

**REDACTED DECISION -- 07-469 W, 07-472 C -- BY R. MICHAEL REED, CHIEF ALJ -- SUBMITTED for DECISION on JANUARY 8, 2008 -- ISSUED on APRIL 25, 2008**

## **SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** -- Under the 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 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).

Accordingly, a person who, as here, was a member of a member-managed limited liability company in name only, that is, a person who did not in fact have the responsibility of performing any managerial duties, is not personally liable, under W. Va. Code § 11-15-17 [1978] and the implementing regulations, for an unpaid consumers' sales and service tax liability of the member-managed limited liability company.

**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** -- 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, including a limited liability company, 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 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.

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 withholding 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 withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

Accordingly, a person associated with the member-managed limited liability company in question is not personally liable for the unpaid withholding tax liability of that company if, as here, one or both of the two requirements for personal liability is/are lacking.

## FINAL DECISION

On June 13, 2007, the Director of the Compliance “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a consumers’ sales and service tax assessment against the Petitioner, as an individual who is allegedly responsible for the unpaid consumers’ sales and service tax liability of a Corporation, LLC. 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 various months between December, 2001 and December, 2004, for tax of \$\_\_\_\_\_, interest, through June 13, 2007, of \$\_\_\_\_\_, and additions to tax of \$\_\_\_\_\_, for a total assessed consumers’ sales and service tax liability of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner on June 29, 2007.

Also, on June 13, 2007 (apparently; the record before this tribunal is not clear on this point), the Commissioner (apparently by the same “Division”; again the record is not clear) issued a withholding tax “money penalty” assessment against the Petitioner, as an individual who is allegedly responsible for the unpaid withholding tax liability of a Corporation, LLC, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. This assessment was for the three quarterly periods ending June 30, 2003, through December 31, 2003, for a “money penalty” (tax) and total assessed withholding

tax liability of \$\_\_\_\_\_. Written notice of this assessment was also served on the Petitioner on June 29, 2007.

Thereafter, by mail postmarked August 24, 2007, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment with respect to each of these two tax assessments. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petitions was sent to the parties and a hearing was held (after this tribunal granted the Petitioner's request for a postponement of the originally scheduled hearing), in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. During the time periods involved in the assessments, the Petitioner's adult son, a "Member" (and organizer), in fact, of the member-managed limited liability company in question, namely, the Corporation, LLC, listed the Petitioner, in the official corporate records in the West Virginia Secretary of State's Office, as a "Member" (and organizer) of the corporation.

2. The Petitioner's son listed the Petitioner as a "contact person" in the corporation's October 25, 2001 application for a business registration certificate, filed with the Respondent Commissioner.

3. However, the Petitioner did not consent to being listed as a “Member” (and organizer) of the corporation or as a “contact person” for the corporation, and she was not aware of these listings until after she received the notices of the assessments here.

4. The Petitioner lent her son most of the money he needed to start the corporation’s business; she did not, however, have a financial “ownership” interest in the business.

5. During the assessment periods the Petitioner did only clerical work in the office and had check-signing authority for the corporation’s business, which was primarily a motor vehicle body repair shop.

6. During the assessment periods the Petitioner signed some consumers’ sales and service tax and withholding tax checks for the corporation.

7. The Petitioner had only clerical, not managerial, authority concerning the financial affairs of the corporation’s business. Her son had all of the managerial authority.

8. 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 a “Member” in name only, not in fact, of the member-managed limited liability company in question, and was not involved in the management of the corporation by performing clerical duties in the office of the business.

9. Applying withholding 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 shown that she was not one of the persons “required” to collect, account for, and pay over the withholding tax on behalf of the corporation, and finds that

(2) the Petitioner has shown that she did not “willfully” fail truthfully to perform these duties.

## **DISCUSSION**

### Consumers’ Sales and Service Tax

With respect to the consumers’ sales and service tax, the issue is whether the Petitioner is one of the corporate officers who are personally responsible for all or any portion of the unpaid consumers’ sales and service tax liability of the corporation for the time 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 consumers’ sales and service tax legislative 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(s), 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].

In *Schmehl v. Helton*, No. 33379, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2008 W. Va. LEXIS 13 (Feb. 27, 2008), Justice Starcher, writing for a 4-1 majority of the West Virginia Supreme Court of Appeals, upheld the corporate officer's liability for the corporation's unpaid consumers' sales and service tax. The court-authored syllabus point 3 of *Schmehl* states:

3. Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory [*sic*] language setting forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to *W. Va. Code*, 11-15-17 [1978], such liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing evidence, giving due deference to the statute's general authorization for the imposition of such liability, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.

Very curiously, the court majority in *Schmehl*, in discussing the reach of *W. Va. Code* § 11-15-17 [1978], fails to even mention *W. Va. Code State R. §§ 110-15-4a.5 et seq.* (July 15, 1993), the above quoted legislatively approved regulations, having the force and

effect of a statute, *see* W. Va. Code § 29A-1-1 [1982], and have controlling weight, *see, e.g.*, syl. pt. 8, *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007). These legislative regulations do “set[ ] forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to W. Va. Code, 11-15-17 [1978],” quoting the language from syl. pt. 3 of *Schmehl*.

The *Schmehl* majority’s failure to mention W. Va. Code St. R. §§ 110-15-4a.5 *et seq.* (July 15, 1993), is especially surprising because: (1) that same high court referred (with apparent approval) to those legislative regulations in *Frymier-Halloran v. Paige*, 193 W. Va. 687, 691, 458 S.E.2d 780, 784 (1995) (Cleckley, J., writing the unanimous opinion); and (2) the court majority in *Schmehl*, in discussing the statute of limitations issue, discusses and applies the virtually adjacent provisions of W. Va. Code St. R. § 110-15-4a.7.1 (July 15, 1993). In any event, the broad reach of syllabus point 3 of *Schmehl* breaks no new ground in this state but, instead, is consistent with: (1) the language utilized in W. Va. Code § 11-15-17 [1978]; (2) W. Va. Code St. R. §§ 110-15-4a.5 *et seq.* (July 15, 1993); (3) syl. pt. 1, *Frymier-Halloran*; (4) syl. pt. 2, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W. Va. 524, 170 S.E.2d 362 (1969); and (5) the published precedents of this specialized and independent state tax tribunal since the inception of our operations in January, 2003, involving corporate officer liability for the corporation’s unpaid consumers’ sales and service tax obligations.

### Withholding Tax

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

An employer is liable for withholding taxes withheld from employees' wages but not remitted, W. Va. Code § 11-21-75 [1990], and the withheld-but-not-remitted withholding taxes are trust fund moneys belonging to the West Virginia State Tax Commissioner. 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) 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 withholding 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 (4<sup>th</sup> 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 withholding 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 withholding 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 (4<sup>th</sup> 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] and W. Va. Code St. R. § 63.1 (Apr. 20, 2003).

### CONCLUSIONS OF LAW

1. Under the 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. The Petitioner is not one of the corporate officers who are personally liable for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the time 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 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.

4. 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.

5. 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.

6. The Petitioner is not personally liable for the unpaid withholding tax liability of the corporation for the time periods involved in the assessment of that tax in this matter.

## **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 for the months between December, 2001 and December, 2004, for tax of \$\_\_\_\_\_, interest, through June 13, 2007, of \$\_\_\_\_\_, and additions to tax of \$\_\_\_\_\_.

for a total assessed consumers' sales and service tax liability of \$\_\_\_\_\_, should be and is hereby **FULLY VACATED**, and no consumers' sales and service tax is due from the Petitioner on behalf of this member-managed limited liability company 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 issued against the Petitioner for the three quarterly periods ending June 30, 2003, through December 31, 2003, should be and is hereby **FULLY VACATED**, and no withholding tax is due from the Petitioner on behalf of this member-managed limited liability company for the periods in question.