

**REDACTED DECISION -- 07-513 W -- BY GEORGE V. PIPER, ALJ --
SUBMITTED for DECISION on APRIL 17, 2008 -- ISSUED on APRIL 23, 2008**

SYNOPSIS

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 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 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. Here, both requirements are lacking.

FINAL DECISION

On August 22, 2007, the Director of the Compliance “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a withholding tax “money penalty” assessment against Petitioner, as (an allegedly) responsible 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 21 of the West Virginia Code. This assessment was for the periods ended March 31, 2007 and June 30, 2007, for a “money penalty” (tax, without any interest or additions to tax) and total assessed withholding tax- responsible person liability of \$_____. Written notice of this assessment was served on the Petitioner on a date not set forth in the record.

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

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held 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).

At the conclusion of the administrative hearing, the presiding administrative law judge allowed both parties until April 17, 2008 to supplement the factual record by any additional documentation which could be obtained from the West Virginia Worker’s Compensation Office of Judges regarding a disability hearing, involving another of Petitioner’s family member, during which disability hearing certain representations were made concerning Petitioner’s status as a corporate officer.

FINDINGS OF FACT

1. Effective February 10, 1997, the West Virginia Secretary of State’s Office listed Petitioner as being the Treasurer of the Corporation.

2. On its 2005 and 2006 corporation license tax returns, the name of Petitioner appears again as Treasurer of the Corporation.

3. At the administrative hearing, Petitioner testified that in 2005 another corporate officer informed Petitioner that when Petitioner's wife died in 2002, Petitioner's name had been substituted for hers as corporate secretary and that that was the first notice Petitioner had that he had been listed as a corporate officer.

4. Petitioner further testified that upon receiving an assessment from the Respondent as being a legally responsible officer for the withholding debt of the corporation in July, 2007, he immediately went to the West Virginia Secretary of State's Office and saw to it that his name was removed as a corporate officer after having paid a fifteen-dollar (\$15) fee for the removal of same.

5. Petitioner also testified that he never attended any corporate meetings, never received dividends, never solicited business on behalf of the corporation, never filed any withholding tax returns, and never knew that he was treasurer of the corporation.

6. The record does show that, in support of his argument that Petitioner was not knowingly an officer of the corporation, Petitioner's counsel submitted to this tribunal a transcript from a proceeding held in March, 2007, before the West Virginia Workers' Compensation Office of Judges, wherein the then corporate President, testified that his father, the Petitioner, was, as of that date, not an officer of the corporation.

7. The record also shows that this same transcript is replete with testimony from Petitioner, himself, stating that he knew that he was an officer of the corporation since 1997 and that he had continued in that capacity until at least August, 2005. Said testimony is in direct contravention to that given by Petitioner in front of this tribunal that he did not know that he was an officer until 2005.

8. The authority and the responsibility to direct the day-to-day financial decisions on behalf of the corporation rested solely with the corporate president as per his testimony before the West Virginia Worker's Compensation Office of Judges during his appearance on March 29, 2007.

9. The Petitioner, therefore, did not have the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation nor did he knowingly or recklessly fail to collect, account for, and pay over the withholding tax.

DISCUSSION

The sole issue in this matter is whether the Petitioner is one of the individuals who was personally responsible for all or any of the unpaid withholding tax liability of the corporation.

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 (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 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 (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] and W. Va. Code St. R. § 63.1 and 69.2 (Apr. 20, 2003).

CONCLUSIONS OF LAW

1. 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.

2. 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.

3. 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.

4. The Petitioner clearly is not personally liable for the unpaid withholding tax liability of the corporation for the time periods involved in the assessment because he neither had authority nor the responsibility to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, nor did he knowingly or recklessly fail to collect, account for and pay over the withholding tax.

DISPOSITION

WHEREFORE, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the periods ended March 31, 2007 and June 30, 2007, in the amount of \$_____ 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.