

**REDACTED DECISION – DOCKET # 08-245 W & 08-247 C – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on FEBRUARY 3, 2009 – ISSUED on AUGUST 3, 2009.**

### **SYNOPSIS**

**PERSONAL INCOME TAX – CONSUMERS SALES AND SERVICE TAX – BURDEN OF PROOF** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**PERSONAL INCOME TAX – CONSUMERS SALES AND SERVICE TAX – OFFICER LIABILITY FOR CONSUMERS SALES AND SERVICE TAX** – An individual who is elected or appointed as a corporate officer without his knowledge or consent, or a person who was not exercising the authority of a corporate officer and who had no responsibility to ensure that the consumers sales and service tax collected by the corporation was remitted to the State, is not liable as a corporate officer pursuant to W. Va. Code § 11-15-17, and the assessment of consumers sales and service tax against him is therefore erroneous, unlawful, void or otherwise invalid.

**PERSONAL INCOME TAX – PERSONAL INCOME TAX WITHHOLDING MONEY PENALTY ASSESSMENT – BURDEN OF PROOF** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**PERSONAL INCOME TAX – PERSONAL INCOME TAX WITHHOLDING MONEY PENALTY ASSESSMENT – LIABILITY OF A RESPONSIBLE PERSON** – Where a money penalty assessment for personal income tax withheld from the pay of corporate employees is issued to a person who is not required to collect, account for and pay over personal income tax withheld from the pay of corporate employees, the assessment is erroneous, unlawful, void or otherwise invalid.

### **FINAL DECISION**

On September 4, 2006, the director of the Compliance Division (“the 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, in his capacity as an

officer of Corporation A. The 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. The assessment was for the periods ending on February 28, 2006, April 30, 2006, June 30, 2006, August 31, 2006 and December 31, 2006, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through the date of the assessment, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_.

On September 4, 2006, the director of the Compliance Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) also issued a money penalty assessment against the Petitioner, in his capacity as a person responsible to collect, account for and pay over personal income tax withheld from the pay of employees of Corporation A. The 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. The assessment was for the periods ending on March 31, 2006, May 31, 2006, June 30, 2006 and August 31, 2006, in a total assessed amount of \$\_\_\_\_\_.

Written notice of the assessments was served on the Petitioner on September 11, 2008.

Thereafter, by mail postmarked October 30, 2008, received on November 5, 2008, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

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

An evidentiary hearing was held in this matter on February 3, 2009.

### **FINDINGS OF FACT**

1. The Petitioner began his employment with Corporation B in August, 1987.

2. Corporation A, which was owned by Mr. A and Mr. B, bought Corporation B in February or March of 2006. It appears that the company's name was then changed to Corporation A.

3. According to the records maintained by the West Virginia Secretary of State, Corporation A did business under the trade name "Corporation A Group."

4. "Corporation A Group" was the parent corporation of Corporation A.

5. The officers of Corporation A Group were Mr. A, Chief Executive Officer, Mr. B, President, and Ms. A, Vice President. The Directors were Mr. A and Mr. B. The Chief Financial Officer was Mr. C. *See* Petitioner's Exhibit No. 2.

6. The Petitioner was neither an officer, a director nor a shareholder of Corporation A Group.

7. Prior to the purchase, Mr. D was Chief Financial Officer for Corporation B and Mr. C was the Chief Financial Officer for Corporation A Group.

8. When the companies were consolidated, the Petitioner thinks that Mr. D became Chief Financial Officer and Mr. C became the Treasurer.

9. Corporation A was primarily engaged in the installation and maintenance of security systems, fire alarms and sound systems.

10. When another employee, Mr. E, retired in 2005, the Petitioner took over sales and became the point of contact in West Virginia, dealing with contractors and the employees who were involved in sales.

11. The Petitioner was an employee of Corporation A as of January 1, 2006, the earliest date covered by the two assessments.

12. The Petitioner managed sales of Corporation A.

13. By letter dated November 17, 2006, the Petitioner was terminated as an employee of Corporation A effective at the close of business on November 22, 2006. *See* Petitioner's Exhibit No. 1.

14. The termination letter was signed by "Mr. B, President."

15. The Petitioner's witness, Ms. B, was a secretary and purchasing agent.

16. Ms. B was an employee of Corporation A as of January, 2006. Her employment was also terminated in November, 2006.

17. Ms. B was not a director, an officer or shareholder in Corporation A.

18. Ms. B testified that she reported to Mr. D, Chief Financial Officer, and Mr. A, Owner.

19. The records maintained by the West Virginia Secretary of State show that the Petitioner was the President of Corporation A.

20. The other officers of Corporation A were Mr. D, Ms. A and Mr. C.

21. When the assessments were issued, the Petitioner saw that he was listed as President of Corporation A on the West Virginia Secretary of State's web site. He contacted the Secretary of State's office and asked if there was some document with his signature wherein he agreed to act as the corporation's President.

22. The Secretary of State's office was unable to provide him with any document showing how he was named President of Corporation A.

23. The Petitioner did not know that he was made the President of the corporation at the time that the documents were filed with the Secretary of State.

24. Ms. B was not aware that the Petitioner was President of Corporation A.

25. The Petitioner does not think he was listed as an officer of the corporation prior to the purchase of the business.

26. The Petitioner was not elected as President of Corporation A by the corporation's Board of Directors.

27. The Petitioner was not on the Board of Directors of Corporation A. The Directors were Mr. A and Mr. B. *See* Petitioner's Exhibit No. 2.

28. The Petitioner never attended any meetings of the Board of Directors of Corporation A.

29. The Petitioner never attended any meetings of the officers of Corporation A.

30. The Petitioner was not a shareholder and had no ownership interest in the corporation.

31. The Petitioner never attended any meetings of the shareholders of Corporation A.

32. The Petitioner never saw any minutes of any meetings of the shareholders or Board of Directors of Corporation A.

33. The Petitioner primarily reported to Mr. D. Sometimes the Petitioner reported to Mr. A and Mr. B.

34. The Petitioner never presided over all aspects of the business of Corporation A.

35. Ms. B testified that the Petitioner was not in charge of the corporation during 2006. Mr. A was in charge.

36. The Petitioner did not decide the order or priority in which bills of Corporation A were paid.

37. Mr. A was responsible for deciding the priority in which bills of Corporation A were to be paid.

38. Ms. B testified that the Petitioner did not decide what bills were to be paid.

39. The Petitioner may have seen financial statements for the corporation as of one or more of the early months of 2006. The statements he saw were internally generated statements that were printouts.

40. The financial statements he saw were given to him by Mr. D, who represented that all of the numbers contained therein were not accurate.

41. The Petitioner is not certain if Corporation A had an outside accountant.

42. The Petitioner could not have hired an independent accountant to audit the books and records of Corporation A to determine that the taxes were not being paid.

43. Ms. B testified that the bookkeeping for Corporation A was handled in the office in Kentucky. The Petitioner did not do so.

44. Mr. A was a “hands on” manager.

45. The Petitioner did not hire or fire any employees during 2006.

46. The Petitioner could not have fired Mr. A, Mr. B or Ms. A, Mr. D or Mr. C.

47. Ms. B testified that the Petitioner did not hire or fire any employees during 2006.

48. She further testified that the Petitioner could not have fired Mr. A, Mr. D or Mr. C.

49. Each of those individuals could have fired the Petitioner and, in fact, Mr. A did fire the Petitioner in 2006.

50. The Petitioner never opened any bank accounts on behalf of Corporation A.

51. The Petitioner was a signatory on a petty cash account in the name of Corporation A which was opened at a bank located in a city in Kentucky. *See* Petitioner’s Exhibit No. 4.

52. The other signors on the petty cash account were Mr. A, Ms. B, Mr. C and Mr. D. *See* Petitioner’s Exhibit No. 4.

53. Identifying information, such as the social security number, phone numbers, employment, date of birth and other identifying information was provided by or for Mr. A. No such information was provided by or for the other signors on the account. *See* Petitioner's Exhibit No. 4.

54. The Petitioner did not open the petty cash account.

55. He does not recall that he signed any documents related to the opening of this account.

56. The Petitioner recalls that the petty cash account was limited to approximately \$200.00.

57. The Petitioner never made any deposits to the petty cash account.

58. The Petitioner testified that the petty cash account was primarily to reimburse employees for out of pocket expenses and occasional small parts and equipment purchases.

59. The Petitioner recalls that he may have signed four or five checks drawn on the petty cash account.

60. The Petitioner usually did not sign petty cash account checks unless Ms. B was absent from the office.

61. To the extent that the Petitioner signed checks, Ms. B believes that they were drawn on the petty cash account.

62. Ms. B never saw the Petitioner sign a check drawn on any other account.

63. Ms. B would sign checks on the petty cash account for office supplies and postage. She never recalls signing checks to reimburse employees for expenses.

64. The Petitioner did not make any bank deposits on behalf of Corporation A.

65. Ms. B testified that the Petitioner did not make any bank deposits during 2006.

66. The Petitioner testified that when checks in payment for services were sent to the office in a city in West Virginia, they were forwarded to the office in Kentucky to be deposited by the personnel there.

67. Ms. B testified that when Corporation A received payment for services in the West Virginia office, the check would be forwarded to the Kentucky office for processing.

68. The Petitioner was never aware of the amounts in the corporation's bank accounts.

69. The Petitioner never signed any checks that were drawn on an operating account, payroll account or other account that may have been used to pay taxes.

70. The Petitioner's paychecks were usually signed by Mr. A or Mr. D. Occasionally they might be signed by Mr. C.

71. The Petitioner's paycheck would sometimes be on a check drawn on an account of Corporation A and sometimes drawn on an account of Corporation A Group.

72. Ms. B does not recall who signed her paychecks, but knows that it was not the Petitioner.

73. The banking for Corporation A was generally handled by Mr. A. *See* Petitioner's Exhibit No. 5.

74. Ms. B never received any checks drawn on any account that were signed by the Petitioner.

75. The Petitioner never reviewed financial records or data that would have given him an indication that the trust fund taxes in question were not being paid to the State of West Virginia.

76. The Petitioner had no reason to believe that the sales and withholding taxes were not being paid to the State of West Virginia.

77. The Petitioner first became aware that Corporation A owed the trust fund taxes in question in September, 2008, when he was served with the assessments.

78. Ms. B testified that, to her knowledge, the Petitioner never prepared, reviewed or signed any tax returns of Corporation A.

79. The Petitioner never prepared, reviewed or signed any tax returns for Corporation A, including consumers sales and service tax returns, withholding tax returns or income tax returns.

80. To the Petitioner's knowledge, Mr. A, Mr. B and Mr. D were responsible for preparation and filing of tax returns on behalf of Corporation A.

81. The Petitioner presented a number of consumers sales and service tax and personal income tax withholding returns that had been filed by "Corporation B dba Corporation A Group" for the year 2006.

82. Ms. C (sp.) worked in the office of Corporation A Group in Kentucky, as a secretary/receptionist, assisting Mr. C and Mr. D.

83. To the extent that the returns were signed, they were signed by Ms. C.

84. To the extent that the taxes were paid, the checks used to pay the taxes were signed by Mr. C, Mr. D or Mr. A.

85. The Petitioner thinks that Mr. C and Mr. D were responsible for maintaining the employee withholding, but that Mr. A had the ultimate say.

86. He thinks this because most of the time they reviewed employee withholding statements, but had to get Mr. A's approval.

## **DISCUSSION**

### **CONSUMERS SALES AND SERVICE TAX**

The first issue presented by this matter is whether the Petitioner is liable for the corporation's consumers sales and service tax by reason of the fact that he was an officer, namely president, of the corporation.

West Virginia Code § 11-15-17 provides:

§ 11-15-17. Liability of officers of corporation.

If 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, and payment of the tax and any additions to tax, penalties and interest thereon imposed by article ten of this chapter may be enforced against them as against the association or corporation which they represent.

This statute appears to impose absolute liability on any corporate officer for the corporation's failure to either collect consumers sales and service tax or to pay over to the state any consumers sales and service tax collected.

The legislative rules also appear to impose absolute liability on corporate officers. West Virginia Code St. R. § 110-15-17 provides, in relevant part:

17.1. Liability of Officers of Corporation. - If the taxpayer or vendor is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default in the reporting or payment of taxes on the part of the association or corporation. Payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 *et seq.* may be enforced against such officers as against the association or corporation which they represent.

This provision imposes liability on corporate officers for the failure of a corporation to collect and pay over any consumers sales and service tax that was or should have been collected by the corporation. This liability imposed by this section is also apparently absolute.

The absolute liability imposed on corporate officers is governed by the provisions of West Virginia Code St. R. § 110-15-4a, which provides, in relevant part:

**§ 110-15-4a. Liability of Officers of Corporation.**

4a.1. If 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, and payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 *et seq.* may be enforced against them as against the association or corporation which they represent.

4a.2. A corporation, the officers of which are liable for payment of the tax, is any corporation incorporated under the laws of this State, and any foreign corporation authorized to do business in this State or doing business in this State without such authorization.

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4a.4. There is a default by the corporation or association resulting in officer liability when: (a) the tax is shown on a tax return and the corporation or association neglects or fails to pay the tax within 15 days after notice and demand for payment; (b) the liability of the corporation is determined by an assessment and such assessment is final and not subject to administrative or judicial review and the corporation neglects or fails to pay the tax within 15 days after notice and demand for payment; or (c) when an assessment has not been made against the corporation or association and the corporation or association has not filed any return at the time required by law and has failed to file such return after notice of such failure.

4a.4.1. A default occurs whether or not a notice of tax lien has been filed against the corporation or association and whether or not the State has attempted to collect or failed to collect the tax from the corporation or association, and whether or not the corporation or association is defunct, dissolved, or insolvent.

4a.4.2. The filing of a petition in bankruptcy by a corporation does not stay or preclude the assessment of officers of the corporation, since the tax is not dischargeable in bankruptcy.

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

4a.5.1. *A person who acts as an officer or assumes the character, duties or responsibilities of an officer, is presumed to be an officer, and such person cannot avoid personal liability by alleging he was not properly elected. A person who is elected or appointed as an officer without his knowledge or consent, or who does not act as an officer and does not assume the character, duties, or responsibilities of an officer, is not liable as an officer.*

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. . . . (Emphasis added.)*

Any language in the statute and legislative rules which provide for the absolute liability of a corporate officer for consumers' sales and service tax which a corporation either collected and failed to remit or which it failed to collect has been tempered by the decision of the West Virginia Supreme Court in *Schmehl v. State Tax Commissioner*, 222 W. Va. 98, 662 S.E.2d 697 (2008). In syllabus point 3 of *Schmehl*, the West Virginia Supreme Court held:

Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory 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.

Thus, a corporate officer is liable for the consumers sales and service tax of a corporation of which he is an officer, unless the officer shows by clear and convincing evidence that it is fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability on the corporate officer. In the present matter, the Petitioner has made the requisite showing with evidence that is clear and convincing.

The evidence presented in this matter is undisputed in showing that the Petitioner was listed as the president of Corporation A in the records maintained by the Secretary of State. However, the evidence is also undisputed that the Petitioner was unaware that he had been elected or appointed as the president of the corporation until the issuance of the assessment by the State Tax Commissioner, which occurred subsequent to all of the events resulting in the underlying tax liability.<sup>1</sup>

A person who is elected or appointed a corporate officer without his or her knowledge or consent cannot be held liable, unless he or she acts as an officer and assumes the character, duties or responsibilities of an officer. W. Va. Code St. R. § 110-15-4a.5.1. The Petitioner was elected or appointed without his knowledge or consent. In view of this fact, he cannot be held liable for the consumers sales and service tax liability of the corporation solely by reason of his status as a corporate officer. To permit a titular corporate officer to be held liable under such circumstances would result in a twofold injustice: 1) An innocent party would be liable for tax under circumstances where he or she did nothing to knowingly assume liability for those taxes; and 2) It would encourage those persons who are actually responsible for collecting, segregating and remitting consumers sales and service tax to surreptitiously name innocent and unsuspecting individuals as corporate officers, in an attempt to absolve themselves of liability and to foist liability off on unsuspecting parties. The clear purpose of the legislative rule is to prevent this injustice. To allow this would be fundamentally unfair, and would permit the responsible parties to engage in an arbitrary, capricious and unreasonable act, thereby running afoul of the holding in *Schmehl*.

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<sup>1</sup> In fact, the Petitioner was unaware that he had been named a corporate officer until nearly two years after his employment had been terminated.

W. Va. Code St. R. § 110-15-4a.5 permits the extension of the statutory and regulatory liability to persons who are not titular corporate officers or to persons who are not properly elected or appointed as officers. It provides that liability extends to a person elected or appointed to a position with the authority of a corporate officer and who performs the duties or responsibilities in the management of the corporation. Section 110-15-4a.5.1 provides that the person who acts as an officer or who assumes the characters, duties and responsibilities of an officer is presumed to be an officer, and cannot avoid liability by claiming that his election or appointment was improper.

The Petitioner, while elected or appointed to a position with the authority of a corporate officer, albeit without his knowledge, did not perform duties or responsibilities in the management of the corporation. The evidence shows that the Petitioner did not perform any activities which would demonstrate that he was involved in the management of the corporation. He did not attend meetings of the officers, the directors or the shareholders. There is no evidence to show that the directors or officers vested him with any authority with respect to the management of the corporation. The evidence showed that the company was managed by Mr. A, Mr. C and Mr. D. The Petitioner was a sales person for the corporation, a mere employee. He had no authority to hire or fire employees. In fact, the Petitioner reported to others. Ultimately he was fired by the new management of the corporation, less than a year after the corporation's purchase.

The Petitioner had no authority with respect to the finances of the corporation. He did not participate in the preparation of financial statements and was provided only incomplete financial statements. His sole apparent authority with respect to expenditure of corporate funds was to write an occasional check drawn on the petty cash and to receive his paycheck. He had

no authority to open or close bank accounts and did not open or close any bank account. He could not make deposits, withdrawals or write checks, except to write checks on the petty cash account. He had no authority to decide the order in which bills, including consumers sales and service tax, were to be paid or whether they were to be paid at all. His lack of authority respecting corporate finances further demonstrates his inability to ensure payment of corporate tax liabilities.

The Petitioner also had no authority respecting the filing of consumers sales and service tax returns or the payment of said tax. He was not required to prepare, review or sign the consumers sales and service tax returns for the periods covered by the assessment. He did not do so. He was not required to ensure payment the consumers sales and service tax on behalf of the corporation. To the extent that consumers sales and service tax was paid, the checks in payment therefore were not signed by the Petitioner. The Petitioner took no action with respect to the consumers sales and service tax liability in question that might show that he had some authority to ensure its payment. Therefore, he is not liable.

#### WITHHOLDING TAX

The second issue presented is whether the Petitioner is a “responsible person” for purposes of the statutory requirement of payment of the withholding tax. W. Va. Code § 11-10-19(a) provides, in relevant part,

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 any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over. No additions to tax shall be imposed under section eighteen for any offense to which this subsection is applicable.

Thus, the issue presented is whether or not the Petitioner was a “person required to collect, account for and pay over” personal income tax withheld from the pay of the employees of Corporation A under the provisions of this section. The evidence in this matter makes it clear that the Petitioner was not such a person.

As more fully discussed with respect to the consumers sales and service tax, there is no evidence in the record to show that the Petitioner exercised any duties making him directly responsible for collecting, accounting for or paying over the personal income tax that was withheld from the corporation’s employees. The returns were prepared, reviewed and signed by individuals other than the Petitioner. The checks in payment for the tax withheld, to the extent that they exist, were prepared and signed by other individuals. The Petitioner was clearly not responsible for any of mechanics of collecting, accounting for and paying over the personal income tax withheld from the employees of Corporation A.

Also, as with the consumers sales and service tax, there is no evidence to show that the Petitioner exercised any sort of broad managerial or administrative functions or authority over the operations of the corporation that would make him responsible for collecting, accounting for or paying over the personal income tax withholding. Accordingly, the Petitioner was not a person responsible for collecting, accounting for and paying over the personal income tax withheld from the employees of Corporation A.<sup>2</sup>

## **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

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<sup>2</sup> The Petitioner contends that any failure on his part to collect and tender payroll withholdings was not willful because he was not aware of them until he was assessed nearly two years after his termination. This contention, while valid, is irrelevant, since the Petitioner had no authority or responsibility to do so at all.

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. With respect to the consumers sales and service tax assessment, the Petitioner in this matter has carried his burden of proving that he was not a duly elected or appointed corporate officer or a person who was exercising the authority of a corporate officer, who had responsibility to ensure that the consumers sales and service tax was collected by the corporation and remitted to the State, and that the assessment of consumers sales and service tax against him is therefore erroneous, unlawful, void or otherwise invalid.

3. With respect to the money penalty assessment for personal income tax withheld from the pay of corporate employees, the Petitioner in this matter has carried his burden of proving that he is not a person required to collect, account for and pay over personal income tax withheld from the pay of corporate employees, and that the assessment of consumers sales and service tax against him is erroneous, unlawful, void or otherwise invalid.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers sales and service tax assessment issued against the Petitioner for the periods ending on February 28, 2006, April 30, 2006, June 30, 2006, August 31, 2006 and December 31, 2006, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, computed through the date of the assessment, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_, should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the money penalty assessment against the Petitioner for the periods ending on March 31, 2006, May 31, 2006, June 30, 2006 and August 31, 2006, in a total assessed amount of \$\_\_\_\_\_ should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.