

**REDACTED DECISION -- 08-045 C -- BY GEORGE V. PIPER, ALJ --
SUBMITTED for DECISION on JUNE 4, 2008 -- ISSUED on JUNE 17, 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 never an officer of the corporation and 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 corporation.

FINAL DECISION

On January 17, 2008, 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, an individual, as an officer who is allegedly responsible for the unpaid consumers' sales and service tax liability of a certain Volunteer Fire Department. 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 January 1, 2005 through December 31, 2006, for tax of \$_____, interest, through

January 17, 2008, 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.

Thereafter, by mail postmarked March 12, 2008, 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).

It should be noted that at the conclusion of the administrative hearing, the presiding administrative law judge noted, for the record, that Petitioner's letter of resignation predated the assessment period and Respondent's counsel concurred with that conclusion.

FINDINGS OF FACT

1. On or about September 17, 2004, Petitioner met with the then Fire Chief, and informed him that Petitioner would resign as Assistant Fire Chief of the Volunteer Fire Department, Inc. ("VFD") at the regularly scheduled meeting to be held on September 24, 2004.

2. On September 24, 2004, Petitioner attended the regularly scheduled meeting of the VFD, handed his letter of resignation, effective immediately, to the Chief and the same was read aloud to the members.

3. At the administrative hearing, all three of the Petitioner's witnesses testified that they were all in attendance at the regularly scheduled meeting held on September 24, 2004, and heard Petitioner's letter of resignation read by the Fire Chief.

4. Petitioner testified that the VFD never had a Board of Directors, that Petitioner was never an officer of the VFD, and that the entire operation was run by the Fire Chief and another person who was designated as the Secretary-Treasurer.

5. Petitioner testified that his only duties at the VFD were to schedule the ambulance runs and to provide training as needed, and that his only connection with the business end of the enterprise was to co-sign payroll checks for the emergency medical technicians, as directed by the Fire Chief, because two (2) signatures were necessary to validate same.

6. Based upon the testimony of the Petitioner and the corroborating witnesses, who appeared at the hearing, it is clear that the Petitioner did, in fact, resign as Assistant Fire Chief of the VFD on September 24, 2004; that Petitioner was never an officer of the VFD; that he was never involved in performing any managerial duties for the VFD; and that what duties he did perform were all at the direction of the Fire Chief of the VFD.

DISCUSSION

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.

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 is 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.

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 period January 1, 2005 through December 31, 2006, for tax of \$_____, interest 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 period in question.