

REDACTED DECISION – DK# 12-207 C-C

**BY: MATTHEW R. IRBY, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 21, 2012
DECISION ISSUED ON JANUARY 23, 2013**

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) (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 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) (2010)

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “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 (2010)

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “Each vendor shall collect from the purchaser the consumer 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, the vendor shall be personally liable for the amount the vendor failed to collect, . . .” W. Va. Code Ann. § 11-15-4a (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 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 (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 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.” W. Va. 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 MET -- The Petitioner has met his burden of proving that he was not a responsible “officer” of Company A and 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 April 3, 2012, Respondent issued an officer assessment against Petitioner personally¹, as a responsible officer of Company A, for consumers sales and service tax covering a number of tax periods from December 31, 2001, to December 31, 2003, in the amount of \$____, interest in the amount of \$____, and additions in the amount of \$____, for a total assessment of \$_____.

Upon receiving the officer assessment at issue in this case, on April 7, 2012, the Petitioner made timely appeal to the West Virginia Office of Tax Appeals on May 29, 2012. An evidentiary hearing was held in Bridgeport, West Virginia, on August 21, 2012. Following the hearing this matter became ripe for decision.

FINDINGS OF FACT

1. Mr. A, the Petitioner herein, was a painter, working for Company A, which was doing business in a West Virginia city, during the time period of the Audit.
2. At some point in time around 1998, Mr. A signed a document naming him as Secretary of the Corporation. In turn, Mr. A concedes that his name is listed on the Secretary of State's website as Secretary of the Corporation.
3. Mr. A did not supervise any employees during his tenure as an employee. Also, he did not engage in the interviews of prospective employees; he did not take part in employment issues; he did not engage in purchasing, signing of checks; nor the filing of tax returns.
4. There is a Corporate License Tax Return dated July 9, 2002, listing Mr. A as Secretary. This return is not signed by Mr. A, but by the President of the Corporation, Mrs. X.
4. Company A was run exclusively by Mr. C. There were no other investors, and the officers of the corporation held no meetings.

¹ The assessment was actually issued against Mr. B; however, the Petitioner is named Mr. A. The Petitioner corrected the name on the record, and this matter proceeded with the name change.

5. The underlying assessment in this matter became final on April 27, 2006².

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) (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) (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 (2010)

The consumers sales and service tax regulations provide that “[e]ach vendor shall collect from the purchaser the consumer 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) (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

² Counsel for the Respondent proffered, and asked this tribunal to take judicial notice of an action previously decided as to the liability of Company A. This liability was thereby established through a Final Written Decision of this tribunal in Docket No. 05-334 C, on April 27, 2006. It became final on that date.

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 (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 consumer 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 an officer of Company A, sometime after joining the corporation in 1998, 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 corporation. 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.

It was undisputed at the hearing that Mr. A did not assume the characters, duties, and responsibilities of an officer. He did not file the taxes, engage in bookkeeping, nor take part in any of the decision making involved in the business. For all intents and purposes, the Petitioner was a regular employee, and was an officer in name only. Thus, under Schmehl, it would be fundamentally unfair to hold the Petitioner responsible in this matter.

Additionally, even if he could be held responsible under the fundamental fairness test, 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)³. It is undisputed that the officer liability assessment that forms the basis of this

³ 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 Docket No. 10-036 C, that he has ten years to issue such an assessment under the provisions of West Virginia Code Section 11-10-16. However, this tribunal continues to find such argument unpersuasive.

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) (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 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) (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 (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. “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 (2010)

6. “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 . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (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 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).

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 R. § 110-15-4a.3 (1993)

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

10. “Under the due process protections of State Constitution, 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, 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, and 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).

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

12. “[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)

13. 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 December 31, 2001, to December 31, 2003, should be and hereby is **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack⁴
Chief Administrative Law Judge

Date Entered

⁴ 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.