

Cite as Det. No. 18-0158, 39 WTD 017 (2020)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 18-0158
)	
... )	Registration No. . . .
)	

RCW 82.32.145; RCW 82.32.160: TRUST FUND ACCOUNTABILITY ASSESSMENT – CORRECTION OF TAX – FINAL ASSESSMENT AGAINST ENTITY – EVASION PENALTY: We decline to adjust the trust fund accountability assessment against Taxpayer based on the unsupported assertion that some of the retail sales tax might not have been collected trust funds. Proof that Taxpayer himself evaded payment of retail sales tax is not necessary to assess the evasion penalty.

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.

Margolis, T.R.O. – The sole principal and managing member of a used car dealer (Taxpayer) petitions for correction of a Trust Fund Accountability Assessment (TFAA) on grounds that (1) the assessments against the used car dealer do not show a failure to remit trust funds, and (2) the 50% evasion penalty is inapplicable because there is no showing that Taxpayer himself evaded payment. We deny the petition.<sup>1</sup>

ISSUE

Whether, under RCW 82.32.145, Taxpayer is liable for the retail sales tax and evasion penalty assessed against the used car dealer.

FINDINGS OF FACT

. . . (LLC) was a used car dealer. Its tax registration endorsement was revoked effective October 13, 2016, and it was administratively dissolved on May 1, 2017. Taxpayer was LLC’s sole principal and manager, and per [Bank], he signed all checks written by LLC during the audit period. The Department of Revenue’s (Department) Audit Division (Audit) examined LLC’s records for the period January 1, 2010, through December 31, 2013. On August 29, 2014, Audit assessed LLC \$ . . . . The assessment is comprised of \$ . . . in retail sales tax, \$ . . . in retailing

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

business and occupation (B&O) tax, a credit of (\$ . . . ) in wholesaling B&O tax, \$ . . . in motor vehicle tax, \$ . . . in 50% evasion penalty, \$ . . . in interest, and \$ . . . in 5% assessment penalty. Audit assessed the evasion penalty because [it found that:] (1) LLC manufactured records to support wholesale sales, and (2) LLC substantially underreported its income. LLC petitioned for review of the assessment on grounds that the Department erred in assessing the evasion penalty on the total tax deficiency.<sup>2</sup>

On October 28, 2015, [the Department’s Administrative Review and Hearings Division (ARHD)] denied the petition, noting that the taxpayer underreported sales by 44% and, per WAC 458-20-228, “[t]he willful failure of a seller to remit retail sales taxes collected from customers to the department” generally establishes an intent to evade taxes. . . . LLC withdrew its petition for reconsideration, and on May 4, 2016, ARHD dismissed the petition and the assessment became final. On July 6, 2016, the unpaid assessment was assumed into Warrant No. . . . In addition to this liability, LLC failed to pay amounts it reported on its monthly excise tax returns for June 2016, which were assessed on August 10, 2016, and assumed into Warrant No. . . . on September 1, 2016. Compliance issued an estimated assessment for July, September and October 2016 (Taxpayer did not file returns for these periods) on November 15, 2016; and on January 3, 2017, it was assumed into Warrant No. . . .

On February 15, 2017, the Department’s Compliance Division (Compliance) issued a TFAA against Taxpayer for \$ . . . . The assessment is comprised of retail sales tax, and interest and penalties on that tax, which was assessed against LLC and assumed into the aforementioned warrants. It is comprised of \$ . . . in retail sales tax, \$ . . . in audit interest, \$ . . . in extension interest, \$ . . . in delinquent return penalties, \$ . . . in 50% evasion penalty, and \$ . . . in 5% assessment penalty.

Taxpayer petitions for correction of the TFAA on grounds that Audit did not establish that the retail sales tax at issue was collected and not remitted trust funds. [However, in affirming the assessment of the evasion penalty, the determination issued to the LLC determined that the taxpayer had collected and not remitted sales taxes.] . . .

## ANALYSIS

In general, a company that sells used cars to consumers is required to collect retail sales tax, and that tax is deemed held in trust until paid to the department. RCW 82.04.050(1)(a); RCW 82.08.050. LLC was in the business of selling used cars to consumers, but it failed to pay retail sales tax to the Department. 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 provides in part:

(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. . . .

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<sup>2</sup> During the hearing, LLC abandoned the request for relief based on Audit’s use of estimates.

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

(3)(a) For a responsible individual who is the current or a 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 liability of the limited liability business entity.

“Trust fund taxes” is statutorily defined to mean taxes collected from purchasers and held in trust under RCW 82.08.050. RCW 82.32.145(9)(h). “Responsible individual” includes any manager of a limited liability business. RCW 82.32.145(9)(g)(i). Certain responsible individuals, such as chief executives, are strictly liable for the trust fund taxes regardless of fault. “Chief executive” for non-corporations means “the highest ranking executive manager or administrator in charge of the management of the company or organization.” RCW 82.32.145(9)(a).

In this matter, it is uncontested that the Department issued a warrant for the collection of taxes from a limited liability company, that business entity has been terminated, dissolved, abandoned, or is insolvent, and that Taxpayer, as the highest ranking executive manager of LLC, is a responsible individual whose liability applies regardless of fault or whether Taxpayer should have been aware of the unpaid trust funds. Taxpayer argues that the assessment should be adjusted on grounds that the LLC audit was based on estimates and may include amounts of retail sales tax that were not trust funds, and because the Department failed to establish that Taxpayer intended to evade the payment of trust funds.

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 company 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[s] 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); Det. No. 86-268, 1 WTD 245 (1986).

In this matter, LLC had an opportunity to contest the amount of taxes assessed by Audit. It contested the evasion penalty, and the petition was denied. It withdrew its petition for reconsideration, and the assessment became final. It never contested assessments for June, July, September and October 2016. In accord with 23 WTD 243, we conclude that Taxpayer cannot challenge the amount of the underlying assessments. *See also* Det. No. 08-0116, 27 WTD 228 (2008) (holding that petitions for review filed within 30 days of a TFAA being issued may concern matters only as to the issuance of the TFAA itself, such as whether one is a “responsible party” under RCW 82.32.145).

Taxpayer argues that because LLC was not explicitly assessed collected and unremitted retail sales tax that amounts to trust funds, Compliance cannot issue a TFAA based on the assessments. However, in this matter, the amounts at issue are trust funds. Specifically, Compliance confirmed that customers had been charged retail sales tax by contacting customers directly and reviewing customer invoices that show itemized retail sales tax; a prior audit indicates that LLC had records showing the collection of retail sales tax; and Taxpayer's assertion that records are unavailable is unsupported . . . . We find no grounds for concluding that underlying assessments must state that the sales tax was collected and unremitted. Further, responsible persons cannot avoid TFAA liability simply by not providing records showing whether retail sales tax was collected, and making unsupported assertions that the records are unavailable, where there is evidence that the retail sales tax was indeed collected. Taxpayers have a duty to maintain their records in such a manner that their tax liabilities can be determined. RCW 82.32.070. We decline to adjust the assessment based on Taxpayer's unsupported assertion that some of the retail sales tax might not have been collected trust funds.

Taxpayer also argues that the evasion penalty was incorrectly assessed because there is no proof that Taxpayer himself evaded the payment of retail sales tax. RCW 82.32.145(1) states that the Department may pursue penalties on the entity's unpaid trust fund taxes against any and all responsible individuals. Because LLC was assessed the evasion penalty on its retail sales tax liability, and evidence shows that LLC collected the retail sales tax, Compliance properly included the evasion penalty in the TFAA. Compliance need not prove that Taxpayer himself was engaged in evasion.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 12th day of June 2018.