

SYNOPSIS

GASOLINE/SPECIAL FUEL CONSUMERS’ SALES TAX – LIABILITY OF CORPORATE OFFICER – For periods covered by the current, legislatively approved 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 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. §§ 110-15-4.a.5 & 4a.5.2 [1993]; *see also* W. Va. Code § 64-7-6(rr) [1993]. *See also* W. Va. Code §§ 11-15-18 [2003] and 11-15-18b [2003].

Accordingly, a person who was an officer of a corporation, or a person who did in fact have the responsibility of performing any managerial duties, is personally liable under W. Va. Code § 11-15-17 [1978] and the implementing regulations, for an unpaid gasoline/special fuel consumers’ sales tax liability of the corporation.

MOTOR FUEL EXCISE 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 – 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 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.

A person was “required” to collect, account for and pay over a motor fuel excise tax, W. Va. Code § 11-14C-6(c) [2003, 2004], 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.

The term “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], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the excise tax. That is, the person in question, prior to the money penalty tax assessment against him or her, had actual knowledge of the corporation’s default with respect to the excise tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

Accordingly, a person associated with the corporation is personally liable for the unpaid motor fuel excise tax liability of the corporation if both of the two requirements for personal liability are present.

FINAL DECISION

On February 10, 2005, the Compliance Division of the West Virginia State Tax Commissioner's Office issued a gasoline/special fuel consumers' sales tax assessment against the Petitioner, as an officer of a 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 periods of February 1, 2002 through December 31, 2004, for tax, interest, through February 10, 2005, and additions to tax, for a total assessed gasoline/special fuel consumers' sales and service tax liability. Written notice of this assessment was served on the Petitioner on April 5, 2005.

On February 14, 2005, the Commissioner issued a motor fuel excise tax "money penalty" assessment against the Petitioner, as a person responsible on behalf of a corporation, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. This assessment was for the period of January 1, 2004 through November 30, 2004, for a "money penalty" (tax). Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked April 12, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

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

There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioner, *see* W. Va. Code § 11-10A-10 [2002], and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. During the periods involved in the assessments, the Petitioner was listed in the official corporate records in the West Virginia Secretary of State's Office as the Vice-President of the corporation.

2. In State's Exhibit No. 8, Petitioner's name appears as Vice-President with respect to lending agreements entered into between the corporation and the financial institution, dated January 29, 2002, April 22, 2003, and August 19, 2004.

3. Also, contained within State's Exhibit No. 8 are the minutes of the January 6, 2005 Stockholders' Meeting, which state that the Petitioner, Vice-President – Secretary of the corporation, seconded the motion to enter the corporation into Chapter 11 bankruptcy protection.

4. By letter dated July 6, 2005, Respondent's counsel verified that a payment had been received from the corporation's surety bond and that said payment should be applied against the motor fuel excise tax officer liability assessment.

5. Applying the relevant provisions of the consumers' sales and service tax regulations, discussed below, to the evidence in this matter, the West Virginia Office of

Tax Appeals finds that the Petitioner was the Vice-President of the corporation and was involved in the management of the corporation by performing the duties of that office.

6. Applying the motor fuel excise tax substantive and procedural law discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that (1) the Petitioner has not shown that he is not one of the persons “required” to collect, account for, and pay over the excise tax on behalf of the corporation and that (2) the Petitioner has not shown that he did not “willfully” fail truthfully to perform these duties.

7. The Petitioner was the Vice-President of the corporation, and, in that capacity, presumptively was involved with the day-to-day financial affairs of the corporation and presumptively was aware of the default of the corporation with respect to its tax liabilities, but failed to see that the corporation paid these particular trust fund debts, which are not dischargeable in any bankruptcy proceeding.

DISCUSSION

GASOLINE/SPECIAL FUEL CONSUMER’S SALES TAX

With respect to the gasoline/special fuel consumers’ sales tax, the issue is whether the Petitioner is one of the corporate officers who is personally responsible for all or any portion of the unpaid tax liability of the corporation for the periods involved in the assessment of that tax in this matter.

For consumers' sales and service tax purposes, W. Va. Code § 11-15-17 [1978] provides that "[i]f 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" with respect to that tax.

Effective on and after July 15, 1993, the current consumers' sales and service tax regulations follow the broad reach of W. Va. Code § 11-15-17 [1978] by basing corporate officer liability for unpaid corporate consumers' sales and service tax liability upon the corporate officer's status as a corporate officer, as long as that officer, during the assessment period, had any actual managerial authority on behalf of the corporation, that is, he or she was not merely an officer in name only. Under this approach, the precise duties or the breadth of the authority of the officer are not determinative. Also, corporate officer liability for the unpaid corporate consumers' sales and service tax liability is not dependent upon the corporate officer's knowledge of the corporation's default in filing such tax returns or in paying such taxes. The relevant portions of the current consumers' sales and service tax regulations provide:

Sec. 4a.5. The officers of a corporation or association that are personally liable for consumer[s] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or bylaws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who perform 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 a personal liability.

....

Sec. 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.

W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993) (emphasis added). After reviewing these regulations, the Legislature approved them. *See* W. Va. Code § 64-7-6(rr) [1993].

MOTOR FUEL EXCISE TAX

With respect to the motor fuel excise tax, the issue is whether the Petitioner is one of the individuals who is personally responsible for all or any portion of the unpaid motor fuel excise tax liability of the corporation for the periods involved in the assessment of that tax in this matter.

W. Va. Code § 11-14C-6(c) [2003, 2004] requires a supplier to “collect” the motor fuel excise tax -- explicitly as a “trustee” for the State Tax Commissioner -- from the person removing the motor fuel from the refinery or terminal in this State.

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

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 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 which persons are responsible for collecting, accounting for, and paying over a corporation’s withholding tax liabilities.

W. Va. Code § 11-10-19(a) [1978], quoted previously, 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 in deciding the same issues under W. Va. Code § 11-10-19(a) [1978].

Generally, a “person required” to collect, account for, and pay over a tax, for purposes of Internal Revenue Code § 6672(a) – and, therefore, for purposes of W. Va.

Code § 11-10-19(a) [1978] – 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 (4th Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993) (Faber, J.).

Under Internal Revenue Code § 6672(a), and, therefore, under W. Va. Code § 11-10-19(a) [1978], the “willful” failure to prevent or to correct the corporation’s tax default is usually the key element in deciding who is personally liable for that default. In the context of these civil penalty statutes, the term “willful” failure to collect, account for, and pay over a tax does not require a criminal intent, such as an evil motive to defraud. On the other hand, these statutes require 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 (4th Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993).

In addition to the foregoing substantive law, the relevant procedural law is that, in a hearing on a petition for reassessment, the burden of proof is upon the person assessed to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002].

CONCLUSIONS OF LAW

1. For periods covered by the current, 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); *see also* W. Va. Code § 64-7-6(rr) [1993].

2. The Petitioner is one of the corporate officers who is personally liable for all or any portion of the unpaid gasoline/special fuel consumers' sales tax liability of the corporation for the periods involved in the assessment of that tax in this matter.

3. 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 trust fund tax obligation of a corporation other than sales tax, 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.

4. A person was "required" to collect, account for, and pay over a 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.

5. The term “willfully” failed truthfully to collect, account for, and pay over the 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 tax money penalty assessment against him or her, had actual knowledge of the corporation’s default with respect to the tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

6. The Petitioner is personally liable for the unpaid motor fuel excise tax liability of the corporation for the periods involved in the assessment of that tax in this matter. The Petitioner is jointly and severally liable along with any other person responsible for this tax.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the gasoline/special fuel consumers’ sales tax assessment issued against the Petitioner for the periods of February 1, 2002 through December 31, 2004, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this gasoline/special fuel consumers’ sales tax assessment until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax money penalty (tax) assessment issued

against the Petitioner for the periods of January 1, 2004 through November 30, 2004, for tax should be and is hereby **MODIFIED** for a revised money penalty liability for these periods.