

SYNOPSIS POINTS

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 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).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “For the privilege of selling tangible personal property and of dispensing 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 commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

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

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “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).

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

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- 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).

TAXATION -- 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).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- 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).

TAXATION -- 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.” West Virginia Code R. § 110-15-4a.5. (1993).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “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 v. Helton, 222 W.Va. 98, 662 S.E.2d 697, Syl. pt. 3 (2008).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF NOT MET -- The Petitioner has failed to meet his burden of proving that he was not a responsible “officer” of Company A, or that it would be fundamentally unfair to impose such liability on him.

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “[A]n assessment against an officer must be made within five years after the assessment against the corporation or association has become final.” W. Va. Code R. § 110-15-4a.7.1 (1993)

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET -- The Petitioner has met his burden of proving that this assessment was beyond the five year window prescribed by the Tax Departments Legislative Rule.

FINAL DECISION

On November 8, 2011, Respondent issued an officer assessment against Petitioner, personally, as a responsible officer of Company A, for consumers sales and service tax for the period of June 30, 2004, through December 31, 2004, in the amount of \$_____, interest in the amount of \$_____, and additions in the amount of \$_____, for a total assessment of \$_____. However, Cherie Wise, a revenue officer who operated as a witness for the Tax Commissioner, testified that the consumers sales and service tax assessment should be revised to remove the \$_____ in tax, as it had been paid. Thus, the amount in contest is interest in the amount of \$_____, and additions in the amount of \$_____, for a total assessment of \$_____.

Additionally, on November 8, 2011, Respondent issued an officer assessment against Petitioner, personally, as a responsible officer of Company A, for an unpaid withholding tax money penalty for the period of June 30, 2004, through December 31, 2004, of the business in the aggregate amount of \$_____. However, the Tax Commissioner's Counsel proffered that this assessment was being removed and no evidence would be presented as it had been paid.

Upon receiving the officer assessment at issue in this case, Petitioner made timely appeal to the West Virginia Office of Tax Appeals on November 29, 2011. An evidentiary hearing was held in a West Virginia City, in West Virginia, as scheduled, on July 25, 2012. At the beginning of the evidentiary hearing the Respondent proffered that it was withdrawing the withholding tax assessment.

FINDINGS OF FACT

1. The Petitioner herein, was a bookkeeper operating out of a building owned by Mr.A in a West Virginia City, in a West Virginia County.

2. Mr.A instructed the Petitioner to draft documentation organizing Company A, as a business operating in a West Virginia City, in a West Virginia County.

3. On June 9, 2004, Petitioner filed the Articles of Organization, along with an application to register a trade name for Company A, as a limited liability company, with the West Virginia Secretary of State, naming Mr.B and Mr. C as members.

4. On June 13, 2004, Petitioner filed an Application for Employer Identification Number with the Internal Revenue Service for Company A, with Mr.B listed as the principal officer.

5. On June 14, 2004, Petitioner filed an Application for a Business Registration Certificate for Company A, with the West Virginia State Tax Department which listed Mr.B and Mr. C as members.

6. On June 21, 2004, Petitioner filed an Application for Retail License for Company A, to sell alcohol as a private club with the Alcohol Beverage Control Commission with Mr.B and Mr. C listed as managing members.

7. On or about July 19, 2004, Mr.B resigned his post as a managing member of Company A, and relinquished his right and title to any interest in Company A.

8. On or about August 4, 2004, Mr. D, and Petitioner were elected to be included as managing members of Company A, along with Mr. C. Petitioner was given a 19 percent interest in Company A, at that time.

9. On August 4, 2004, Petitioner filed an Application for Retail License for Company A, to sell alcohol as a private club with the Alcohol Beverage Control Commission with Mr. C and Mr. D listed as managing members, and Petitioner, listed only as a member.

10. Petitioner testified that Mr. A made it clear that it was necessary to have him become a member of Company A, because Mr. C and Mr. B were unable to obtain the necessary licenses to allow Mr. A to operate his video lottery terminals in Company A's business location.

11. The Mr. A did, in fact, operate limited video lottery terminals in Company A's business location from September 2004 through January 2005.

12. No tax returns or tax payments were ever made or filed by Company A.

12. On May 4, 2006, two separate assessments were issued against Company A, for withholding tax and consumers sales tax. Those assessments became final on July 3, 2006.

DISCUSSION

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property and of dispensing 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(z) (West 2010).

Likewise, the Code provides that “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (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, he shall be personally liable for such amount as he failed to collect.” W. Va. Code Ann. §11-15-4(a) (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 Ann. § 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).

In the instant case, Petitioner was named a managing member of Company A, on or about August 4, 2004, and under a plain reading of the statute and regulations should be held liable under the West Virginia Code and supporting regulations of the Tax Commissioner.

Nevertheless, the Petitioner argues that he should not be held responsible because he did not take part in the management or affairs of the LLC. Essentially, the Petitioner argues that it would be fundamentally unfair to impose liability on him as stated in the West Virginia Supreme Court Decision, 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.

Schmehl at Syl. pt. 3.

However, in the present case, as in Schmehl, the Petitioner is a bookkeeper by trade. While the Petitioner argues that he did not engage in the bookkeeping for this business, the record seems clear that the Petitioner prepared all corporate filings that were available in the present case. His failure to file tax returns does not obviate him from a responsibility to do so. This is so, particularly where the Petitioner is the member of the organization best equipped to make such filings. Thus, under Schmehl, it would not be fundamentally unfair to hold the Petitioner responsible in this matter.

However, the Petitioner also argues that Section 4a of Series 15, Title 110 of the West Virginia Code of State Rules provides that “an assessment against an officer must be made within five years after the assessment against the corporation or association has become final.”

W. Va. Code R. § 110-15-4a.7.1 (1993)¹. It is undisputed that the officer liability assessment that forms the basis of this matter was issued beyond five years after the default of the corporation. Thus, the assessment issued against the Petitioner must be vacated.

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 of dispensing 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 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 shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (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).

¹ This tribunal previously held in Docket No. 10-036 C, that the Tax Commissioner has five years to issue an assessment following the default of a corporation. The Tax Commissioner argues here, as he argued in 10-036 C, that he has 10 years to issue such an assessment under the provisions of W. Va. Code § 11-10-16. However, this tribunal continues to find such argument unpersuasive.

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

6. 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 consumers [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. “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 v. Helton, 222 W. Va. 98, 662 S.E.2d 697, Syl. pt. 3 (2008).

12. The Petitioner has failed to meet his burden of proving that he was not a responsible “officer” of Company A, or that it would be fundamentally unfair to impose such liability on him.

13. “[A]n assessment against an officer must be made within five years after the assessment against the corporation or association has become final.” W. Va. Code R. § 110-15-4a.7.1 (1993)

14. The Petitioner has met his burden of proving that this assessment was beyond the five year window prescribed by the Tax Department’s Legislative Rule.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment, as modified, issued against the Petitioner, personally, as a responsible officer of Company A, in the aggregate amount of \$_____, an amount including interest and additions, for the unpaid sales taxes of the business covering a number of tax periods from June 30, 2004, through December 31, 2004, should be and hereby is **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack ²
Chief Administrative Law Judge

Date Entered

² Administrative Law Judge, Matthew R. Irby, heard this matter and wrote this decision; however, Judge Irby is no longer employed with the West Virginia Office of Tax Appeals. Therefore, this decision was signed by Chief Administrative Law Judge A. M. "Fenway" Pollack.