

**REDACTED DECISION – DK# 10-332 W, 10-333 C – BY – GEORGE V. PIPER,  
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on NOVEMBER 30,  
2010 – ISSUED ON MAY 27, 2011**

**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 *West Virginia Code Section 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 not only was shown to be verbally dismissed as a corporate officer prior to the assessment period, and who had no authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation, but whose job as an officer was solely that of managing the sales people and looking after the manufacturing side of the business without having any financial responsibility at all.

**PERSONAL INCOME TAX WITHHOLDING -- REQUIREMENT OF WITHHOLDING TAX FROM WAGES** -- West Virginia Code Section 11-21-71(a) provides, “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 from such wages for each payroll period a tax computed in such manner. . . an amount substantially equivalent to the tax estimated to be due under this article.”

**PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER’S LIABILITY FOR WITHHELD TAXES** -- West Virginia Code Section 11-21-75 mandates 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.

**PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER’S LIABILITY FOR WITHHELD TAXES NOT DEFINED** -- Because neither Article 21, nor its accompanying regulations define “employer”, this Tribunal must inquire as to whether the Tax Commissioner’s construction of Section 75 of Article 21 is permissible. *See Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

**PERSONAL INCOME TAX WITHHOLDING --EMPLOYER'S LIABILITY FOR WITHHELD TAXES -- DUE PROCESS PRINCIPLES** -- This Tribunal rules that finding a director or officer of a corporation liable for employee withholding taxes, merely by virtue of their position as a director or officer, is an impermissible construction of Section 75 of Chapter 11, Article 21 of the West Virginia Code. Additionally, such a finding by the Tax Commissioner is in violation of the "fundamental fairness" test contained in Syllabus Point 3 of *Schmehl v. Helton, supra*.

**PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER'S LIABILITY FOR WITHHELD TAXES -- 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 was shown to be verbally dismissed as a corporate officer 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 did not sign any checks in payment thereof, but who merely had signature authority on the corporate bank account for the sole purpose of purchasing raw materials used in the manufacture of steel without having any financial responsibility. *See Schmehl v. Helton*

#### **FINAL DECISION**

On July 19, 2010, the Compliance Division of the West Virginia State Tax Commissioner's Office (Respondent) issued a consumers sales and service tax assessment against the Petitioner in his capacity as an officer of the company. 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 February 28, 2001, through September 30, 2001, for tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_, computed through July 19, 2010, and additions to tax in the amount of \$\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_.

Also, on July 19, 2010, the Commissioner 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, 2001, through May 31, 2002, for a total assessed money penalty liability in the amount of \$\_\_\_\_\_.

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

Thereafter, by mail postmarked August 5, 2010, received on August 6, 2010, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. W.Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9 (West 2010)

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

### **FINDINGS OF FACT**

1. Petitioner was a vice-president of the company.
2. Petitioner was first hired in 1996 as the purchasing manager of the company.
3. In 1998 Petitioner became a corporate officer assuming new duties as vice-president of operations.
4. Petitioner testified that he was verbally dismissed as vice-president of operations in the year 2000 by the companies president Mr. A and once again assumed the duties of purchasing manager.
5. Mr. B who was the accounts payable clerk for the company between 1998 and 2002 testified that he too was informed that Petitioner had been verbally dismissed as vice-president in the year 2000.
6. In preparation for this evidentiary hearing Petitioner testified that he met with Mr. A about Mr. A's claim that he had a letter proving that Petitioner had been dismissed in the year 2000; however Mr. A could not produce the letter for the Petitioner.

7. Petitioner testified that in the year 2001 he became aware that certain corporate taxes were not being paid and was assured by both Mr. A and the corporate treasurer that all taxes were being paid.

8. While Petitioner served as vice-president his only duties were to acquire raw materials used in the manufacture of steel and to oversee the sales force.

9. The Petitioner testified that he was never assigned nor assumed any financial duties for the company, to wit: he never filed any tax returns, never signed any tax returns, never handled the corporate payroll, never opened a bank account and could not financially bind the corporation in any manner. This testimony from the Petitioner was un-rebutted.

### **DISCUSSION**

The first issue is whether the Petitioner is liable for consumers sales and service tax that was collected by the company from its customers, but not remitted to the State of West Virginia. Petitioner, if he is liable, is liable pursuant to the provisions of West Virginia Code Section 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.

W.Va. Code Ann. § 11-15-17 (West 2010)

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 *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

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

Petitioner was once the Vice-President of the company; however his testimony and that of a witness showed that prior to the assessment at issue, he was verbally dismissed from his vice-president duties. Additionally, the evidence clearly demonstrates that Petitioner, during the time when he was vice-president of operations, had absolutely no financial responsibility whatsoever. He never filed any tax returns, never signed any tax returns, never handled the corporate payroll, never opened a bank account and could not financially bind the company.

Considering all of these factors together, it appears that it would violate fundamental fairness to hold Petitioner liable for the corporation's consumers sales and service tax liability. Petitioner was not an officer in the business during the assessment period. 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. Based on these facts and circumstances, it must be held that 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, 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 such 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). However, because neither Article 21, nor its accompanying regulations, define employer, this tribunal must inquire as to whether it is permissible for the the Tax Commissioner to construct Section 75 of Article 21 to find a director or officer of a corporation liable for employee withholding taxes, merely by virtue of their position as a director or officer; we think not. *See e.g. Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995)*. In the absence of a definition of employer, this Tribunal has traditionally used the same "fundamental fairness" test as laid out in *Schmehl v. Helton, supra*. Applying the test to the assessment for the un-remitted withholding taxes in this matter reveals the same result as above. It would be fundamentally unfair to impose liability on a corporate officer who was not an officer in the business during 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 did not sign any checks in payment thereof, but whose duties solely involved the manufacturing side of the business without having any financial responsibility.

## 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. Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

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

4. If the taxpayer is an association or corporation, the officers are 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 may be enforced against them as against the association or corporation which they represent. *See* W. Va. Code Ann. § 11-15-17 (West 2010).

5. In *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008), the West Virginia Supreme Court of Appeals created a test to ascertain corporate officer liability pursuant to West Virginia Code Section 11-15-17. The Court ruled:

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.

*Schmehl* at Syl., Pt 3

6. 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 Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

7. It does not comport with the principle of due process, and it is unreasonable and is fundamentally unfair to impose liability on a corporate officer who, by his un-rebutted and corroborated testimony, was not an officer during 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, and whose job as an officer was solely that of looking after the manufacturing side of the business without having any financial responsibility.

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

9. Every employer required to deduct and withhold tax under article twenty-one is liable for such tax. *See* W. Va. Code Ann. § 11-21-75 (West 2010).

10. Because neither Article 21, nor its accompanying regulations define “employer”, this Tribunal must inquire as to whether the Tax Commissioner’s construction of Section 75 of Article 21 is permissible. *See Appalachian Power Company v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).*

11. This Tribunal rules that finding a director or officer of a corporation liable for employee withholding taxes, merely by virtue of their position as a director or officer, is an impermissible construction of Section 75 of Chapter 11, Article 21 of the West Virginia Code. Additionally, such a finding by the Tax Commissioner is in violation of the “fundamental fairness” test contained in Syllabus Point 3 of *Schmehl v. Helton, supra*.

12. It does not comport with the principle of due process, and it is unreasonable and is fundamentally unfair to impose liability upon a corporate officer who, by his corroborated testimony, was not an officer during 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 did not sign any checks in payment thereof, but whose duties solely involved the manufacturing side of the business without having any financial responsibility.

13. 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 company for the period of February 28, 2001, through September 30, 2001, for tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_, computed through July 19, 2010, 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 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, 2001, through May 31, 2002, 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.