

**SANITIZED DECISION – DOCKET NOS. 04-470 C, 04-471 C, 04-472 C & 04-473 C –
ROBERT W. KIEFER, JR., ALJ – SUBMITTED for DECISION on SEPTEMBER 22,
2005 – ISSUED on FEBRUARY 17, 2006**

SYNOPSIS

CONSUMERS’ SALES AND SERVICE TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF -- The failure of a taxpayer to articulate adequate grounds in his petition for reassessment justifying his claim, combined with his failure to appear at a hearing and to present any evidence respecting his claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER – An individual, who is an officer of a corporation, may be personally liable for the unpaid consumers’ sales and service tax liability of the corporation, including interest, additions to tax and penalties thereon, by virtue of his or her status as an officer. *See* W. Va. Code 11-15-17 [1978].

CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER – Individuals who may be liable for the consumers sales tax liability of a corporation include the president, vice-president, secretary, or treasurer, any other officers provided for in the charter or by-laws of the corporation, and any other person who is elected or appointed to any position with the authority of an officer. W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993).

CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER – In order for an officer or other individual identified in W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993), to be liable for any default in the payment of a corporation’s consumers’ sales and service tax liability, he or she must have performed duties or responsibilities in the management of the corporation. Such individual is liable if he or she has any actual managerial authority, regardless of whether he or she had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether he or she knew of the corporation’s default with respect to its consumers’ sales and service tax obligations. *See* 110 C.S.R. 15, §§ 4.a5 & 4a.5.2 (July 15, 1993).

FINAL DECISION

On May 15, 2004, the Unit Manager of the Accounts Monitoring Unit of the Internal Auditing Division of the State Tax Commissioner’s Office (“the Commissioner”) issued four different assessments for consumers’ sales and service tax against the Petitioner, as an officer of the corporation. These assessments were 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 assessments were for fifty-three different months between June 1, 1991, and

February 28, 2003, not all of which were consecutive, for tax in the amount, interest in the amount, computed through May 15, 2004, and additions to tax in the amount, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked July 9, 2004, received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on July 13, 2004, the Petitioners timely filed a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002].

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of the Petitioner. The evidentiary hearing was held, however, without an appearance on behalf of the Petitioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and W. Va. Code. St. R. § 121-1-69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. The periods for which the Petitioner was assessed, with the tax, interest, additions to tax, and total amount assessed for each period, are as follows . . .

2. The assessed liability is for consumers' sales and service tax that was collected in the normal course of business by a corporation, but which was not paid over to the State Tax Commissioner.

3. In his petition for reassessment, the Petitioner asserts that he is not liable for the consumers' sales and service tax because the liability is that of the corporation and that it is not the personal liability of the Petitioner.

4. As reflected by the consumers' sales and service tax returns filed by the corporation, the Petitioner, is the President of the corporation.

5. The Petitioner signed a number of the checks by which the corporation. remitted consumers' sales and service tax to the State Tax Commissioner for periods not covered by the assessment.

5. The Petitioner signed a number of the returns filed by the corporation as the President thereof.

6. The Petitioner was provided with notice that he was required to appear at the evidentiary hearing and present evidence respecting the reasons he believed that the assessment was erroneous, unlawful, void or otherwise invalid.

7. The Petitioner did not appear at the time and place of the hearing and presented no evidence respecting any of his allegations.

8. At the hearing, counsel for the State Tax Commissioner conceded that with respect to the periods ending June 30, 1991, through June 30, 1993, as covered by the assessments, the assessment was issued subsequent to the expiration of the applicable statute of limitation.

DISCUSSION

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 § 11-10A-10(e) [2002]; and W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003). The Petitioner asserts that he is not personally liable for the consumers' sales and service tax assessed in this matter, because the liability is that of the corporation. The burden is on the Petitioner to prove that he is not personally liable.

W. Va. Code § 11-15-17 [1978] provides:

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 enforced against them as against the association or corporation which they represent.

The provisions of this section, when read literally, make a corporate officer unconditionally liable for the consumers' sales and service tax of the corporation of which he is an officer, upon which the corporation defaults.

The absolute provisions of W. Va. Code § 11-15-17 are tempered by the provisions of the legislative rules promulgated by the State Tax Commissioner. The legislative rules provide, in relevant 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.2. A corporation, the officers of which are liable for payment of the tax, is any corporation incorporated under the laws of this State, and any foreign corporation authorized to do business in this State or doing business in this State without such authorization.

....

4a.4. There is a default by the corporation or association resulting in officer liability when: (a) the tax is shown on a tax return and the corporation or association neglects or fails to pay the tax within 15 days after notice and demand for payment; (b) the liability of the corporation is determined by an assessment and such assessment is final and not subject to administrative or judicial review and the corporation neglects or fails to pay the tax within 15 days after notice and demand for payment; or (c) when an assessment has not been made against the corporation or association and the corporation or association has not filed any return at the time required by law and has failed to file such return after notice of such failure.

4a.4.1. A default occurs whether or not a notice of tax lien has been filed against the corporation or association and whether or not the State has attempted to collect or failed to collect the tax from the corporation or association, and whether or not the corporation or association is defunct, dissolved, or insolvent.

....

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.5.2. An officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.

4a.5.3. The liability of a corporation, that is owned or controlled by a parent or other corporation, may be imposed on an officer of the other corporation, if such officer performs duties or responsibilities in the management of the taxpayer corporation.

By assessing the Petitioner, the State Tax Commissioner has created the presumption that the Petitioner meets the requirements for liability for the tax under the statute and the legislative rules. The presumption created is that the Petitioner is an officer of the corporation and that he performed some managerial functions as an officer of the corporation. *See* W. Va. Code St. R. § 110-15-4a.5 and 4a.5.2 (July 15, 1993).

The evidence presented at the hearing demonstrates that the Petitioner is an officer of the corporation, specifically, the president thereof. The Petitioner filed signed and filed returns on behalf of the corporation. The evidence presented also demonstrates that the Petitioner performed managerial duties on behalf of the corporation. Specifically, the Petitioner prepared and filed consumers' sales and service tax returns on behalf of the corporation and signed checks remitting tax to the State Tax Commissioner on behalf of the corporation. The Petitioner is an officer of the corporation, performing managerial duties on behalf of the corporation. As such, this evidence is sufficient to show that the Petitioner is liable for the consumers' sales and service tax collected by the corporation, but not remitted to the State Tax Commissioner.

The Petitioner has failed to rebut the presumption created by the assessment, either factually or as a matter of law. The allegations contained in his petition for reassessment do not state legal grounds that are sufficient to rebut the presumption or otherwise show that the assessment is without a legal basis. Contrary to his assertion, the Petitioner may be liable as a corporate officer under W. Va. Code § 11-15-17. Moreover, the Petitioner failed to appear at the evidentiary hearing and present any evidence to contradict the evidence presented by the State Tax Commissioner, which demonstrates that the Petitioner satisfies the statutory standard for corporate officer liability. In fact, the law and the evidence in this matter clearly demonstrate that the Petitioner is personally liable for the corporation's consumers' sales and service tax liability.

At the hearing, the State Tax Commissioner conceded that the statute of limitations had expired with respect to certain of the periods for which the Petitioner was assessed. Specifically, the Tax Commissioner conceded that the limitation period had expired with respect to the periods ending June 30, 1991, through June 30, 1993. The tax assessed for these periods, the interest assessed, and the additions to tax assessed.* The total barred by the statute of limitations. In light of the Tax Commissioner's admission, the assessment must be reduced by this amount.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. For the periods covered by the assessment in this matter, which are governed by legislatively approved consumers' sales and service tax regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation is personally liable for the unpaid consumers' sales and service tax liability of the corporation by virtue of his or her status

* State's Exhibit No. 4 shows that the additions to tax assessed for the periods barred by the statute of limitations totaled \$. The figure shown on State's Exhibit is incorrect, in all likelihood due to a math error. This inures to the benefit of the State Tax Commissioner.

as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

2. 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 § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

3. The Petitioner has failed to present evidence sufficient to show that he was not an officer of the corporation, or that he did not have or exercise actual managerial authority with respect to the corporation during the time that he was a corporate officer thereof.

4. For the periods covered by the assessment in this matter, the Petitioner is personally liable for the unpaid consumers' sales and service tax liability of the corporation. by virtue of his status as an officer of the corporation, because he had actual managerial authority which he exercised on behalf of the corporation during the time that he was a corporate officer thereof. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

5. The assessment must be reduced by the amount which is barred by the statute of limitations, totaling, which consists of tax, interest, and additions to tax in the amount.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioner for fifty-three different months between June 1, 1991, and February 28, 2003, which were not all

consecutive, for tax in the amount, interest in the amount computed through May 15, 2004, and additions to tax in the amount, for a total assessed tax liability, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax in the amount of, interest, as assessed on the revised tax, in the amount through May 15, 2004, and additions to tax, for a **total revised** liability.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest continues to accrue** on this modified personal income tax assessment until this liability is fully paid.