

REDACTED DECISION – DOCKET NUMBER 13-143 W - By – A. M. “FENWAY” POLLACK – CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED for DECISION on SEPTEMBER 4, 2013 – DECISION ISSUED on FEBRUARY 26, 2014

SYNOPSIS

TAXATION

SUPERVISION

GENERAL DUTIES AND POWERS OF COMMISSIONER

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).

TAXATION

PROCEDURE AND ADMINISTRATION

COLLECTION OF TAX

“The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. §11-10-11(a) (West 2010).

TAXATION

PERSONAL INCOME TAX

REQUIREMENT OF WITHHOLDING TAX FROM WAGES

“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 as to result, so far as practicable, in withholding from the employee’s wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article . . .” W. Va. Code Ann. §11-21-71 (West 2010).

TAXATION

PERSONAL INCOME TAX

EMPLOYER’S LIABILITY FOR WITHHELD TAXES

“Every employer required to deduct and withhold tax under this article is hereby made liable for such tax.” W. Va. Code Ann. §11-21-75 (West 2010).

TAXATION

WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT

PENALTIES

“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. §11-10-19(a) (West 2010).

**WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW**

Internal Revenue Code Section 6672 is virtually identical to West Virginia Code Section 11-10-19; therefore, we find cases interpreting Section 6672 to be highly persuasive.

CASE LAW

The Petitioner in this matter is a responsible person, and therefore required to pay over the corporation's withholding taxes. Her designation as such is based upon factors such as, the degree of influence and control she exercised over the financial affairs of the corporation and, specifically, disbursement of funds and the priority of payments to creditors. *See e.g. Plett v. United States*, 185 F.3d 216, 219 (4th Cir. 1999); *McGlothin v. United States*, 720 F.2d 6, 8 (6th Cir. 1983); *Swanton v. Comm'r of Internal Revenue*, 99 T.C.M. (CCH) 1576 (T.C. 2010); *Mason v. C.I.R.*, 132 T.C. 301 (T.C. 2009).

CASE LAW

The Petitioner willfully attempted to evade the corporation's withholding tax obligations by her knowledge that these taxes were not paid during July, August, and September of 2012 while other creditors were paid. *See e.g. Thibodeau v. United States*, 828 F.2d 1499, 1505-06 (11th Cir. 1987); *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970); *Johnson v. United States*, 734 F.3d 352 (4th Cir. 2013); *Romano-Murphy v. C.I.R.*, 104 T.C.M. (CCH) 656 (T.C. 2012).

TAXATION

**WEST VIRGINIA OFFICE OF TAX APPEALS
HEARING PROCEDURES**

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 it 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)

**WEST VIRGINIA OFFICE OF TAX APPEALS
CONCLUSION OF LAW**

Petitioner in this matter has not carried her burden of proving that the assessment of taxes against her is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On April 5, 2013, the Compliance Division of the West Virginia State Tax Commissioner's Office (hereinafter the Tax Commissioner or Respondent) issued an Officer assessment¹, against the Petitioner. This assessment was issued pursuant to the authority of the

¹ As will be discussed in greater detail below, despite its title, the assessment at issue was not issued because the Petitioner was an officer of a corporation, but rather because she was a person required to pay over withholding tax on behalf of her employer.

State Tax Commissioner, granted to him by the provisions of Chapter 11, Articles 10 and 21 *et seq.*, of the West Virginia Code. The assessment was for withholding tax for the period of July 1, 2012, through September 30, 2012, for a money penalty in the amount of \$_____. Written notice of this assessment was served on the Petitioner, as required by law.

Thereafter, on April 22, 2013, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petition was sent to the Petitioner, and, in accordance with the provisions of West Virginia Code Section 11-10A-10 a hearing was held on September 4, 2013. At the conclusion of this hearing this matter became ripe for decision.

FINDINGS OF FACT

1. The Petitioner is the office manager of a West Virginia corporation (hereinafter “the corporation”) located in a West Virginia County.

2. As part of her duties, the Petitioner was responsible for all West Virginia tax filings, including the payment of withholding taxes. Specifically, the Petitioner would prepare the filings, sign them using a signature stamp of the corporation’s president, and mail them in. The Petitioner would normally use this same signature stamp on all checks of the corporation. The Petitioner had check signing authority and on rare occasions she would sign corporation checks herself.

3. The corporation experienced financial difficulties at various times. During some of these times, including the time period of the assessment in this matter, West Virginia withholding taxes were held out from the corporation’s employee’s checks, but those held out monies were not remitted to the West Virginia Tax Department.

4. During some of these times of financial difficulties the corporation did not have the funds to pay all the tax monies due.

5. At certain times, after consultation with the corporation's president, the Petitioner would deliberately pay smaller bills that were due, such as the electric bill, knowing that certain West Virginia tax obligations were going unfulfilled.

6. During the period of July, August and September of 2012, the corporation withheld tax monies from its employees' paychecks in trust for the State of West Virginia. However, the corporation never remitted these monies to the Tax Commissioner.

DISCUSSION

Neither party disputes the facts above or argues about what transpired in this matter. The Petitioner appeared *pro se* and essentially makes an equity argument that can best be summarized as "I'm just an office manager, and there was no money to pay the tax bills, so what was I supposed to do, write a check that would bounce?" The Tax Commissioner argues that the Petitioner, as the person who prepared the corporation's tax filings, was responsible for seeing that the corporation's tax obligations were fulfilled and when she failed to ensure fulfillment she became personally liable.

Our starting off point is the main statutory provision relied on by the Tax Commissioner, West Virginia Code Section 11-10-19, which states:

- (a) Failure to collect, account for, and pay over tax, or attempt to defeat or evade 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

W. Va. Code Ann. §11-10-19 (West 2010).²

Section 19 raises two questions, was the Petitioner “required” to pay over the corporations’ withholding taxes and did she “willfully” fail to do so? There are no cases from the West Virginia Supreme Court of Appeals on point, however, as one might expect, there are many decisions from other jurisdictions, most notably the federal courts and the U.S. Tax Court, that address the issues raised by the parties. This Tribunal considers these decisions highly persuasive because they rely on Internal Revenue Code Section 6672, which is virtually identical to Section 19.³

These out-of-jurisdiction cases perform the same analysis discussed above, namely, was the Taxpayer required to pay the tax and did they willfully fail to do so. A good example is Plett v. United States, a Fourth Circuit case which states:

To determine who within a company is a responsible person under §6672, we undertake a pragmatic, substance-over-form inquiry into whether an officer or employee so participated in decisions concerning payment of creditors and disbursement of funds that he effectively had the authority-and hence a duty-to ensure payment of the corporation's payroll taxes. Stated differently, the crucial inquiry is whether the person had the effective power to pay the taxes-that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed. Several factors serve as indicia of the requisite authority, including whether the employee (1) served as an officer of the company or as a member of its board of directors; (2) controlled the company's payroll; (3) determined which creditors to pay and when to pay them; (4) participated in the day-to-day management of the corporation; (5) possessed the power to write checks; and (6) had the ability to hire and fire employees.

² The tax that the Tax Commissioner alleges the Petitioner failed to pay over is employee withholding, which is governed, in part, by West Virginia Code Section 11-21-71. Section 71 requires each employer that pays taxable wages, withhold from those wages an amount as close as possible to the amount that the employee would owe in state income tax.

³ Section 6672 states: **(a) General rule.**--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or 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 to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. 26 U.S.C.A. §6672 (West 2014).

Plett v. United States, 185 F.3d 216, 219 (4th Cir. 1999) (internal citations omitted). *See also* McGlothin v. United States, 720 F.2d 6, 8 (6th Cir. 1983) (If one had the authority over the decision to pay or not to pay the taxes to the Government, that person qualifies as a “responsible person” under Section 6672.); Swanton v. Comm'r of Internal Revenue, 99 T.C.M. (CCH) 1576 (T.C. 2010) (An individual's designation as a responsible person is based upon the degree of influence and control which the person exercised over the financial affairs of the corporation and, specifically, disbursement of funds and the priority of payments to creditors); Mason v. C.I.R., 132 T.C. 301 (T.C. 2009) (deciding how to disburse funds and pay creditors; and possessing the authority to sign checks for the business is indicia of responsible person status, but no single factor is dispositive).

Here, the Petitioner clearly meets the standard of a person required to, or responsible for the corporation's tax obligations. While not the only employee to do so, she was the primary person who participated in decisions concerning payment of creditors and disbursement of funds. She was the only employee responsible for the corporation's tax filings. She testified that she regularly spoke with the corporation's president and informed him that there was not enough money to pay certain West Virginia taxes, including the taxes at issue in this case. Therefore, we rule that her status as an office manager does not automatically remove her from consideration as a person “required” to pay over and account for the corporation's withholding taxes. We further rule that, by virtue of her job duties and knowledge of the corporation's affairs, she is a person subject to the money penalty contained in West Virginia Code Section 11-10-19.

The Petitioner's next argument seems to be that her actions were not “willful” because the corporation did not have enough money to pay all the taxes at issue, so she and others chose to pay creditors and employees in order to keep the corporation going. Again, there are numerous decisions from the federal courts that have addressed this issue as well. We believe

that the Eleventh Circuit Court of Appeals most succinctly deals with the Petitioner's argument, when it states: "[T]he taxpayer argues that the checks she signed were necessary to keep the corporation operating as a going concern, but the government cannot be made an unwilling partner in a business experiencing financial difficulties." Thibodeau v. United States, 828 F.2d 1499, 1505-06 (11th Cir. 1987). *See also* Newsome v. United States, 431 F.2d 742 (5th Cir. 1970) (The responsible officer's actions satisfies the 'willfulness' requirement under section 6672: when the responsible officer knows that the withheld funds are being used for other corporate purposes); Johnson v. United States, 734 F.3d 352 (4th Cir. 2013) (If the taxpayer knowingly permits payments of corporate funds to be made to other creditors, a finding of willfulness is appropriate); Romano-Murphy v. C.I.R., 104 T.C.M. (CCH) 656 (T.C. 2012) (rejecting argument that threat of business' demise forgives failure to pay trust fund taxes).

The Petitioner does not dispute that other creditors and employees were paid during the period when the withholding taxes were not. Therefore, we reject the Petitioner's argument that there was no money to pay the taxes at issue. Rather, the corporation was in the same position as the business in Thibodeau, seeking a pass on certain tax obligations until business improves. At first blush, that argument almost makes sense, the theory being "if we close up shop now the Tax Commissioner gets nothing, but maybe business will improve and we can pay the taxes next quarter." The problem comes when a moment's thought is applied to this argument. First and foremost, taxes are due when they are due. There are certain times where the Tax Commissioner may allow Taxpayers to enter into payment plans, under terms and conditions dictated by the Tax Commissioner. However, the corporation was not operating under a payment plan when the withholding taxes in this matter were not remitted. Second, the Tax Commissioner cannot play banker and "loan" tax monies back to a Taxpayer till business gets better and to suggest such a

scenario is simply silly. As a result, we rule that the Petitioner in this matter did willfully attempt to evade the corporation's withholding tax payments.

Finally, we believe that the reasoning in this decision, based upon persuasive authority from other jurisdictions, would pass muster with the West Virginia Supreme Court of Appeals. We feel as such based upon the Supreme Court's ruling in Schmehl v. Helton, 222 W.Va. 98, 662 S.E.2d 697 (2008). As mentioned above, the Court has not issued a decision on point with the legal issues in this matter. The Schmehl decision dealt with the liability of corporate officers for unpaid consumers sales taxes pursuant to West Virginia Code Section 11-15-17⁴. Section 17 is similar to a "strict liability" statute, in that corporate officers are liable for the unpaid sales and use tax obligations of the corporation, merely by their status as an officer. The Schmehl Court found this to be problematic, on due process grounds. As a result, the Court overlaid Section 17 with what it called a "fundamental fairness" test, the result of which is a required inquiry into the facts and circumstances of each officer's position and duties within the corporation. The end result of the Schmehl decision is something that looks similar to West Virginia Code Section 11-10-19. Under both the first inquiry is, has the Tax Commissioner looked to the right person for payment, either an officer under 11-15-17 or a person required to pay the taxes under 11-10-19. Once that is established, the inquiry shifts to what actually transpired. Under 11-15-17 and the fundamental fairness test the inquiry involves what the officers actual day-to-day involvement was in the corporation's affairs. Under the willfulness requirement of 11-10-19 there is a similar inquiry, namely, what did this "responsible person" do or not do regarding payment of taxes. This similarity certainly makes the Schmehl decision persuasive authority for our decision here.

⁴ 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)

Mr. Schmehl, like the Petitioner here, knew that certain West Virginia trust taxes were not being remitted. He argued that he could not pay the taxes because the corporation's president would not allow it. The Court rejected this argument, noting that Mr. Schmehl, as bookkeeper, knew that taxes were not being remitted while other creditors were being paid. The Court also found determinative the fact that Mr. Schmehl did not resign his position or report the wrongdoing. Ultimately, the Court found that it would not be fundamentally unfair to find Mr. Schmehl personally liable for the corporation's unpaid sales and use taxes. We believe that the West Virginia Supreme Court, would likewise, find that the Petitioner in this matter was a person required to pay over the withholding taxes held out from the corporation's employees and that she willfully failed to do so.

CONCLUSIONS OF LAW

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. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. §11-10-11(a) (West 2010).

3. "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 as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article . . ." W. Va. Code Ann. §11-21-71 (West 2010).

4. “Every employer required to deduct and withhold tax under this article is hereby made liable for such tax.” W. Va. Code Ann. §11-21-75 (West 2010).

5. “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. §11-10-19(a) (West 2010).

6. Internal Revenue Code Section 6672 is virtually identical to West Virginia Code Section 11-10-19; therefore, we find cases interpreting Section 6672 to be highly persuasive.

7. The Petitioner in this matter is a responsible person, and therefore required to pay over the corporation’s withholding taxes. Her designation as such is based upon factors such as, the degree of influence and control she exercised over the financial affairs of the corporation and, specifically, disbursement of funds and the priority of payments to creditors. *See e.g. Plett v. United States*, 185 F.3d 216, 219 (4th Cir. 1999); *McGlothin v. United States*, 720 F.2d 6, 8 (6th Cir. 1983); *Swanton v. Comm'r of Internal Revenue*, 99 T.C.M. (CCH) 1576 (T.C. 2010); *Mason v. C.I.R.*, 132 T.C. 301 (T.C. 2009).

8. The Petitioner willfully attempted to evade the corporation’s withholding tax obligations by her knowledge that these taxes were not paid during July, August and September of 2012 while other creditors were paid. *See e.g. Thibodeau v. United States*, 828 F.2d 1499, 1505-06 (11th Cir. 1987); *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970); *Johnson v. United States*, 734 F.3d 352 (4th Cir. 2013); *Romano-Murphy v. C.I.R.*, 104 T.C.M. (CCH) 656 (T.C. 2012).

9. 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 it 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)

10. Petitioner in this matter has not carried her burden of proving that the assessment of taxes against her is erroneous, unlawful, void, or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Officer Assessment issued against the Petitioner on April 5, 2013, for withholding tax for the period of July 1, 2012, through September 30, 2012, for a money penalty in the amount of \$_____ is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

Date Entered