

REDACTED DECISION – DK# 12-117 W, 12-118 CU – BY – MATTHEW R. IRBY, ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on MAY 14, 2012 – ISSUED ON NOVEMBER 9, 2012.

SYNOPSIS POINTS

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).

CONSUMERS SALES AND SERVICE TAX -- 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).

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).

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 St. R. § 110-15-4.1 (1993).

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).

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).

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 West Virginia. Code Section 11-10-1 et seq. may be enforced against them as against the association or corporation which they represent.” W. Va. Code St. R. § 110-15-4a.1 f (1993).

CONSUMER 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 St. R. § 110-15-4a.3 (1993).

CONSUMERS SALES AND SERVICE TAX -- “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 St. 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 St. R. § 110-15-4a.5.1 (1993).

WITHHOLDING TAX -- 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.

FINAL DECISION

On February 3, 2012, 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 a number of tax periods from July 31, 2008, through November 30, 2009. Additionally, on February 3, 2012, Respondent issued an officer assessment against Petitioner personally, as a responsible officer of Company A, in the aggregate amount of \$_____, for an unpaid withholding tax money penalty of the business covering a number of tax periods from April 30, 2008, through December 31, 2009.

Upon receiving the officer assessment at issue in this case, Petitioner made timely appeal to the West Virginia Office of Tax Appeals on February 28, 2012. An evidentiary hearing was held in Charleston, West Virginia as scheduled, on May 14, 2012.

FINDINGS OF FACT

1. Petitioner's Spouse, assisted Child No. 1, and Petitioner in the incorporation of Company A, on or about July 13, 1989, which gave 50% of the stock in the corporation to his son, Child No. 1, and 50% of the stock to his other children, Child No. 2 and Child No. 3, to be held in trust by his wife, Petitioner.

2. As a matter of course, he appointed Petitioner as the Secretary and Vice President of the corporation at the time of formation.

3. After not participating in the business from its inception, Petitioner resigned her position as Vice President and Secretary of Company A.

4. On or about July 30, 2003, Petitioner disposed of all the stock held in trust for Child No 2 and Child No. 3 by selling it to Child No. 1.

5. On the same date, Petitioner caused the trust to be dissolved.

6. The previous stock certificates, held by Petitioner, were also retired on July 30, 2003, and new stock certificates were issued on that same date.

7. The new stock certificates were signed by Child No. 1, as president, and by New Secretary of Company A as Secretary.

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 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 St. 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 §

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.*

(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.*

In the instant case, while Petitioner’s name appears on the Articles of Incorporation, it is abundantly clear from the testimony and documents provided that she was not an officer and did not assume the character, duties or responsibilities of an officer during the time period of the assessment. Petitioner unequivocally stated that she resigned her position as officer on January 2, 1990, and provided documentary evidence to that effect. Additionally, while a shareholder is not necessarily responsible as an officer, the Petitioner had even divested herself of that interest as trustee on July 30, 2003, according to both her testimony and the testimony of her husband, Petitioner’s spouse. Finally, it appears clear from the record that the Petitioner was not acting as

Secretary at the time of divesting herself of the stock, as the new certificates are signed by another person as Secretary.

There was absolutely no evidence, outside of a screen print of the Secretary of State's website, to refute the statements made by the Petitioner and her husband, Petitioner's spouse under oath.

Therefore, while it appears from the evidence that Petitioner was an incorporator, officer and shareholder of the business at its inception, it is likewise clear that she did not take part in the management of the company, nor in any way assume the character, duties, or responsibilities of an officer, particularly during the time period of the assessment. Thus, under West Virginia Code of State Rules Section 110-15-4a.5.1, she should not be held liable as an officer.

Similarly, her accountability for the corporation's withholding tax penalty seems unfounded. Under West Virginia Code Section 11-10-19(a), a person is liable, jointly and severally, for a civil "money penalty" (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation, including a limited liability company, if (1) he or she was "required" to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she "willfully" failed truthfully to perform these responsibilities on behalf of the corporation. A person was "required" to collect, account for and pay over a withholding tax, within the meaning of West Virginia Code Section 11-10-19(a), if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

The term "willfully" failed truthfully to collect, account for, and pay over a withholding tax, within the meaning of West Virginia Code Section 11-10-19(a), means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the

withholding tax. That is, the person in question, prior to the money penalty tax assessment against him or her, had actual knowledge of the corporation's default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

In the present case, it is again clear that the Petitioner was not involved in the corporation at all during the time period of the assessment and thereby cannot meet the two-pronged test for liability for withholding tax penalty.

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 St. 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 St. R. § 110-15-4.1 (1993).

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).

7.. “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 West Virginia Code Section 11-10-1 et seq. may be enforced against them as against the association or corporation which they represent.” W. Va. Code St. R. § 110-15-4a.1 (1993).

8.. 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 St. R. § 110-15-4a.3 (1993).

9. “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 St. R. § 110-15-4a.5 (1993).

10. “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 St. R. § 110-15-4a.5.1 (1993).

11. “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. §11-110-19(a) (West 2010).

12. Petitioner has met her burden by clear and convincing evidence that she was not a responsible officer of Company A, during the time period of the assessments at issue in this matter, and as such is not personally responsible for that business’ unpaid sales tax or its withholding tax penalty 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 the unpaid sales taxes of the business covering a number of tax periods from July 31, 2008, through November 30, 2009, should be and hereby is **VACATED** in its entirety.

Additionally, the assessment issued against the Petitioner personally, as a responsible officer of Company A, in the aggregate amount of \$_____, for an unpaid withholding tax money penalty of the business covering a number of tax periods from April 30, 2008, through December 31, 2009, should be and hereby is **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Matthew R. Irby
Administrative Law Judge

Date Entered