

**REDACTED DECISION – DOCKET NUMBER 09-354 W – BY GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION ON SEPTEMBER
1, 2011 – ISSUED ON FEBRUARY 28, 2012**

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER’S DUTY TO WITHHOLD -- “Every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee’s wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article . . .” W. Va. Code Ann. § 11-21-71 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER’S LIABILITY FOR WITHHELD TAXES -- “Every employer required to deduct and withhold tax under this article is hereby made liable for such tax.” W. Va. Code Ann. § 11-21-75 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- PENALTIES FOR FAILURE TO ACCOUNT FOR AND PAY OVER -- “. . . 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. . . .” W. Va. Code Ann. § 11-10-19(a) (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- OFFICERS PERSONALLY LIABLE FOR TAX DEFAULT 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. . . may be enforced against them as against the association or corporation which they represent” W. Va. Code Ann. § 11-15-17 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- NECESSITY OF FINDING OF FUNDAMENTAL FAIRNESS BEFORE OFFICER LIABILITY CAN BE SHOWN -- Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, “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.” *Schmehl v. Helton*, Syl. pt. 3, 222 W. Va. 98, 662 S.E.2d 697 (2008).

PERSONAL INCOME TAX WITHHOLDING -- OFFICER LIABILITY NOT SHOWN -- Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious to impose liability on a corporate officer who was not an authorized signatory on either the payroll or the operating accounts of Company B or the operating account of Company A never had a payroll account; who had no authority over payroll or the financial affairs of the company including the payment of withholding taxes and no power and authority to make any corporate or management decisions.

PERSONAL INCOME TAX WITHHOLDING -- NO SHOWING OF WILLFULLNESS -- The Petitioner showed that he never willfully attempted to evade or defeat the withholding tax of Company A or the payment of the same.

WEST VIRGINIA OFFICE OF TAX APPEALS -- 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 it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET -- Petitioner, in this matter, has carried his burden of proving that the assessment of taxes against him is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On August 18, 2009, the Compliance Division of the West Virginia State Tax Commissioner's office issued a personal income tax withholding money penalty assessment against the Petitioner, an Individual as Officer of Company A, under the provisions of Chapter 11, Article 10, Section 19 of the West Virginia Code, for the period of July 1, 2004, through January 31, 2005, for a total assessed money penalty liability in the amount of \$_____.

Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by fax dated October 20, 2009, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment pursuant to West Virginia Code Sections 11-10A-8(1) and 11-10A-9.

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

On July 13, 2011, an order was entered by the presiding administrative law judge to reopen the record to take additional evidence.

FINDINGS OF FACT

1. Petitioner, is listed on the West Virginia Secretary of State's on-line data screen as both vice-president and secretary of Company A, whose home address is in West Virginia, (State's Exhibit 2).

2. As per Petitioner's testimony the original company, Company B was formed in 1984 as a licensed installer of windows; however, a separate company, Company A was later formed for workers' compensation purposes which consisted of employees such as clerical workers, telemarketers and sales personnel who would technically not carry the risk of injury as would the installers.¹

3. Petitioner testified that he began employment with Company B in 1987 becoming vice-president and a shareholder in 1993.²

4. It was Petitioner's testimony that his number one priority and responsibility and that between 90 to 95 percent of his time at Company A was devoted to being its marketing director and running the telemarketing center which involved hiring, training and administering the sales program through its managers.

5. Petitioner also testified that the president of Company A was Mr. A who owned seventy percent of the stock and who had absolute power and authority to make and did make all corporate and management decisions. Further, Petitioner had absolutely no authority over the payroll or the other financial affairs of the company including payment of withholding taxes.

¹ Petitioner testified that he became vice-president of Company A when it was formed inasmuch as it was never intended or designed to have profits, losses, or to make distributions to anyone, but only to bill its costs to Company B.

6. Petitioner signed the 2002 West Virginia business franchise tax return for Company A as its vice-president (State's exhibit 3).

7. Petitioner signed a payment plan agreement with Respondent dated June, 2005, as vice-president of Company A (not executed by Respondent) which provided for a \$_____ down payment and monthly payments of \$_____ beginning July, 2005, (State's exhibit 4). It was Petitioner's testimony that he alone was instrumental in getting Mr. A to agree to set up a payment plan agreement with the Respondent, although he had no authority to do so, and that he was the one who worked with the revenue agent to get that accomplished.³ Further, funds from the corporate account were used to make payments under the payment agreement while Petitioner was employed by the company, but payments stopped after he left.

8. As requested by this Tribunal, Respondent's counsel submitted a detailed account history of Company A showing that withholding taxes were paid for periods between February, 2003 and June, 2004 and again between February, 2005 and November, 2006; however, no withholding taxes were paid in the interim for time periods ending July 31, 2004, through January 31, 2005. (State's Exhibit 5)

9. As per Petitioner's testimony he was summoned by the Internal Revenue Service in 2007 to establish responsibility for Company B's unpaid federal employment taxes (Petitioner's Exhibit 5) and that to his knowledge he was never determined to be a responsible party.

10. By letter dated August 15, 2006, Petitioner confirmed to Mr. A, President of Company B that effective July 17, 2006, he had been relieved as an employee of the company

² Petitioner testified that although he was purportedly given a thirty-percent share of the company he was never an owner in that no certificate of stock was ever issued in his name and no distributions were ever received.

³ It was Petitioner's testimony that although he was not responsible for the payroll or the delinquent withholding taxes he believed that the payment of taxes was the right thing for the company to do.

and relieved of any further positions such as director and/or officer which he may have held but that he would continue to remain a thirty percent shareholder in the company (State's Exhibit 1). Petitioner testified that at some point he attempted to relinquish his shares back to the corporation but the request was denied by Mr. A.

11. Petitioner testified he was not an authorized signatory on either the payroll or the operating accounts of Company B, and that Company A never had a payroll account. Petitioner's exhibits 6 & 7, dated April 17, 1987, which are payroll and operating accounts of Company B, show Mr. A having signed as vice-president and a Mr. B as president. He further testified that he never had check signing authority and signed no checks while he was employed by the company.

12. All of the Petitioner's testimony was un-rebutted.

DISCUSSION

The sole issue to be determined is whether the Petitioner is liable for the personal income tax withheld from the pay of Company A's employees, but never remitted to the State of West Virginia.

With respect to the personal income tax withheld from the pay of the corporation's employees, West Virginia Code Section 11-21-71(a) states that "every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual shall deduct and withhold such wages for each payroll period a tax computed in such manner . . . an amount substantially equivalent to the tax reasonably estimated to be due under this article . . ." W. Va. Code Ann. § 11-21-71(a) (West 2010).

Section 75 of Article 21 states that, if the required withholding does not occur or if the required amounts are not remitted to the Tax Commissioner, the employer is liable for the uncollected and unpaid amounts. *See* W.Va. Code Ann. § 11-21-75 (West 2010).

It should be noted that the Tax Commissioner issued the assessment in this matter pursuant to West Virginia Code Section 11-10-19(a) which states, “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” W. Va. Code Ann. § 11-10-19(a) (West 2010) Presumably the Tax Commissioner believes that the Petitioner is a “person required to collect, account for and pay over” the unpaid withholding tax liabilities of Company A because he was an officer of Company A.

Section 17 of Article 15, Chapter 11, provides that officers of an association or corporation “. . . 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 . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010). Neither party raised the issue of the presumed default of Company A, with regard to its unpaid withholding tax liabilities. Taking the default as a given, the Petitioner would be liable for Company A’s default, were it not for the West Virginia Supreme Court of Appeals holding in *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008). The *Schmehl* Court addressed the constitutionality of West Virginia Code Section 11-15-17 and the Tax Commissioner’s practice of holding officers liable for the

defaults of a corporation, merely by virtue of their position as an officer. In Syllabus point 3 the *Schmehl* Court states:

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 *West Virginia 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.

Schmehl, at Syl. pt. 3.

Applying the test to the assessment for the un-remitted withholding taxes in this matter reveals that it would be fundamentally unfair to impose liability on a corporate officer who was not an authorized signatory on either the payroll or the operating accounts of Company B or the operating account of Company A (Company A never had a payroll account). Moreover, the Petitioner had no authority over payroll or the other financial affairs of the company including the payment of withholding taxes and no power and authority to make any corporate or management decisions. Additionally, West Virginia Code Section 11-10-19(a) states that the person required to collect, account for and pay over any tax, (in this case an officer of a corporation that has defaulted) must have willfully attempted to evade or defeat the tax or payment of the tax. Here, there has been no showing of willful conduct on the part of the Petitioner.

The Tax Commissioner makes much of the fact that in June of 2005, the Petitioner signed a payment plan with the Tax Department, suggesting that it establishes the Petitioner's liability. However, the Petitioner testified that he had to go to Mr. A to get permission to negotiate with

the Tax Department and that he only signed it because Mr. A was not in the office the day it was executed. The undersigned finds the Petitioner's testimony in this regard to be credible, because the record in this matter shows that in his thirteen years as an officer of either company, he only signed two tax related documents, the payment plan and one business franchise tax return.

CONCLUSIONS OF LAW

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

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. "Every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual, shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article . . ." W. Va. Code Ann. § 11-21-71 (West 2010).

3. "Every employer required to deduct and withhold tax under this article is hereby made liable for such tax. . . ." W. Va. Code Ann. § 11-21-75 (West 2010).

4. ". . . 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...”
W. Va. Code Ann. § 11-10-19(a) (West 2010).

5. “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...may be enforced against them as against the association or corporation which they represent” W. Va. Code Ann. § 11-15-17 (West 2010).

6. Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, “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.”
Schmehl v. Helton, Syl. pt. 3, 222 W. Va. 98, 662 S.E.2d 697 (2008).

7. Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious to impose liability on a corporate officer who was not an authorized signatory on either the payroll or the operating accounts of Company B or the operating account of Company A (Company A never had a payroll account); who had no authority over payroll or the financial affairs of the company including the payment of withholding taxes and no power and authority to make any corporate or management decisions.

8. The Petitioner showed that he never willfully attempted to evade or defeat the withholding tax of Company A or the payment of the same.

9. 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 it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2. (2003)

10. Petitioner in this matter has carried his burden of proving that the assessment of taxes 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 personal income tax withholding money penalty assessment against the Petitioner, under the provisions of Chapter 11, Article 10, Section 19 of the West Virginia Code, for the period of July 1, 2004, through January 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.

WEST VIRGINIA OFFICE OF TAX APPEALS