

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 an officer of an "S" corporation 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 "S" 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 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 in name only with the "S" corporation 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 December 12, 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 officer who is allegedly responsible for the unpaid consumers’ sales and service tax liability 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 various months between December, 2005 and August, 2007, for tax of \$_____, interest, through December 12, 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 as required by law.

Also, on December 12, 2007, the Commissioner (by the “Division”) issued a withholding tax “money penalty” assessment against the Petitioner, as an officer who is allegedly responsible for the unpaid withholding tax liability of the Corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. This assessment was for the period January 1, 2006 through April 30, 2007, for a “money penalty” (tax) and total assessed withholding tax liability of \$_____. Written notice of this assessment was also served on the Petitioner as required by law.

Thereafter, by hand delivery on January 31, 2008, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions 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 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).

It should be noted that at the conclusion of the administrative hearing, the parties agreed that, with respect to the withholding tax “money penalty” assessment, the entry for the period ending March 31, 2006 should be \$_____ and not \$_____.

FINDINGS OF FACT

1. Petitioner retired as a supervisor from a West Virginia company in 1993.
2. On November 23, 1998 the Corporation, was incorporated in the West Virginia Secretary of State’s Office; however, the same had its charter revoked on May 1, 2007, for failure to file annual returns or an annual report.
3. The Corporation was formed for the purpose of operating a restaurant in a city in West Virginia.
4. Petitioner testified that he was not involved in the incorporation or formation of the Corporation, and he did not ever provide any capital or funding for the enterprise such as cash, services, real or personal property, etc., to his son, either personally or to the Corporation.
5. Petitioner further testified that at a point in time subsequent to the formation of the corporation, Petitioner’s son asked that his father give him a one (1) dollar bill.

Whereupon, Petitioner was informed that he was now a one (1) percent owner of the corporation, was its Vice-President, and that one (1) share of stock would forthwith be gifted or issued to Petitioner. However, no stock certificate was ever received by Petitioner.

6. Petitioner also testified that the only enumeration that he ever received from the corporation was a check in the amount of three hundred (\$300.00) dollars which was sent to him from the Corporation for agreeing to be vice-president and a shareholder; he also testified that the only contact he ever had with the restaurant, thereafter, was agreeing, on six (6) occasions just to show up at the restaurant when his son was out of town, but the visits did not require Petitioner to perform any managerial duties while on the premises.

7. All of the witnesses, including Petitioner, testified that Petitioner never acted as an officer of the corporation, never attended any corporate meetings and at no time did he ever get involved in the operation or management of the corporation, including any of the financial or tax reporting aspects of the same.

8. All of the witnesses further testified that the ability to sign checks, hire and fire employees, make the payroll and otherwise perform the financial requirements of the corporation, including the filing of tax returns, rested with the President and the Facilities Manager.

9. Petitioner's son, the former president, testified that because the Corporation, was an "S" corporation, an accountant advised him early on that it would be necessary to make ceremonial officers and shareholders of friends and family members, which is why he made the Petitioner the Corporation's Vice-President and a shareholder.

10. 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 an "officer" in name only, not in fact, of the company in question, and was not involved in the operations or management of the corporation.

11. 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 he 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 he 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 (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* (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, 2005 and August, 2007, for tax of \$_____, interest, through December 12, 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 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 issued against the Petitioner for period January 1, 2006, through April 30, 2007, should be and is hereby **FULLY VACATED**, and no withholding tax is due from the Petitioner on behalf of this corporation for the period in question.