCW 82.32.145(3)(a).

However, the Department assessed against Taxpayer all the retail sales taxes from the entire audit period from January 1, 2011, through December 31, 2013. RCW 82.32.145(4)(a) limits a former chief executive's liability for unpaid trust taxes of a defunct entity "only for trust fund tax liability accrued during the period that he or she was the chief executive" The evidence shows Taxpayer took ownership of Company on September 1, 2012. Accordingly, the Department erred when it assessed retail sales taxes accrued by Company between January 1, 2011, through August 31, 2012, against Taxpayer, because Taxpayer was not yet a responsible person or a chief executive of Company. Taxpayer's petition is granted as to the retail sales tax assessed against Company between January 1, 2011, and August 31, 2012.

Taxpayer also protests the Department collecting payment on the assessment from a bank account owned by Taxpayer and an unrelated third party. RCW 82.32.235 provides:

(1) . . . [T]he [D]epartment is authorized to issue to any person, including the [D]epartment, a notice and order to withhold and deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person, property which is or will become due, owing, or belonging to any taxpayer against whom a warrant has been filed.

. . .

(3)(a) The [D]epartment is authorized to issue a notice and order to withhold and deliver to any financial institution in the form of a listing of all or a portion of the unsatisfied tax warrants filed under this chapter and outstanding warrants under RCW 49.48.086 with the clerk of the superior court of a county of the state, except tax warrants subject to a payment agreement, which is not in default, between the department and the taxpayer.

Here, Tax Warrant . . . was issued against Taxpayer, filed with the Clerk of . . . County Superior Court, and the taxes owed under the Warrant had not been satisfied. The Department was therefore authorized to issue the notice asking Taxpayer's financial institution to deliver to the Department Taxpayer's money, e.g., Taxpayer's property. RCW 82.32.235. Taxpayer contends the Department unlawfully took money out of the joint bank account because the money taken was not only Taxpayer's.

effective if it was made at the time the contract was executed. Furthermore, the fact that the Bill of Sale was executed indicates the sale did close, considering the Purchase and Sale Agreement indicated the Bill of Sale would only need to be delivered at closing.

... WAC 458-20-100[(1)(a)] lists four [nonexclusive] types of Departmental action that are subject to informal administrative review: an assessment of tax, interest, or penalties; denial of a refund, credit, or deferral request; issuance of a balance due notice or a notice of delinquent taxes, including a notice of collection action; and the issuance of an adverse ruling on future liability from the taxpayer information and education section. WAC 458-20-100 does not specifically authorize the Administrative Review and Hearings Division to review Departmental collection actions after the notice of collection action has been sent. More importantly, Taxpayer's claim that the Department improperly collected funds from a joint bank account involves persons who are not parties to this review, such as Taxpayer's bank and the other owner of the joint bank account. *See generally Robb v. Kaufman*, 81 Wn. App. 182, 187, 913 P.2d 828 (1996) (all persons whose interests are impacted by a garnishment need to be included as parties in a lawsuit contesting a garnishment). Such claims as to the propriety of garnishment are properly brought in forums where all parties whose interests may be affected may be heard. That is not this forum. Accordingly, we decline to rule whether the garnishment was done lawfully.

DECISION AND DISPOSITION

Taxpayer's petition is granted as to the retail sales tax assessed against Company between January 1, 2011, and August 31, 2012. Taxpayer's petition is denied as to the retail sales tax assessed against Company from September 1, 2012, through December 31, 2013. We remand this case to the Compliance Division for adjustment consistent with this determination.

Dated this 12th day of May 2017.