

**REDACTED DECISION -- 05-654 C & 05-666 C -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on MAY 2, 2008 -- ISSUED on MAY 12, 2008**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- 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 a taxpayer to show that any assessment of tax against it 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).

CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER -- An individual who proves that he was appointed as a corporate officer without his knowledge or consent has satisfied his burden of proving that he is not liable for the corporation's consumers' sales and service tax liability for the periods that he was a corporate officer.

CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER -- An individual who proves that he was appointed as a corporate officer, but did not act as an officer and did not assume the character, duties, or responsibilities of an officer, has satisfied his burden of proving that he is not liable for the corporation's consumers' sales and service tax liability for the periods that he was a corporate officer.

FINAL DECISION

On November 15, 2005, the Accounts Monitoring Unit of the Internal Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued two separate consumers' sales and service tax assessments against the Petitioner, in his capacity as an officer of a 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 various periods between October 1, 2002, and August 31, 2005, for tax in the amount of \$_____, interest in the amount of \$_____, computed through November 15, 2005, and additions to tax in the amount of

\$_____, for a combined total assessed tax liability of \$_____. Written notice of the two assessments was served on the Petitioner on November 16, 2005.

Thereafter, by mail postmarked December 16, 2005, and received on December 30, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Corporation was formed as a West Virginia corporation by Articles of Incorporation filed December 6, 1991, in the Office of the Secretary of State of West Virginia. The purpose of the Corporation was to own and operate a golf course, golf club, and to develop surrounding contiguous property as residential properties. The golf course is commonly known as Company A.

2. The following persons testified in person at the hearing: Mr. A, Esquire; Mr. B, Esquire; Mr. C and the Petitioner.

3. An individual named Mr. D testified by telephone.

4. Mr. A and Mr. B appeared as joint bankruptcy counsel for the Corporation. The bankruptcy proceeding was originally filed as a Chapter 11 reorganization proceeding, but was subsequently converted to a Chapter 7 liquidation.

5. Mr. A and Mr. B both testified that they had reviewed all available corporate records, many of which had been obtained from third parties.

6. Mr. C appeared as the former Chief Financial Officer of the Corporation, as a member of the golf club which the corporation previously owned, and as a homeowner on residential property at the golf course.

7. Mr. D, appearing by telephone, was the former Chairman of the Board of Directors of the Corporation, a former Secretary/Treasurer of the Corporation, and a shareholder of the Corporation.

8. The testimony of all of the witnesses was consistent with the respect to the operation of the Corporation by an individual, Mr. E, and the actions of the Petitioner with respect to his participation and relationship to the Corporation.

9. Mr. E, in effect, operated the Corporation, as his sole proprietorship.

10. For an extended period of time, there was no Board of Directors of the Corporation.

11. No stockholder meetings were ever held while Mr. E operated the Corporation.

12. Mr. E obtained cash from investors by informing them that money obtained from other investors was, in fact, operating income of the Corporation.

13. Upon information and belief, Mr. E abandoned the Corporation during the month of August, 2005, taking with him the hard drive from the computer upon which he kept substantial information regarding the Corporation.

14. When Mr. E abandoned the Corporation, he took with him or destroyed nearly all of the corporate records.

15. On or about February 6, 2004, Mr. E appointed the Petitioner as Vice-President of the Corporation. by a corporate filing with the West Virginia Secretary of State.

16. On or about December 28, 2005, the Petitioner was removed as Vice-President of the Corporation by a corporate filing with the West Virginia Secretary of State.

17. The Petitioner was appointed as an officer of the Corporation without his knowledge or consent.

18. The Petitioner was not aware that he had been named as an officer of the Corporation until he received the tax assessment which is the subject of this proceeding.

19. The Petitioner never drew or received any monetary compensation as a Vice-President of the Corporation.

20. Initially, the Petitioner was the manager of the pro shop located at the golf course clubhouse (which was owned by the Corporation) and that was his sole duty and responsibility at the golf course.

21. Subsequently, the Petitioner undertook to operate the pro shop as the owner thereof, and paid rent and/or a portion of the proceeds of the pro shop to the Corporation.

22. No record exists that the Petitioner was ever properly elected as an officer of the Corporation.

23. No record exists that the Petitioner ever acted as an officer of the Corporation.

24. The Petitioner has never assumed the character, duties or responsibilities of an officer of the Corporation.

25. The Petitioner never acted in any management capacity as an officer of the Corporation.

26. The Petitioner never signed any corporate documents as an officer of the Corporation.

27. The Petitioner never had any signatory authority at all with regard to any of the corporate banking or financial accounts of the Corporation.

28. The Petitioner never signed any corporate banking or financial account checks or other documents of the Corporation.

29. The Petitioner has never acted as an officer of the Corporation.

30. The Petitioner has never assumed the character, duties or responsibilities as an officer of the Corporation.

31. The testimony of the Petitioner was consistent with all of the aforesaid findings of fact.

32. No corporate record exists to contradict the testimony of the witnesses which support the findings of fact made herein.

DISCUSSION

The issue in this matter is whether the Petitioner, as vice-president of the Corporation, is liable for the consumers' sales and service tax liability of the corporation.

West Virginia Code § 11-15-17 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 [§§ 11-10-1 et seq.] of this chapter may be enforced against them as against the association or corporation which they represent.

To elucidate the provisions of the consumers' sales and service tax statute, the State Tax Commissioner has promulgated legislative rules. As relevant to the liability of corporate officers for a corporation's consumers' sales and service tax, W. Va. Code St. R. § 110-15-4a (April 20, 2003), which provides, 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.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.*

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. (Emphasis added.)*

The legislative rules modify a statute that otherwise appears to make all corporate officers absolutely liable for the corporation's consumers' sales and service tax liability. The limitations imposed by the legislative rule, as pertinent to this actions, are that an officer is not liable for the corporation's consumers' sales and service tax liability if the officer performs no duties or responsibilities in the management of the corporation, or if the individual is elected or appointed an officer without his knowledge or consent, or the individual does not act as an officer and does not assume the character, duties or responsibilities of an officer.

The Petitioner in this matter was appointed Vice-President of the Corporation. He testified that he was appointed as Vice-President without his knowledge or consent. Given the evidence respecting haphazard manner in which the corporation was run, with no apparent observance of or regard for corporate governance procedures and with an apparent intent on the part of the president of the corporation to cover up his corporate mismanagement before his disappearance, this assertion is no implausible. The Petitioner's testimony in this regard is

bolstered by the testimony of Messrs. C and D, who have no reason to lie about any involvement of the Petitioner, if he were somehow involved in corporate mismanagement. They were both so disgusted by the misfeasance or malfeasance of the corporation's President that if they thought the Petitioner was involved with him, they would say so. In fact, it would make sense that they would want the Petitioner to be liable for the corporation's consumers' sales and service tax liability if, for no other reason, than to reduce the corporation's liability for the same.

The legislative rule also provides that a person 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 for the corporation's consumers' sales and service tax liability. This describes the Petitioner. He testified that he did never participated in any activities associated with corporate governance, In fact, he was not aware that the individual who managed the corporation ever observed any of the activities required for corporate governance, such as meetings of officers or shareholders.

The Petitioner initially operated the pro shop at the clubhouse for the corporation, as an employee. He later became the owner of the pro shop, working for himself, not the Corporation. He testified that during that period the only duties he performed on behalf of the corporation were to occasionally collect greens fees and sell some food and drinks after the employees who were regularly tasked with those duties had gone home for the day. These are neither the duties nor responsibilities of a corporate officer, nor are they duties that one might expect of a corporate officer, as opposed to a mere employee.

Considering the totality of the evidence in this action, it is apparent that the Petitioner did not consent to his appointment as a corporate officer. Furthermore, he did not act as an officer and does not assume the character, duties, or responsibilities of an officer. Consequently, he cannot lawfully be held liable for the corporation's consumers' sales and service tax liability.

CONCLUSIONS OF LAW

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

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 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).
2. Having proven that he was appointed as a corporate officer without his knowledge or consent, the Petitioner has satisfied his burden of proving that he is not liable for the corporation's consumers' sales and service tax liability for the periods that he was a corporate officer.
3. Having proven that he was appointed as a corporate officer, but that he did not act as an officer and did not assume the character, duties, or responsibilities of an officer, the Petitioner has satisfied his burden of proving that he is not liable for the corporation's consumers' sales and service tax liability for the periods that he was a corporate officer.
4. The Petitioner has carried his burden of proving that he is not individually liable for the consumers' sales and service tax of the Corporation, as an officer of said corporation. W. Va. Code. St. R. § 110-15-4a.5.1 (July 15, 1993).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the two consumers' sales and service tax assessments issued against the Petitioner for various periods between October 1, 2002, and August 31, 2005, for tax in the amount of \$_____, interest in the amount of \$_____, computed through November 15, 2005,

and additions to tax in the amount of \$_____, for a combined total assessed tax liability of \$_____, should be and are hereby **VACATED**, and the Petitioner owes no further such tax liability for the period in question.