

Cite as Det. No. 16-0054, 36 WTD 190 (2017)

BEFORE THE APPEALS DIVISION
 DEPARTMENT OF REVENUE
 STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 16-0054
)	
...)	Registration No. . . .
)	

[1] RCW 82.32.160; WAC 458-20-100(5)(d): CORRECTION OF TAX – FINAL ASSESSMENT AGAINST ENTITY. When an entity fails to provide records or request reconsideration of the Department’s determination sustaining an assessment, the assessment and Audit’s findings becomes final. Audit’s findings cannot later be appealed in the course of a trust fund accountability assessment appeal.

[2] RCW 82.32.145(9)(h); WAC 458-20-217: TRUST FUND TAXES. Uncollected retail sales tax assessments are not trust fund taxes and the Department cannot include such amounts in assessments against responsible individuals under RCW 82.32.145.

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.

Anderson, A.L.J. – Two individuals dispute trust fund accountability assessments (“TFAAs”) on the basis that the TFAAs include uncollected retail sales tax and the individuals did not willfully fail to pay or cause collected retail sales tax not to be paid to the Department. Petition denied in part and granted in part.¹

ISSUES

1. Whether RCW 82.32.160 permits individuals to dispute the amount of collected retail sales tax included in a TFAA.
2. Whether RCW 82.32.145 permits the assessment of uncollected retail sales tax in a TFAA.

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

FINDINGS OF FACT

On December 13, 2007, [Individual A] and [Individual B] formed [Corporation], an [out-of-state] corporation that provided commercial equipment recovery and re-marketing services to lenders nationwide. [Corporation] would recover and re-market trucks, trailers, construction equipment, industrial equipment, and other types of heavy equipment and machinery after a borrower defaulted. [Corporation] would also provide other services to lenders including collection support, collateral inspections and appraisals, equipment transport, and secure storage.

[Corporation] registered with the Department and; from February 1, 2009, through December 30, 2011; it reported and paid service and other activities business and occupation (“B&O”) tax on its income except \$. . . that it reported as retail in 2010 (and, with respect to the \$. . . , [Corporation] paid retailing B&O tax and retail sales tax). Taxpayer closed its reporting account with the Department effective December 30, 2011, and the Department’s Audit Division (“Audit”) reviewed [Corporation’s] books and records.

Audit determined that [Corporation] was acting as a consignee [rather than an agent] in its recovery and re-marketing activities, and reclassified its income from service and other activities to retailing. On December 6, 2012, Audit issued an assessment against [Corporation]; for February 1, 2009, through December 30, 2011 (the “Audit Period”); in the amount of \$. . . , [comprising] \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in wholesaling B&O tax, \$. . . in retailing of interstate transportation equipment B&O tax, \$. . . in interest, \$. . . in five percent assessment penalty, and a \$. . . small business credit, and a \$. . . credit for paid service and other activities B&O tax. As relevant here, the \$. . . assessment of retail sales tax is [comprising] \$. . . in uncollected retail sales tax and \$. . . in collected retail sales tax.² Audit determined that [Corporation] had collected \$. . . of retail sales tax in the following four transactions: (1) \$. . . – In a May 15, 2010, sale to . . . ; (2) . . . – In a July 13, 2010, sale to . . . ; (3) \$. . . – In a July 31, 2010, sale to . . . ; and (4) \$. . . – In a December 6, 2010, sale to

[Corporation] appealed the Department’s assessment and argued that Audit had erred in reclassifying its business income. In Determination No. 14-0019, we remanded the assessment for possible adjustment based upon additional records that [Corporation] was to provide. Determination No. 14-0019 was sent to [Corporation’s] address of record with the Department – a post office box – on January 22, 2014, but [Corporation] did not check the post office box for mail nor provide additional records, and the assessment was sustained.

Eventually, the [unadjusted] balance of the assessment was referred to the Compliance Division (“Compliance”) for collection. Compliance issued Tax Warrant No. . . . (the “Tax Warrant”) for \$. . . against [Corporation] on April 29, 2014, and filed the Tax Warrant in the Superior Court of . . . County under Cause No. . . . on May 16, 2014. To date, [Corporation] has not paid any amounts due under the Tax Warrant.

On January 21, 2015, Compliance issued two TFAAs against [Corporation’s] owners and officers, [Individual A] (50% owner and Executive Vice President) and [Individual B] (50% owner and

² [Corporation] Audit Workbook, Audit Number . . . , Workpaper A: Sales Detail, Tax Collected in transactions on Lines 26, 38, 41, and 58.

President). Both TFAAs are for \$. . . , this amount is [comprising] \$. . . in retail sales tax, \$. . . in interest, and \$. . . in penalties.³

[Individual A] and [Individual B] (collectively, the “Taxpayers”) dispute the TFAAs. First, Taxpayers assert the TFAAs violate RCW 82.32.145 because, in large part, they include uncollected retail sales tax amounts that are not “trust fund taxes,” as the term is defined in RCW 82.32.145(9)(h). In support, Taxpayers point to Audit’s finding that [Corporation] did not collect \$. . . of the total retail sales tax that was assessed.

In addition, Taxpayers dispute that [Corporation] collected the retail sales tax listed on [Corporation’s] Invoice . . . , dated July 31, 2010, issued to . . . , for \$. . . , [comprising] \$. . . for [equipment] and \$. . . in retail sales tax. Taxpayers point to the language on the invoice that states, “Please provide copy of reseller certificate if sale tax exempt,” and explain that sometimes – and, with respect to this transaction – [Corporation] would not collect retail sales tax listed on the invoice if a purchaser showed it was exempt from retail sales tax. In support of Taxpayers’ assertion that it did not collect \$. . . of retail sales tax in the sale of the [equipment], Taxpayers have provided [Corporation’s] accounting journal entries for the sale, bank records, and the sales proceeds statement.⁴

The remaining amounts of retail sales tax included in the TFAAs are collected retail sales tax from the following three transactions:

1. Bill of Sale, dated May 15, 2010, issued to . . . , for \$. . . , [comprising] \$. . . for a used . . . tractor and \$. . . in retail sales tax;
2. Invoice # . . . , dated July 13, 2010, issued to . . . , for \$. . . , [comprising] \$. . . for a used . . . dozer and \$. . . in retail sales tax;
3. Invoice, dated December 6, 2010, issued to . . . , for \$. . . , [comprising] \$. . . for a . . . forklift and \$. . . in retail sales tax.

Taxpayers concede liability for \$. . . of collected retail sales tax from the third transaction listed above (a sale to . . .).⁵ But, as to these remaining [two] transactions, Taxpayers assert that they did not willfully fail to pay [or cause to be paid] the collected retail sales tax to the Department because [Corporation] . . . remitted collected retail sales tax to its Department-registered customers.

To substantiate this claim, Taxpayers offer [Corporation’s] bank records, accounting journal entries, and sales proceeds statements. [Corporation’s] customer, in both of the transactions at issue, was In the first transaction (sale of . . . Tractor), [Corporation’s] sale proceeds statement

³ [Corporation] was assessed \$. . . in retail sales tax; however, this amount was reduced to \$. . . when amounts were credited for [B&O] taxes paid.

⁴ The sales proceeds statement was issued by [Corporation] to its customer. [I]t lists [Corporation’s] sales fee of \$. . . and calculates the net amount due to the customer. [H]ere, that amount is \$. . . (\$. . . - \$. . .). [Corporation’s] accounting records show that [Corporation] issued its customer a check for \$. . . on August 30, 2010, prior to receiving a \$. . . payment from the purchaser on September 10, 2010. Taxpayers state that rather than ask the customer for money back (\$. . .), [Corporation] cut its commission from \$. . . to \$. . . to account for the difference.

⁵ Taxpayers’ representative conceded liability at the hearing on July 20, 2015.

reflects that [Corporation] sent . . . a check for \$. . . (\$. . . sale price + \$. . . in retail sales tax - \$. . . in sales fee) and issued itself a check for a service fee of \$. . . (10% of sale price); this is corroborated by [Corporation's] accounting journal entries and bank statements. In the second transaction (sale of . . . dozer), [Corporation's] sale proceeds statement reflects that [Corporation] sent . . . a check for \$. . . (\$. . . sale price + \$. . . in retail sales tax - \$. . . in sales fee) and issued itself a check for a service fee of \$. . . (10% of sale price); this is corroborated by [Corporation's] accounting journal entries and bank statements. Based upon the records provided, we find that, with respect to these two transactions, [Corporation] did remit collected retail sales tax to its customer:

However, Taxpayers have failed to show that . . . was registered with the Department at the time of these transactions. Taxpayers have not provided a tax registration number for . . . and when we used the Department's business look-up tool (<http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/>) to search for . . . tax registration status, we did not find any business by that name, registered with the Department. Therefore, because Taxpayers have not shown that [Corporation] complied with the April 9, 2003 Special Notice [and remitted the retail sales tax collected in these two transactions, to a Department-registered customer], we need not address Taxpayers' legal argument that is predicated upon a factual finding that [Corporation's] complied with the April 9, 2003 Special Notice.

ANALYSIS

Businesses that make retail sales are required under RCW 82.08.050 to collect retail sales tax from their customers, hold it in trust until paid to the Department, and report and remit the collected tax to the Department. Sellers who fail to collect retail sales tax or fail to remit collected retail sales tax to the Department are personally liable to the state for the amount of tax. RCW 82.08.050(3). Here, the seller is [Corporation]. Pursuant to RCW 82.08.050(3), [Corporation] is liable to the Department for the amount of retail sales tax it collected and did not collect on consignment sales. *See* Det. No. 14-0412, 34 WTD 386 (2014) (Department within statutory authority to proceed against taxpayer for uncollected retail sales tax where the taxpayer failed to collect the tax or obtain a copy of a reseller's permit from buyers.)

When a limited liability business entity, like a corporation, is dissolved or otherwise terminated, and the Department has issued a tax warrant against the entity, the Department has statutory authority to collect certain types of taxes from the entity's "responsible individuals." RCW 82.32.145 states as follows:

(1) Whenever the department has issued a warrant under RCW 82.32.210 for the collection of unpaid trust fund taxes from a limited liability business entity and that business entity has been terminated, dissolved, or abandoned, or is insolvent, *the department may pursue collection of the entity's unpaid trust fund taxes, including penalties and interest on those taxes, against any or all of the responsible individuals.* For purposes of this subsection, "insolvent" means the condition that results when the sum of the entity's debts exceeds the fair market value of its assets.

The department may presume that an entity is insolvent if the entity refuses to disclose to the department the nature of its assets and liabilities.

(2) Personal liability under this section may be imposed for state and local trust fund taxes.

(Emphasis added.) “Trust fund taxes” is statutorily defined to mean “taxes collected from purchasers and held in trust under RCW 82.08.050, including taxes imposed under RCW 82.08.020 and 82.08.150.” RCW 82.32.145(9)(h). Here, Taxpayers challenge the TFAAs, to the extent that they include retail sales tax that was not collected by [Corporation] (\$. . . per Audit + \$. . . on Invoice . . .). Taxpayers assert that these amounts are not “trust fund taxes,” and thus, ineligible to be assessed against “responsible persons” pursuant to RCW 82.32.145.

As to Taxpayers’ assertion that [Corporation] did not collect the \$. . . in retail sales tax on Invoice . . ., we cannot address this assertion in a TFAA appeal. Audit determined that [Corporation] collected \$. . . in retail sales tax on Invoice . . . and issued an assessment reflecting these findings. [Corporation] had an opportunity to appeal Audit’s findings under RCW 82.32.160, and did in fact appeal them. In response to [Corporation’s] appeal, we issued Determination No. 14-0019, that remanded the matter to Audit for possible adjustment based upon records to be provided by [Corporation]. When [Corporation] failed to timely provide any records, [Audit did not adjust the assessment.] [When Corporation failed to appeal Audit’s action on remand,] the assessment – and Audit’s findings – became final. WAC 458-20-100(5)(d); *see* RCW 82.32.160. “Generally, once a tax assessment becomes final, there is no jurisdiction for [the Department] to accept a petition for correction of the assessment.” Det. No. 03-0066R, 23 WTD 243 (2003), *citing* Det. No. 87-39, 2 WTD 189 (1987) and Det. No. 86-268, 1 WTD 245 (1986); *see also* Det. No. 15-0115, 34 WTD 537 (2015); Det. No. 14-340, 34 WTD 244 (2014). This being the case here, to now allow Taxpayers to, again, contest Audit’s findings in the assessment against [Corporation] would allow “two bites at the apple” and contradict our statutory authority for review. Accordingly, we deny Taxpayers’ request to adjust the amount of retail sales tax collected by [Corporation].

As to Taxpayers’ assertion that the \$. . . in uncollected retail sales tax is not “trust fund taxes,” we agree. RCW 82.32.145 limits the Department’s assessment authority to “trust fund taxes,” a term the statute goes on to define as [“taxes collected from purchasers and held in trust under RCW 82.08.050.”] . . . Although Audit assessed \$. . . in retail sales tax, Audit concluded that [Corporation] did not collect \$. . . of the assessed retail sales tax. Because [Corporation] did not collect these taxes, they are not “trust fund taxes,” and the Department cannot include these amounts in assessments issued against Taxpayers pursuant to RCW 82.32.145. *See also* WAC 458-20-217(8)(f).

DECISION AND DISPOSITION

We grant Taxpayers’ petitions in part and remand to Compliance for adjustment consistent with this determination. We deny Taxpayers’ petitions in part.

Dated this 4th day of February 2016.