

**SANITIZED DEC. NOS. 05-147 W, 05-148 W, 05-149 C, & 05-150 C -- BY ROBERT W. KIEFER, JR. -- SUBMITTED FOR DECISION ON 05/17/05 -- DECISION ISSUED -- 08/04/05**

### **SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – An individual, who is an officer of a corporation, may be personally liable for the unpaid consumers' sales and service tax liability of the corporation, including interest, additions to tax and penalties thereon, by virtue of his or her status as an officer. *See* W. Va. Code 11-15-17 [1978].

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – Individuals who may be liable for the consumers sales tax liability of a corporation include the president, vice-president, secretary, or treasurer, any other officers provided for in the charter or by-laws of the corporation, and any other person who is elected or appointed to any position with the authority of an officer. W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993).

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – In order for an officer or other individual identified in W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993), to be liable for any default in the payment of a corporation's consumers' sales and service tax liability, he or she must have performed duties or responsibilities in the management of the corporation. Such individual is liable if he or she has any actual managerial authority, regardless of whether he or she had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether he or she knew of the corporation's default with respect to its consumers' sales and service tax obligations. *See* 110 C.S.R. 15, §§ 4.a5 & 4a.5.2 (July 15, 1993).

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – An individual who is an officer of a corporation in name only, or who does not, in fact, have the responsibility of performing any managerial duties on behalf of the corporation, is not personally liable for an unpaid consumers' sales and service tax liability of the corporation. *See* W. Va. Code § 11-15-17 [1978], and W. Va. Code St. R. §§ 110-15-§ 4.a.5 & 4a.5.2 (July 15, 1993).

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** – A corporate officer is not liable for all amounts of consumers' sales and service tax that were required to be paid or which became due and payable prior to the time that he or she

became an officer of the corporation, where the officer did not have the ability and authority to pay the amounts due from the unencumbered funds of the corporation after he or she became a corporate officer. *See* W. Va. Code § 11-15-17 [1978], and W. Va. Code St. R. §§ 110-15-4a.6.1 (July 15, 1993).

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX) AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO “WILLFULLY” FAILED TO DO SO** – A person is liable, jointly and severally, for a civil “money penalty” (tax, excluding interest and additions to tax) of 100% of an unpaid withholding tax obligation of a corporation if (1) he or she was “required” to collect, account for, and pay over such a trust fund tax on behalf of the corporation, and (2) if he or she “willfully” failed truthfully to perform these responsibilities on behalf of the corporation. W. Va. Code § 11-10-19(a) [1978].

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX) AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION** -- A person is “required” to collect, account for and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if, at the time the tax return was required to be filed and payment was due, he or she was an officer or employee of the corporation, or was otherwise associated with the corporation, and he or she had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX) AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION** – An officer or employee of a corporation, or a person otherwise associated with a corporation is not personally liable for the unpaid withholding tax liability of the corporation if, at the time the tax return was required to be filed and payment was due, he or she did not have the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX) AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION** -- A person who was not a corporate officer or an employee of a corporation, or who was not otherwise associated with a corporation at the time the tax return was required to be filed and payment was due, is not a person who was “required” to collect, account for and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], because he or she could not have been a person with authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX) AS A PERSON WHO “WILLFULLY” FAILED TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION** – For a person to have “willfully” failed truthfully to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], he or she must have been an officer or employee of the corporation, or otherwise associated with the corporation, and must have knowingly or

recklessly failed truthfully to collect, account for, and pay over the withholding tax. Prior to the money penalty tax assessment against him or her, he or she must have had actual knowledge of the corporation's default with respect to the withholding tax or recklessly ignored obvious financial facts which, with merely a cursory inquiry, would have revealed that default.

**WITHHOLDING TAX -- LIABILITY FOR "MONEY PENALTY" (TAX) AS A PERSON WHO "WILLFULLY" FAILED TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION** – A person who is not an officer or employee of a corporation, or who is not otherwise associated with the corporation at the time that withholding tax is collected, accounted for and required to be paid over to the State Tax Commissioner, is not personally liable for knowingly or recklessly failing truthfully to collect, account for, and pay over the withholding tax because, at that time, he or she had no legal duty to inquire into the corporation's default with respect to the withholding tax or inquire into obvious financial facts which would have revealed the default, and had no authority to take steps to correct such default.

**WITHHOLDING TAX -- LIABILITY FOR "MONEY PENALTY" (TAX) AS A PERSON WHO "WILLFULLY" FAILED TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION** – A person who is not an officer or employee of a corporation, or who is not otherwise associated with the corporation, is not personally liable for the unpaid withholding tax liability of the corporation if one or both of the two requirements for personal liability is/are lacking.

**WITHHOLDING TAX -- LIABILITY FOR "MONEY PENALTY" (TAX) AS A PERSON "REQUIRED" TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO "WILLFULLY" FAILED TO DO SO** – There is no authority, either by statute or by legislative rule, which makes a corporate officer liable for the failure to collect, account for and pay over withholding tax to the State Tax Commissioner when the time for collecting, accounting for and paying over the withholding tax occurred prior to the time that the individual became a corporate officer.

#### **FINAL DECISION**

On February 15, 2005, the Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner, as an Officer of Corporation. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the period of May 1, 2000, through October 31, 2001, for tax, interest, computed through February 15, 2005, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Also, on February 15, 2005, the Commissioner issued a withholding tax “money penalty” assessment under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, against the Petitioner, as a person responsible on behalf of Corporation, a corporation. This assessment was for the periods of May 1, 2000, through October 31, 2001, for a “money penalty” (tax) and total assessed withholding tax liability. Written notice of this assessment was also served on the Petitioner.

Thereafter, by mail postmarked March 21, 2005, and received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on March 22, 2005, the Petitioner timely filed a petition for reassessment. *See* W. Va. Code § 11-10A-8 [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

### **FINDINGS OF FACT**

1. The Tax Commissioner seeks to hold the Petitioner liable for estimated consumers’ sales and service tax and withholding tax liabilities of Corporation, which is a West Virginia corporation.
2. Corporation was incorporated on or about April 21, 2000. The incorporator was XY, whose address was West Virginia. *See* Petitioner’s Exhibit No. 3.
3. On or about April 21, 2000, Corporation filed its application to register the trade name. On its “Application to Register a Trade Name,” the Corporation listed XY as its President. *See* Petitioner’s Exhibit No. 4.
4. Corporation’s “Corporation License Tax Return” for the period July 1, 2000 through June 30, 2001, which was due on or before July 1, 2000, listed AB, whose address was West Virginia, as President and Vice-President of the corporation. The same “Corporation License Tax

Return” listed AC, whose address was also West Virginia, as Secretary and Treasurer of the corporation.

5. On or about December 3, 2001, Corporation filed its “Application to Appoint or Change Agent For Process, Officers, and/or Office Addresses.” In the application, the Agent for Process was changed to the Petitioner’s grandson, QQ, who also had a West Virginia address. The President was changed from AB to QQ, and the Secretary was changed from AC to Petitioner. The application was signed by AB, President of Corporation, on behalf of the corporation. Her signature was acknowledged on November 28, 2001. The application was filed with the office of the West Virginia Secretary of State on December 3, 2001. *See* Petitioner’s Exhibit No. 1.

6. On or about April 17, 2002, Corporation filed another “Application to Appoint or Change Agent For Process, Officers, and/or Office Addresses.” In the application, the Agent for Process was changed to AB, West Virginia, the President was changed from QQ to AB, West Virginia, and the Secretary was changed from Petitioner to AC, West Virginia. The application was signed by QQ, President of Corporation, on behalf of the corporation. His signature was acknowledged on April 15, 2002. The application was filed with the office of the West Virginia Secretary of State on April 17, 2002. *See* Petitioner’s Exhibit No. 2.

7. A March 29, 2005 print out of Corporation’s Officer Information screen, as set forth in the Secretary of State’s On-Line Reference database, shows that the President of Corporation was AB, West Virginia, its Secretary was Petitioner, West Virginia, and its Treasurer was AC, West Virginia. *See* State’s Exhibit No. 5.

8. The consumers’ sales and service tax and the withholding tax which the Commissioner has assessed against the Petitioner, in his capacity as a corporate officer of Corporation, accrued and became due and owing for the periods May 1, 2000, through October 31, 2001.

9. The evidence shows that the earliest date on which the Petitioner could have become Secretary of Corporation was November 28, 2001, the date that the signature of the corporate president on the instrument naming the Petitioner as corporate secretary was acknowledged.

10. The Petitioner became an officer of Corporation subsequent to the time that the consumers' sales and service tax and withholding tax amounts accrued, and became due and owing to the State of West Virginia.

11. It was the testimony of QQ, the Petitioner's grandson, who was the President of the Corporation during the period of time that the Petitioner was Secretary of the corporation, that the Petitioner was named as an officer of the corporation solely because he was a West Virginia resident, and the corporation needed a West Virginia resident as an officer of the corporation in order to obtain a West Virginia license to dispense alcoholic beverages by the drink from the West Virginia Alcoholic Beverage Control Authority.

12. QQ testified, either by oral testimony or by written statement, that the Petitioner was never an employee or on the payroll of the Corporation; that the Petitioner did not invest in the corporation, profit financially from the corporation and would not have profited financially had the corporation earned a profit; that the Petitioner's name did not appear on any corporate bank account; that the Petitioner never paid any bill on behalf of the corporation or assumed any financial obligation or responsibility of the corporation; that he did not arrange for or pay for any of the corporation's utility service; that he was not involved in any other business transaction by or on behalf of the corporation; and that he was not otherwise involved with the business. He further testified that the Petitioner never attended the facility.

13. The evidence shows that the Petitioner had no duties or responsibilities in the management of the corporation, was not involved in the day-to-day operations of the corporation, and had no authority to sign checks or to prepare or sign returns on behalf of the corporation.<sup>1</sup>

14. The evidence shows that the Petitioner did not have the authority and the ability to pay the corporation's consumers' sales and service tax liability that had accrued prior to the time that he became a corporate officer out of the unencumbered funds of the corporation.

15. During the periods covered by the assessment, the Petitioner was not a person who had authority to make or direct the day-to-day financial decisions on behalf of Corporation.<sup>2</sup>

## **DISCUSSION**

### Consumers' Sales and Service Tax

With respect to the consumers' sales and service tax, the issue presented by this matter is whether the Petitioner is one of the corporate officers who is personally responsible for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the periods covered by the assessment of consumers' sales and service tax in this matter.

West Virginia Code § 11-15-17 [1978] provides:

If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed by article ten of this chapter may be enforced against them as against the association or corporation which they represent.

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<sup>1</sup> For purposes of this proceeding, it is immaterial whether or not the appointment of the Petitioner as an officer was a necessary requirement for a license to dispense alcoholic beverages. It is also immaterial that, as intimated by counsel for the Respondent, the appointment of the Petitioner as an officer of the corporation for that purpose was contrary to law. The only pertinent issue is whether or not the Petitioner was involved in the management of the corporation.

<sup>2</sup> So far as the evidence in the record shows, the Petitioner had no such authority for periods subsequent to the periods covered by the assessment, including periods during which he was the corporate secretary.

The pertinent legislative rules provide, in relevant part:

§ 110-15-4a. Liability of Officers of Corporation.

4a.1. If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 *et seq.* may be enforced against them as against the association or corporation which they represent.

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4a.5. The officers of a corporation or association that are personally liable for consumer sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.

4a.5.1. A person who acts as an officer or assumes the character, duties or responsibilities of an officer, is presumed to be an officer, and such person cannot avoid personal liability by alleging he was not properly elected. A person who is elected or appointed as an officer without his knowledge or consent, or who does not act as an officer and does not assume the character, duties, or responsibilities of an officer, is not liable as an officer.

4a.5.2. An officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.

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4a.6. An officer is liable for the tax, interest, additions to tax, and penalties for which the corporation or association is liable.

4a.6.1. An officer is liable for all amounts which were required to be paid or which became due and payable during the time the person was an officer. An officer is also liable for all amounts which were required to be paid or which became due and payable prior to the time the person became an officer, if the officer had the ability and authority to pay the amount due from the available unencumbered funds of the corporation or association after such person became an officer. . . .

As relevant to the facts developed in this matter, the Petitioner raises two legal issues that are addressed by the applicable legislative rules. The first issue is whether a corporate officer is absolutely liable for a default on the consumers' sales and service tax liability of a corporation of which he or she is an officer, or whether the officer must have performed some duty or responsibility in the management of the corporation in order to be held liable for the corporation's consumers' sales and service tax liability. The second issue is the extent to which a corporate officer may be held liable for a default on the consumers' sales and service tax liability of a corporation which accrued prior to the time that the individual became an officer of the corporation.

With respect to the first issue, W. Va. Code § 11-10-17 [1978] appears to create absolute liability on the part of a corporate officer. So, too, does W.Va. Code St. R. § 110-15-4a.1, which basically restates the statutory language. However, W. Va. Code St. R. § 110-15-4a.5, *et seq.*, relaxes the apparently absolute liability articulated by the statute and the first subsection of the legislative rules.

A reading of § 4a.5 shows that it is susceptible of two different interpretations. It identifies three different groups, who are *de jure* or *de facto* corporate officers, and whose members may be liable for a corporation's consumers' sales and service tax: 1) the president, vice-president, secretary and treasurer; 2) other officers provided in the charter or by-laws of the corporation; and 3) any person who is elected or appointed to any position with the authority of an officer. In the body of the rule, following identification of these three groups, there is the qualifying language, "[A]nd who performs duties or responsibilities in the management of the corporation." The issue is whether the qualifying language is intended to qualify the absolute liability with respect to all three groups, or whether it is intended to qualify absolute liability with respect to only those individuals who are elected or appointed to a position with the authority of an officer.

Since the legislative rule is not clear and unambiguous, it is subject to rules of interpretation or construction. The rule of interpretation or construction most applicable to this particular legislative rule provides:

Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is “the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.” . . . Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.

Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the act that it is separated from the antecedents by a comma. [Footnotes omitted.]

2A Norman J. Singer, *Statutes and Statutory Construction*, § 47.33 (6<sup>th</sup> ed. 2000). *See also* 73 Am. Jur. 2d *Statutes* §§ 138 & 139 (2004). Applying this rule of statutory construction to the legislative rule, since the qualifying language is separated from the language it qualifies by a comma, it is applicable to all of the antecedent phrases, not merely the last antecedent phrase. Therefore, performance of duties or responsibilities in the management of a corporation or association as a predicate to personal liability for the consumers’ sales and service tax incurred by a corporation applies not only to the last antecedent, namely persons who are elected or appointed to positions with the authority of officers, but to all antecedents, including those officers expressly identified in the legislative rule, namely the president, vice-president, secretary, or treasurer, and also those officers provided in the charter or by-laws of the corporation or association. Stated differently, performance of duties or responsibilities in the management of a corporation or association is a prerequisite to an officer’s personal liability for the consumers’ sales and service tax liability incurred by a corporation or association.

In the present matter, the evidence clearly demonstrates that the Petitioner performed no duties or responsibilities in the management of Corporation. He was an officer for one purpose and

only one purpose, which was to aid the corporation in obtaining a liquor license. There is no evidence to show that he did anything more than allow his name to be placed on record as a corporate officer. This had nothing to do with the management of the corporation. Therefore, the Petitioner would have no liability under the provisions of W. Va. Code St. R. § 110-15-4a.5.

There is also the question of whether or not the Petitioner is personally liable for the consumers' sales and service tax liability of the corporation when the liability was incurred prior to the time that the Petitioner became an officer of the corporation. W. Va. Code St. R. § 110-15-4a.6.1 imposes personal liability on a corporate officer for the consumers' sales and service tax liability incurred by the corporation if the officer had the ability and authority to pay the amount due from the available unencumbered funds of the corporation or association after such person became an officer.

Again, the evidence clearly demonstrates that the Petitioner did not perform any duties or responsibilities respecting any day-to-day operations of the Corporation. He had no responsibility or authority to pay any amounts due to any creditor of the corporation, including the State of West Virginia, from the unencumbered funds of the corporation, if any unencumbered funds existed. Consequently, the Petitioner would have no liability under the provisions of W. Va. Code St. R. § 110-15-4a.6.1. Based on the foregoing, it is the conclusion of the West Virginia Office of Tax Appeals that the Petitioner is not personally liable for the consumers' sales and service tax assessment.

#### Withholding Tax

With respect to the withholding tax, the issue is whether the Petitioner is an individual who is personally responsible for all or any portion of the unpaid withholding tax liability of the corporation for the periods involved in the assessment of that tax in this matter.

An employer is liable for tax that is withheld from employees' wages but not remitted to the State Tax Commissioner. W. Va. Code § 11-21-75 [1990]. Tax that is withheld from any person, such as an employee, which is not paid over to the State Tax Commissioner, constitutes moneys that are held in trust for the State of West Virginia. W. Va. Code § 11-10-5j [1986].

The West Virginia Tax Procedure and Administration Act, specifically, W. Va. Code § 11-10-19(a) [1978], provides in relevant part:

*Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over.*

(emphasis added) For purposes of the West Virginia Tax Procedure and Administration Act, a “person” is defined by W. Va. Code § 11-10-4(b) [1979] to include a “corporation . . . and also any officer, employee or member [thereof] . . . who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of this article[.]” The question, then, is whether the Petitioner is a person who was responsible for collecting, accounting for, and paying over the Corporation’s withholding tax liabilities.

W. Va. Code § 11-10-19(a) [1978] is derived from and is virtually identical to section 6672(a) of the Internal Revenue Code of 1986 (and its predecessors). *See also* Treas.Reg. § 301.6672-1 (1986). Therefore, precedents deciding issues under that federal tax provision are very persuasive and are to be given substantial consideration in deciding the same issues under W. Va. Code § 11-10-19(a) [1978].

For purposes of Internal Revenue Code § 6672(a), a “person required” to collect, account for, and pay over a withholding tax is any person who had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, such as deciding which

corporate debts, including taxes, would be paid. *See, e.g., O'Connor v. United States*, 956 F.2d 48 (4<sup>th</sup> Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993) (Faber, J.). This Office adopts the same standard for purposes of W. Va. Code § 11-10-19(a) [1978].

Under Internal Revenue Code § 6672(a), the “willful” failure to prevent or to correct the corporation’s withholding tax default is usually the key element in deciding who is personally liable for that default. In the context of civil penalty statutes, the term “willful” failure to collect, account for, and pay over a withholding tax does not require a criminal intent, such as an evil motive to defraud. On the other hand, the statute requires more than a negligent failure to collect, account for, and pay over the tax. Instead, the person in question must knowingly or recklessly fail to collect, account for, and pay over the withholding tax. *See, e.g., Turpin v. United States*, 970 F.2d 1344 (4<sup>th</sup> Cir. 1992); *Johnson v. United States*, *supra*. This Office adopts the same standard for purposes of determining what constitutes a willful failure to account for and pay over taxes withheld pursuant to the provisions of W. Va. Code § 11-10-19(a) [1978].

Application of the foregoing legal standards to the facts presented by this matter leads to a very simple conclusion. The Petitioner was neither an employee nor a corporate officer of the Corporation during the periods covered by the assessment, during which periods the taxes were either withheld or required to be withheld. It logically follows that if the Petitioner was neither an employee nor a corporate officer of the Corporation during the periods covered by the assessment, then he could not have been a person who was “required” to collect, account for and pay over the withholding taxes for those periods. Additionally, since the Petitioner was not a person who was required to collect, account for and pay over the withholding taxes for those periods and did not, in fact, do so, he does not meet the statutory requirement of willfulness. Accordingly, the Petitioner is not liable for the Corporation’s withholding tax for the periods covered by the assessment.

## CONCLUSIONS OF LAW

1. For the periods covered by the assessment in this matter, which are governed by legislatively approved consumers' sales and service tax regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation is personally liable for the unpaid consumers' sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

2. For the periods covered by the assessment in this matter, the Petitioner is not personally liable for the unpaid consumers' sales and service tax liability of the Corporation by virtue of his status as an officer of the corporation, because he did not have any actual managerial authority with respect to the corporation during the time that he was a corporate officer thereof. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

3. After he or she becomes an officer a corporation, a corporate officer is liable for amounts of consumers' sales and service tax which were required to be paid or which became due and payable to the State Tax Commissioner prior to the time he became an officer if he had the ability and authority to pay the amount due from the available unencumbered funds of the corporation. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. § 110-15-4a.6.1 (July 15, 1993).

4. For the periods covered by the assessment in this matter, the Petitioner is not personally liable for the unpaid consumers' sales and service tax liability of Corporation that were required to be paid or which became due and payable to the State Tax Commissioner prior to the time he

became an officer, because he did not have the ability and authority to pay the amount due from the available unencumbered funds of the corporation. W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. § 110-15-5-4a.6.1 (July 15, 1993).

5. Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil “money penalty” (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) if he or she was “required” to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she “willfully” failed truthfully to perform these responsibilities on behalf of the corporation.

6. A person was “required” to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

7. The term “willfully” failed truthfully to collect, account for, and pay over the withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the withholding tax money penalty assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

8. For the periods covered by the assessment in this matter, the Petitioner is not personally liable for the unpaid withholding tax liability of the Corporation, either jointly or severally with any other person, because the Petitioner was not an officer, employee or other person associated with the corporation at the time that the corporation was required to collect, account for, and pay over the

withholding tax and, therefore, was not a person who was “required” to perform those acts on behalf of the corporation.

8. For the periods covered by the assessment in this matter, the Petitioner is not personally liable for the unpaid withholding tax liability of the Corporation, either jointly or severally with any other person, because the Petitioner was not an officer, employee or other person associated with the corporation at the time that the corporation was required to collect, account for, and pay over the withholding tax and, therefore, was not a person who was “willfully” failed to perform those acts on behalf of the corporation.

### **DISPOSITION**

**WHEREFORE**, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers’ sales and service tax assessment issued against the Petitioner, William Securo, as an Officer of Corporation, for the period of May 1, 2000, through October 31, 2001, for tax, interest, computed through February 15, 2005, and additions to tax, for a total assessed liability, should be and is hereby **VACATED**, and no consumers’ sales and service tax is due from the Petitioner on behalf of this corporation for the periods in question.

It is **ALSO** the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax “money penalty” assessment for the periods of May 1, 2000, through October 31, 2001, for a “money penalty” (tax) and total assessed withholding tax liability, should be and is hereby **FULLY VACATED**, and no withholding tax is due from the Petitioner on behalf of this corporation for the periods in question.