

REDACTED DECISION – DOCKET #S 09-002 C, 09-003 W – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on AUGUST 3, 2009 – ISSUED on FEBRUARY 3, 2010.

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX –LIABILITY OF CORPORATE OFFICER – DUE PROCESS PRINCIPLES – “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.” Syllabus point 3, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008).

CONSUMERS SALES AND SERVICE TAX –LIABILITY OF CORPORATE OFFICER – DUE PROCESS PRINCIPLES -- It does not comport with the principles of due process, and it is unreasonable and is fundamentally unfair to impose liability on a corporate officer who did not actively participate in the business for approximately ten years prior to the assessment period, who had no authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation, but who merely had signature authority on the corporate bank account for the convenience of the corporation and who signed checks solely for the convenience of those actively operating the corporation, who were his son and daughter-in-law.

PERSONAL INCOME TAX WITHHOLDING – LIABILITY OF “RESPONSIBLE PERSON” – *W. Va. Code* § 11-10-19(a) provides, “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.

PERSONAL INCOME TAX WITHHOLDING – LIABILITY OF “RESPONSIBLE PERSON” – An individual who is a corporate officer but who did not actively participate in the business for approximately ten years prior to the assessment period, who had no authority to account for, make return of or pay over the personal income tax withheld from the corporation’s employees and who does not sign any checks in payment thereof, but who merely had signature authority on the corporate bank account for the convenience of the corporation and who signed

checks solely for the convenience of those actively operating the corporation, who were his son and daughter-in-law. and who has signature authority on the corporate bank account for the convenience of the corporation, is not a “person responsible for the payment of personal income tax withheld.

FINAL DECISION

On November 3, 2008, 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 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. The assessment was for the period of June 1, 2000, through December 31, 2003, for tax in the amount of \$____, interest in the amount of \$____, computed through November 3, 2008, and additions to tax in the amount of \$____, for a total assessed tax liability of \$_____.

Also, on November 3, 2008, the Commissioner (by the Division) issued a personal income tax withholding money penalty assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2004, through December 31, 2005, for a total assessed money penalty liability in the amount of \$_____.

Written notice of both assessments was served on the Petitioner on November 10, 2008.

Thereafter, by mail postmarked December 31, 2008, received on January 6, 2009, 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].

FINDINGS OF FACT

1. The Petitioner is the President of the corporation.
2. The Petitioner was an incorporator of the corporation.
3. The Petitioner signed the original application for the corporation's business license in 1988, in his capacity as President of the corporation.
4. The corporation was chartered on September 30, 1988, and its corporate charter was revoked on October 10, 1997.
5. He incorporated the business, believing it to be the proper thing to do at the time.
6. The Petitioner never resigned as President.
7. The petitioner started the corporation as a family business.
8. The corporation sold and serviced small lawn and garden tools, such as lawn mowers, lawn trimmers, chain saws and tractors.
9. The Petitioner's daughter was the secretary of the corporation.
10. The Petitioner's daughter kept minutes of the few meetings that were held. She recalls a meeting in 1988, but is not sure when others took place.
11. The principals of the corporation probably observed at least some of the corporate procedural requirements until the early 1990s.
12. The Petitioner opened the original store in a city in West Virginia, prior to incorporating.
13. The Petitioner's main business was running a restaurant and he derived most of his income from the restaurant.
14. The original store was adjacent to the restaurant.
15. The Petitioner turned the restaurant over to his son and daughter-in-law around 1988.

16. The Petitioner opened a second store in another city in West Virginia, in 1986, and operated it until approximately 1994.

17. He and his wife moved to a county in West Virginia in the early 1990s so that they could devote time to caring for his mother.

18. His son operated the original store.

19. Petitioner's daughter testified that her brother operated the corporation after the Petitioner distanced himself from the business so that he and his wife could care for his mother.

20. He was the primary operator of the corporation when he was involved with the business.

21. After closing the second store in the nineties, the Petitioner did not actively participate in the business.

22. Petitioner's son was the primary operator at the time of the assessments.

23. During the assessment period, he might visit the business every couple of months. He might ask if he could do something, but generally did nothing. He did not participate in sales or administration.

24. Petitioner's daughter testified that Petitioner would occasionally visit the city of the original store, primarily to visit his children and grandchildren.

25. The Petitioner was authorized to sign on the business bank account maintained by the corporation.

26. The last signature card for the bank account of the corporation was executed in November 30, 1998 by Petitioner's son and Petitioner's son's wife, and the Petitioner and his wife. One has not been executed since then.

27. He and his wife executed the signature card as a matter of convenience, not expecting to be responsible for the business.

28. His name was never taken off the bank signature card.

29. The Petitioner testified that he would stop at the store when he was visiting in the area.

30. From 2002 through 2004, the Petitioner signed ten checks drawn on the bank account of the corporation.

31. The checks signed by the Petitioner, one in August, 2002, two in February, 2003, two in August, 2002, four in March, 2004, and one in April, 2004, are evidence of sporadic visits, consistent with the testimony of the Petitioner and his daughter.

32. The Petitioner signed checks only when he happened to be in the city and his son or daughter-in-law weren't available.

33. None of the checks written to pay consumers sales and service tax, or an installment agreement or payment plan for other taxes were signed by the Petitioner.

34. The consumers sales and service tax returns that were filed were signed by Petitioner's son.

35. Only four Forms W-2 were found for 2004. The total amount withheld for those four employees, including Petitioner's son and his wife, was \$_____.

36. Petitioner testified that he couldn't say with certainty how many employees the corporation had during 2004.

37. The Petitioner is relatively certain that the corporation did not have more than the employees for which the Petitioner presented Forms W-2.

38. Petitioner's daughter does not recall more than one or two employees, other than her brother and sister-in-law.

DISCUSSION

The first issue is whether the Petitioner is liable for consumers sales and service tax that was collected by the corporation from its customers, but not remitted to the State of West Virginia. The Petitioner, if he is liable, is liable pursuant to the provisions of W. Va. Code § 11-15-17, which provides in relevant part:

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.

While this provision is stated in terms that impose absolute liability on corporate officers, the absolute language of this section has been tempered by the decision of the West Virginia Supreme Court in *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008). Syllabus point 3 of *Schmehl* provides:

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.

In considering the facts of this case, this Office is of the opinion that the Petitioner has demonstrated the fundamental unfairness of imposing liability for the consumers sales and service tax on him.

The Petitioner was the President of the corporation at the time of its incorporation and remained President of the corporation until such time as it ceased operating as a viable business.

The evidence clearly demonstrates that the Petitioner moved to a county in West Virginia with his wife in the early 1990s to operate a store he had opened several years earlier, but primarily to care for his mother. When the Petitioner moved to the county his son took over operation of the original store. The Petitioner did not participate in the operation of the original store after moving to this county. He ceased actively working for the business shortly thereafter.

The evidence demonstrates that the consumers sales and service tax returns that were prepared and signed, and those that were filed, were signed by Petitioner's son. There is no evidence in the record to show that the Petitioner participated in the preparation or execution of the consumers sales and service tax returns.

The Petitioner was a signatory on the corporation bank account. He executed the signature card in the late 1990s. There is evidence in the record to show that the Petitioner signed ten corporate checks on five different occasions during the assessment period. None of the checks he signed were for taxes. The testimony of the Petitioner and his daughter shows that he was in the city of the original store for the purpose of visiting his children and grandchildren, and signed the checks for the convenience of the corporation when his son and daughter-in-law were unavailable. The Petitioner was not in the city of the original store for the purpose of active participation in the operation of the business.

Considering all of these factors together, it appears that it would violate fundamental fairness to hold the Petitioner liable for the corporation's consumers sales and service tax liability. The Petitioner was not an active participant in the business during the assessment period. He was not responsible for the management of the store. He did not prepare or execute consumers sales and service tax returns. He did not make any payments of consumers sales and service tax and had no responsibility for doing so. He only signed checks on behalf of the

corporation because he happened to be available at times when his son and daughter-in-law were not. Based on these facts and circumstances, it must be held that the Petitioner is not liable for the consumers sales and service tax.

With respect to the personal income tax withheld from the pay of the corporation's employees, liability is imposed on a "responsible person" pursuant to W. Va. Code § 11-10-19, which provides, in relevant part:

(a) 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.

With respect to the withholding tax, the evidence is that the Petitioner did not sign any of the returns showing that personal income tax was withheld from the pay of the corporation's employees. He did not sign any checks in payment of tax withheld from the pay of the employees. Having left the business some years prior to the assessment period, the Petitioner was not a person "required" to collect, account for or pay over such tax. Thus, he is not liable for the taxes withheld from the pay of the corporation's employees.

CONCLUSIONS OF LAW

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

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. Syllabus point 3, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008), provides:

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.

3. It does not comport with the principles of due process, and it is unreasonable and is fundamentally unfair to impose liability on a corporate officer who did not actively participate in the business for approximately ten years prior to the assessment period, who had no authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation, but who merely had signature authority on the corporate bank account for the convenience of the corporation and who signed checks solely for the convenience of those actively operating the corporation, who were his son and daughter-in-law.

4. W. Va. Code § 11-10-19(a) provides:

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.

5. An individual who is a corporate officer but who did not actively participate in the business for approximately ten years prior to the assessment period, who had no authority to account for, make return of or pay over the personal income tax withheld from the corporation's employees and who does not sign any checks in payment thereof, but who merely had signature

authority on the corporate bank account for the convenience of the corporation and who signed checks solely for the convenience of those actively operating the corporation, who were his son and daughter-in-law. and who has signature authority on the corporate bank account for the convenience of the corporation, is not a “person responsible for the payment of personal income tax withheld.

5. The Petitioner in this matter has carried his burden of proving that the assessments of taxes against him are 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 in his capacity as an officer of the corporation for the period of June 1, 2000, through December 31, 2003, for tax in the amount of \$____, interest in the amount of \$____, computed through November 3, 2008, and additions to tax in the amount of \$____, totaling \$____, 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 personal income tax withholding money penalty assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2004, through December 31, 2005, for a total assessed money penalty liability in the amount of \$____ should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.