

**REDACTED DECISION – DOCKET NUMBER 09-464 C – BY – MATTHEW R. IRBY,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION ON AUGUST 16,
2011 – ISSUED ON FEBRUARY 15, 2012**

SYNOPSIS POINTS

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

CONSUMERS SALES AND SERVICE TAX -- VENDOR TO COLLECT -- “For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article, . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010).

CONSUMERS SALES AND SERVICE TAX -- PURCHASER TO PAY -- “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

CONSUMERS SALES AND SERVICE TAX -- VENDOR TO COLLECT -- “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

CONSUMERS SALES AND SERVICE TAX -- VENDOR DEFINED -- A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

CONSUMERS SALES AND SERVICE TAX -- VENDOR PERSONALLY LIABLE FOR TAXES IT FAILS TO COLLECT -- “If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect . . .” W. Va. Code Ann. § 11-15-4a (West 2010).

CONSUMERS SALES AND SERVICE TAX -- LIABILITY OF OFFICERS OF CORPORATIONS, ETC., -- 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).

CONSUMERS SALES AND SERVICE TAX -- “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.” W. Va. Code R. § 110-15-4a.1 (1993).

CONSUMERS SALES AND SERVICE TAX -- DEFINITION OF ASSOCIATION -
- An association is defined as “any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. An association includes but is not limited to any business, charitable, fraternal, beneficial, historic, veterans, or labor organization, society, foundation, federation, lodge, club or order, or any subordinate association or auxiliary thereof, that is not incorporated.” W. Va. Code R. § 110-15-4a.3 (1993).

CONSUMERS SALES AND SERVICE TAX -- “The officers of a corporation or association that are personally liable for consumer [sic] 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 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.” W. Va. Code R. § 110-15-4a.5 (1993).

CONSUMERS SALES AND SERVICE TAX -- “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.” W. Va. Code R. § 110-15-4a.5.1 (1993).

CONSUMERS SALES AND SERVICE TAX -- BURDEN OF PROOF -- Petitioner has met his burden by clear and convincing evidence that he was not a responsible officer of Three Friends, LLC, and, as such, is not personally responsible for that business' unpaid sales tax as assessed.

FINAL DECISION

On October 9, 2009, Respondent issued an officer assessment against Petitioner, personally, as a responsible officer of Company A, in the aggregate amount of \$_____, for the unpaid sales taxes of the business covering tax periods May 31, 2004, through December 31, 2005.

Upon receiving the officer assessment at issue in this case, Petitioner made timely appeal to the West Virginia Office of Tax Appeals on December 10, 2009. An evidentiary hearing was held in Wheeling, West Virginia, as scheduled, on August 16, 2011.

FINDINGS OF FACT

1. On, or about, May 3, 2004, Petitioner, along with Mr. A and Mr. B, formed Company A.

2. On, or about, May 3, 2004, Articles of Organization of Limited Liability Company for Company A was filed with the West Virginia Secretary of State's Office. That document was signed by Mr. B as managing member, and also listed the Petitioner, along with Mr. A, as members of the business.

3. On, or about, April 29, 2004, Company A filed an application to register a trade name with the West Virginia Secretary of State, which was signed by Mr. B as the managing member.

4. On, or about, April 29, 2004, an application for a West Virginia business registration certificate for Company A was filed with the West Virginia State Tax Department. In this document, Mr. A is listed as managing member and 49% owner of the business. Also, Mr. B is likewise listed as a managing member and a 27% owner of the business. Finally, the Petitioner is listed as a member only and a 24% owner of the business. The application was signed by Mr. B as managing member.

5. On, or about, July 1, 2004, Company A was issued a limited video lottery license to have and operate video lottery machines on the business' premises. The lottery license was issued in the names of Mr. B and Mr. A.

6. Petitioner testified that he was never employed by Company A, never shared in any of the business' profits or losses, never helped manage or operate the business, was not on the video or liquor licenses, never contributed any capital toward the business, and never had the responsibility of collecting and remitting taxes or filing tax returns for the business.

7. All available sales tax returns were signed and filed by either Mr. B or Mr. A. Additionally, all checks made and remitted to the West Virginia State Tax Department were in the name of, and signed by Mr. A, DBA Company B. No sales tax return or remitted check was ever signed, filed, or remitted by Petitioner.

8. The Respondent issued an assessment against Company A for unpaid sales tax in the aggregate amount of \$_____, for tax periods May 31, 2004, through December 31, 2005.

9. On, or about, August 6, 2007, Respondent issued a tax lien against Company A, which was recorded in a West Virginia County courthouse on August 15, 2007.

10. On, or about, October 9, 2009, Respondent issued an officer assessment against Petitioner, personally, as a responsible officer of Company A, in the aggregate amount of \$_____, for the unpaid sales taxes of the business covering tax periods May 31, 2004, through December 31, 2005.

DISCUSSION

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property . . . and for the privilege of furnishing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010). A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

Likewise, the Code provides that, “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

The consumers sales and service tax regulations provide that “[e]ach vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993). To this end, “[i]f any vendor fails to collect the tax imposed by section three of this

article, the vendor shall be personally liable for the amount the vendor failed to collect . . .” W. Va. Code Ann. § 11-15-4a (West 2010).

Beyond this general liability in collection, the Code 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).

The regulations inform the statutory mandate as to the liability of corporate officers by providing in West Virginia Code of State Rules Section 110-15-4a, in pertinent part:

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.5. The officers of a corporation or association that are personally liable for consumers 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.*

W. Va. Code R. § 110-15-4a (1993) (Emphasis added.)

So, while an officer may have personal liability for any default by the association or corporation, such liability will not lie where the apparent officer “does not assume the character, duties, or responsibilities of an officer.” *See id.* Additionally, the regulation makes clear that merely being a member of an association is not considered to be an officer subject to personal liability. *See id.*

In the instant case, while Petitioner’s name appears on the Articles of Organization and the business license application, his signature does not appear on either document. Petitioner further testified that he was never employed by Company A, never shared in any of the business’ profits or losses, never helped manage or operate the company, was not on the video or liquor licenses, never contributed any capital toward the business, and never had the responsibility of collecting and remitting taxes or filing tax returns for the business. The sales tax returns that were introduced into evidence actually bear the signatures of either Mr. B or Mr. A, and the accompanying checks made payable to the Tax Department were in the name of, and signed by Mr. A, DBA Company B. Neither Petitioner’s name nor his signature appears on those returns or payments.

Therefore, while it appears from the evidence that Petitioner was a member of the business, it is likewise clear that he did not take part in the management of the business, nor in any way assume the character, duties, or responsibilities of an officer. Thus, under West Virginia Code of State Rules Section 110-15-4a.5.1., he should not be held liable as an officer).

CONCLUSIONS OF LAW

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 or

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

2. “For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article, . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010).

3. “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

4. “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price” W. Va. Code R. § 110-15-4.1 (1993).

5. A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

6. “If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect” W. Va. Code Ann. § 11-15-4a (West 2010).

7. 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).

8. “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” W. Va. Code R. § 110-15-4a.1 (1993).

9. An association is defined as “any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. An association includes but is not limited to any business, charitable, fraternal, beneficial, historic, veterans, or labor organization, society, foundation, federation, lodge, club or order, or any subordinate association or auxiliary thereof, that is not incorporated.” W. Va. Code R. § 110-15-4a.3 (1993).

10. “The officers of a corporation or association that are personally liable for consumer [sic] 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 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.” W. Va. Code R. § 110-15-4a.5 (1993).

11. “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.” W. Va. Code R. § 110-15-4a.5.1 (1993).

12. Petitioner has met his burden by clear and convincing evidence that he was not a responsible officer of Company A and, as such, is not personally responsible for that business’ unpaid sales tax as assessed.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner, personally, as a responsible officer of Company A, in the aggregate amount of \$_____, an amount including interest and additions, for tax periods May 31, 2004, through December 31, 2005, should be and hereby is **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS