

**REDACTED DECISION – 09-465 W – BY GEORGE V. PIPER, ADMINISTRATIVE
LAW JUDGE – SUBMITTED FOR DECISION on OCTOBER 28, 2010 – ISSUED APRIL
12, 2011**

SYNOPSIS

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 participate in the management of the business and who had no duty or authority whatsoever to account for, make return of or pay over the personal income tax withheld from the corporation’s employees and who did not sign any checks in payment thereof, is not a “responsible person” for the payment of personal income tax withheld.

FINAL DECISION

On October 28, 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, Mr. B, an Individual as Officer of XYZ, corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2002, through November 30, 2008, for a total assessed money penalty liability in the amount of \$_____.

On November 5, 2009 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 W.Va. Code, for the period ending June 30, 2009, for a total assessed money penalty of \$_____.

Written notice of both assessments was served on the Petitioner.

Thereafter, by mail postmarked December 22, 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. Petitioner, is listed on the West Virginia Secretary of State's on-line data screen as vice-president whose address is outside of West Virginia.

2. XYZ corporation was chartered in 1986 as a "Woman Business Enterprise" which the federal government required to be majority owned, operated and controlled by a woman.

3. Ms. A is the president and majority owner of the business, who presently owns 88 percent of the common stock.

4. XYZ corporation is engaged in the business of creating architectural projects such as office buildings for its clients.

5. The petitioner, who owns 12 percent of the outstanding common stock, was hired by Ms. A in 1992 for the sole purpose of estimating sales with some limited project management which included client relations.

6. At all times the management and financial side of the business was conducted from the main corporate office located in West Virginia.

7. Petitioner, who is now retired, never had his office in West Virginia but rather in (2) two other states visited the West Virginia office only five or six times a year.

8. Petitioner has no training or background in any aspect of financial management.

9. Petitioner's training and educational background is solely in the field of architecture.

10. Petitioner has no knowledge whatsoever of who prepared tax returns for the business or who signed any such returns.

11. Petitioner never paid over any withholding taxes to the State of West Virginia, never signed any checks for the business, and never had check signing authority at any time.

12. Petitioner testified that five or six years ago he was contacted by the Internal Revenue Service about whether he was a responsible officer for federal withholding tax purposes but was found not to be a responsible officer as per the IRS tax advocate who investigated his case.

13. XYZ corporation's present controller testified on behalf of Petitioner stating that he investigated all of the books and records of the business when he began in March 2010 and never found Petitioner's signature on any financial documents, never on any tax return and never with respect to the management or financial side of the business.

14. He further testified that he inquired of employees who still remain with the company about Petitioner and was informed that Petitioner was never involved in the management side of the business and that his name never appeared with respect to any banking or financial transaction involving the company.

15. He testified that his investigations revealed that all of the management and financial control of the business rested with and was conducted by Ms. A.

DISCUSSION

The sole issue is whether Petitioner, with respect to the personal income tax withheld from the pay of the corporation's employees, is liable as 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.

The evidence is that the petitioner did not sign any of the tax 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 and possessed no ability to do so. In fact, Petitioner's architectural background and duties while working for XYZ corporation had absolutely nothing to do with the management or financial side of the business. Since the petitioner did not have any duty or authority to prepare, file or pay personal income tax withholding during the assessment period, the petitioner was not a person "required" to collect, account for or pay over such tax. He is not liable for the taxes withheld from the pay of the corporation's employees.¹

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. 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.

¹ See W.Va. Administrative Decisions Docket Nos. 08-245 W and 09-005 W.

3. An individual who is a corporate officer but who did not participate in the management of the business, and who had no duty or authority to account for, make return of or pay over the personal income tax withheld from the corporation's employees and who did not sign any checks in payment thereof, is not a "responsible person" for the payment of personal income tax withheld.

4. 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 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, 2002, through November 30, 2008, for a total assessed money penalty liability in the amount of \$____ should be and is hereby **VACATED**, and the petitioner owes no further personal income withholding tax money penalty liability for the period in question.

It is **ALSO** 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, Articles 10 and 21 of the West Virginia Code, for the period ending June 30, 2009, for a total assessed money penalty liability in the amount of \$____ should be and is hereby **VACATED**, and the petitioner owes no further personal income withholding tax money penalty liability for the period in question.
