

Cite as Det. No. 15-0115, 34 WTD 537 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| 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. 15-0115 |
|) | |
| ...) | Registration No. . . . |
|) | |

[1] RULE: 217; RCW 82.04.230: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT –MANAGING MEMBER. A Managing member of an LLC that serves as a chief executive officer is strictly liable for unpaid trust fund taxes.

[2] RCW 82.32.145: RETAIL SALES TAX – TRUST FUND ACCOUNTABILITY ASSESSMENT - CORRECTION OF ASSESSMENT. A taxpayer who received a TFAA cannot challenge the amount of the tax underlying the TFAA.

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.

Lewis, A.L.J. – The managing member of a now defunct restaurant and lounge [“LLC”] protests a trust fund accountability assessment (“TFAA”) against her, stating that the amount assessed against the defunct business was in error. We conclude that Taxpayer is responsible for the LLC’s collected and unremitted retail sales tax and may not challenge [the amount assessed against] the defunct business. Accordingly, we affirm the assessment.¹

ISSUES:

1. Is a managing member of an LLC personally liable for collected, but unremitted retail sales tax under RCW 82.32.145?
2. May a “responsible person” petition for correction of the amount assessed in a TFAA?

FINDINGS OF FACT:

[Taxpayer] is the sole member of the former [LLC]. She and her husband operated the restaurant and lounge located within Washington. As far as payment of Washington excise taxes, they split the duty: he completed the excise tax returns and she paid them.

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

The [Washington State Department of Revenue’s (the “Department’s”)] Audit Division audited [LLC’s] business records for the period February 1, 2011 through June 30, 2013. On December 23, 2013, the Department issued a \$. . . assessment.² The audit examination included a review of the income that [LLC] reported to the Department with that recorded in its books and records and reported to the federal government. The comparison disclosed \$. . . in under-reported income. The largest difference occurred in 2012, when [LLC] reported \$. . . to the Department and Taxpayer reported \$. . . to the federal government and recorded \$. . . on its QuickBooks records. Based on the income reconciliation, the assessment recorded \$. . . of unreported retail sales tax trust funds.

[LLC] failed to pay the assessment by the January 22, 2014 due date. On February 21, 2014, the Department’s Compliance Division issued a tax warrant. [LLC] did not pay the tax warrant. Subsequently, the Compliance Division learned that the business had been sold and that the Washington Secretary of State had put the LLC on inactive status. On May 29, 2014, the Department issued a \$. . . TFAA against [Taxpayer] and the marital community of [Taxpayer and her husband].³

On April 28, 2014, prior to issuance of the TFAA, [LLC] filed an appeal with the Appeals Division requesting [Correction of Assessment] against [LLC]. On May 2, 2014, the Appeals Division dismissed the petition for not being timely filed.

On May 31, 2014, Taxpayer filed a petition requesting cancellation of the TFAA. Taxpayer maintained that the assessment should be cancelled because the audit of [LLC] was in error.

ANALYSIS:

The first issue presented is whether the Department correctly issued and may collect the TFAA from Taxpayer.

Retail sales tax is paid by the buyer to the seller and held in trust, by the seller, until paid to the Department. RCW 82.08.050. RCW 82.32.145 authorizes the Department, under certain circumstances, to attempt to collect unpaid trust fund taxes by issuing a TFAA. RCW 82.32.145 states as follows:

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 The \$. . . assessment consisted of \$. . . tax, \$. . . interest, and \$. . . assessment penalty.

³ The TFFA consisted of \$. . . tax, \$. . . audit interest, \$. . . extension interest, and \$. . . assessment penalty.

Thus, under the provisions of RCW 82.32.145, the Department may pursue collection of unpaid trust fund taxes (including related penalties and interest) from a responsible party when certain requirements have been met:

- The Department has issued a warrant against the LLC for collection of the unpaid funds;
- The entity has been terminated, dissolved, abandoned, or is insolvent

In such an instance, the personal liability for the unpaid taxes against a former chief executive or chief financial officer applies regardless of fault or whether the individual was or should have been aware of the unpaid trust fund liability. Here, Taxpayer sold the assets of the business and had the Secretary of State put the LLC on inactive status as of March 28, 2014. There is no means of collecting the assessment from the LLC. The requirements of the status of the LLC have been satisfied. The question left to be answered is whether Taxpayer qualifies as a responsible individual.

RCW 82.32.145(9)(g)(i) defines “Responsible individual” to include:

... 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.”

Because Taxpayer was the managing member, in fact the only member of [LLC], and [LLC] has an unpaid tax warrant, Taxpayer qualifies as a “responsible individual”.

RCW 82.32.145(3)(a) further provides that to the extent a “responsible individual” was also a current or former chief executive or chief financial officer – of the limited liability business entity – a strict liability standard applies, which means that the person is liable regardless of whether the individual was or should have been aware of the liability. RCW 82.32.145(3)(a).

WAC 458-20-217(8)(b)(iii) defines “Chief executive” to mean:

The president of a corporation; or for other entities or organizations other than corporations or if a 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.

Here, Taxpayer is listed by the Secretary of State as “managing member”. As a managing member, Taxpayer qualifies as chief executive. Therefore, we conclude that Taxpayer served as the chief executive officer of [LLC], and, as both a “responsible individual” and chief executive, she is strictly liable for the unpaid trust fund taxes. Accordingly, we sustain the TFAA with respect to Taxpayer.

The second issue raised by Taxpayer is whether the amount of the TFAA may be adjusted. Taxpayer maintained the TFAA assessment was in error because the assessment of [LLC] was in error.

RCW 82.32.145(6) provides:

Any person having been issued a notice of assessment under this section is entitled to the appeal procedures under RCW 82.32.160, 82.32.170, 82.32.180, 82.32.190, and 82.32.200.

Thus, a person receiving a TFAA may petition for correction of the TFAA. However, in Det. No. 03-0066R, 23 WTD 243 (2004), the Department concluded that a taxpayer who had received a TFAA could not challenge the amount of the tax assessment underlying the TFAA. The taxpayer in that case asserted that the corporation had not collected some or all of the taxes included in the TFAA. In concluding that the individual taxpayer could not challenge the amounts underlying the TFAA, the Department stated:

The original taxpayer, the business, had an opportunity to contest the amount of taxes assessed when DOR issued the notices of balance due. RCW 82.32.160. It did not appeal. The statutory consequence is that “[i]f no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.” RCW 82.32.160. Generally, once a tax assessment become final, there is no jurisdiction for DOR to accept a petition for correction of the assessment. *See Det. No. 87-39*, 2 WTD 189 (1987) and *Det No. 86-268*, 1 WTD 245 (1986). The taxpayer can, however, pay the assessment and petition for a refund, and contest its liability for the tax in the refund proceeding.

Here, [LLC] failed to file an appeal within 30 days of issuance of the assessment as required by RCW 82.32.160. Thus, consistent with prior rulings, we conclude that the Department correctly denied Taxpayer’s appeal of the amount of tax assessed against the LLC. Accordingly, Taxpayer’s petition as to this issue is denied.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 30th day of April, 2015.