

**REDACTED DECISION -- 07-494 W & 07-495 C -- BY ROBERT W. KIEFER, JR., ALJ
-- SUBMITTED for DECISION on NOVEMBER 29, 2007 -- ISSUED on MAY 29, 2008**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER -- For periods covered by the current, legislatively approved 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 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); see also W. Va. Code § 64-7-6(rr) [1992].

Accordingly, a person who was an officer of a corporation in name only, or a person who did not in fact have the responsibility of performing any managerial duties, is not personally liable, under W. Va. Code § 11-15-17 [1978] and the implementing regulations, for an unpaid consumers' sales and service tax liability of the corporation.

WITHHOLDING TAX -- LIABILITY FOR "MONEY PENALTY" (TAX) AS A PERSON "REQUIRED" TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO "WILLFULLY" FAILED TO DO SO -- Under W. Va. Code § 11-10-19(a) [1978], 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 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 W. Va. Code § 11-10-19(a) [1978], 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 W. Va. Code § 11-10-19(a) [1978], 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.

Accordingly, a person associated with the corporation is not personally liable for the unpaid withholding tax liability of the corporation if one or both of the two requirements for personal liability is/are lacking.

FINAL DECISION

On August 2, 2007, the Compliance "Division" ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a consumers' sales and service tax officer liability assessment against the Petitioner, in his capacity as an officer of a Corporation. This assessment was 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 assessment was for the periods of March 1, 1997, through July 31, 2000, and for the periods September 1, 2000, through September 30, 2000, October 1, 2000, through October 31, 2000, November 1, 2000, through November 30, 2000, and December 1, 2000, through December 31, 2000, for tax in the amount of \$_____, interest in the amount of \$_____, computed through August 2, 2007, and additions to tax in the amount of \$_____, for a total assessed tax liability of \$_____. According to the Petitioner, written notice of this assessment was served on him on August 2, 2007.

Also, on August 2, 2007, the Commissioner (by the Division) issued a withholding tax money penalty assessment against the Petitioner, also in his capacity as an officer of the Corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the periods of April 1, 2000, through June 30, 2000, July 1, 2000, through September 30, 2000, and October 1, 2000, through December 31, 2000, for money penalty (tax) in the amount

of \$ _____. According to the Petitioner, written notice of this assessment was also served on him on August 2, 2007.

Thereafter, by mail postmarked August 31, 2007, received in the offices of the West Virginia Office of Tax Appeals on September 10, 2007, 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 Petitioner was a member of the Corporation.
2. He recalls that he became a member in 1997, but is not absolutely certain that his membership commenced in that year.
3. He recalls that he ceased membership in 2000, using certain turmoil in his personal life as a reference, but he is not absolutely certain that his membership ceased that year.
4. During the time he was a member of the Corporation, the Petitioner became an officer.
5. When asked what position he held as an officer, the Petitioner testified that he was a “trustee.”
6. The Petitioner recalls that he became an officer some time in late 1999 or 2000.
7. The Petitioner had ceased being a trustee at the time that the Corporation folded.
8. To the best of his recollection, the other trustees were Mr. A and Mr. B.
9. Mr. A and Mr. B basically did the same things he did as trustee.

10. As trustees, he recalls them voting on matters such as the expulsion of members and the hiring of persons to keep books.

11. The Petitioner maintains that he had no check writing authority for the Corporation.

12. The "Governor" of the Corporation was the only person who could write checks for purchases.

13. The Petitioner maintains that he had no control over the Corporation's funds.

14. Sometimes they would go to the store and buy things, or pick up items for the Corporation.

15. Members would sometimes help out with things that needed to be done at the Corporation.

16. The Petitioner testified that he was not responsible for payment of taxes to the State of West Virginia.

17. The Petitioner recalls three different governors of the Corporation.

18. He recalls that Mr. C was governor when he joined the Corporation.

19. After he became an officer, he recalls that the governors were Mr. D and an individual named Mr. E.

20. All of the governors and officers served on a volunteer basis.

21. He testified that at some times there was no governor of the Corporation.

22. He doesn't recall ever seeing the governor sign a check.

23. He does not recall who wrote checks to pay for supplies or items to be sold. He was not there most of the time when that occurred.

24. He doesn't know who paid the bills.

25. He was never given cash to pay bills.

26. If items were delivered to the Corporation, he never paid for them.
27. This was not his duty, so he did not ever perform any duty of this nature.
28. He recalls a couple of parties where people would bring soft drinks and snacks.
29. He has no recollection of cookouts, or sales of sandwiches, hot dogs or burgers.
30. He recalls that the Corporation sold chips, beer and liquor drinks.
31. Sometimes he worked the counter, selling beer. When he did so, he would place the receipts in the cash register.
32. At the end of the evening, he would put the money in a money bag and place it in a safe or in the office.
33. He does not recall who was responsible for handling the money beyond that point.

DISCUSSION

Initially, this Office will look at the activities of the Petitioner as an officer or “trustee” of the Corporation.¹

First, the evidence in the record shows that that the Petitioner joined the Corporation in 1997. He became an officer of the Corporation no earlier than 1999. It further shows that he ceased acting as an officer for the Corporation some time in the year 2000. As more fully discussed below, the statutes impose individual liability only on a person who is an officer of a corporation. Thus, any liability of the Petitioner is limited to the period(s) during which he was an officer of the corporation. *See also* W. Va. Code St. R. § 110-15-4a.6.1 (July 15, 1993). Thus, at the very least, the Petitioner may not lawfully be held liable for any periods prior to 1999, and some periods in 2000.

Based on the evidence in the record, it is clear that the Petitioner's activities as an officer or "trustee" did not involve any sort of managerial function with respect to the Corporation. The Petitioner was not responsible for any day-to-day operations of the Corporation. He did not hire, fire or otherwise manage employees. Although he might occasionally go to the store and pick up beer or other items for the Corporation, the Petitioner testified that this was an activity that might be performed by any member of the Corporation at any given time, not just officers.

Similarly, the Petitioner was not responsible for managing the finances of the Corporation. He sometimes collected money when he worked behind the bar, but he merely turned the money over to someone else who was responsible for the payment of taxes, bills and other expenses. The Petitioner had no authority to write checks for the payment of taxes, bills and other expenses. He testified that this was the responsibility of the governor of the Corporation. The Petitioner had no responsibility to account for the distribution of the monies taken in by the Corporation. He could not decide whether taxes were to be paid before utilities or the amounts owed to vendors. The closest he came to any responsibility in this area was voting to determine who was responsible for keeping the Corporation's books. This was a responsibility shared by other trustees.

Consumers' Sales and Service Tax

West Virginia Code § 11-15-18 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 be

¹ For purposes of this decision, the Petitioner's position will be described as that of "officer," since the statutes under which the State Tax Commissioner seeks to hold the Petitioner liable imposes liability only upon officers of a corporation.

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

In elucidating the sparse language of the statute, the applicable legislative rule, W. Va.

Code St. R. § 110-15-4a (July 15, 1993), 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.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.3. An association is 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.

* * * *

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.

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.

4a.6. An officer is liable for the tax, interest, additions to tax, and penalties for which the corporation or association is liable.

4a.6.1. An officer is liable for all amounts which were required to be paid or which became due and payable during the time the person was an officer. An officer is also liable for all amounts which were required to be paid or which became due and payable prior to the time the person became an officer, if the officer had the ability and authority to pay the amount due from the available unencumbered funds of the corporation or association after such person became an officer. (Emphasis added.)

W. Va. Code St. R. § 110-15-4a.5 identifies the corporate officers who may be held liable for a corporation's unpaid consumers' sales and service tax. In order to avoid the unjust result of burdening otherwise innocent corporate officers with the corporation's consumers' sales and service tax liability, it also requires that the corporate officer be one who performs duties or responsibilities in the management of the corporation.

The closest thing that the Petitioner had to managerial authority was his authority as a trustee to vote on certain matters. The only two identified have little to do with the everyday management of the Corporation.

Considering the Petitioner's activities in light of the statute and the relevant portions of the legislative rules, it is clear that the Petitioner is not liable for the Corporation's consumers' sales and service tax liability. The Petitioner neither performed any duties or responsibilities in

the management of the Corporation, nor was he responsible for financial management of the Corporation. Under the standard established by the statute and the legislative rules, the Petitioner cannot be held liable for payment of the Corporation's consumers' sales and service tax liability.

In *Schmehl v. Helton*, No. 33379, ___ W. Va. ___, ___ S.E.2d ___, 2008 W. Va. LEXIS 13 (Feb. 27, 2008), the West Virginia Supreme Court of Appeals, upheld a consumers' sales and service tax assessment against a corporate officer liability for the corporation's unpaid consumers' sales and service tax. Syllabus point 3 of *Schmehl* states:

3. Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory [*sic*] 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.

This Office is of the opinion that the legislative rules address the issue of fundamental fairness with which the Supreme Court was concerned. The legislative rules have as their apparent goal the prevention of arbitrary, capricious or unreasonable application of the statute to corporate officers who perform little or no function in the management of a corporation. Liability for a corporation's consumers' sales and service tax liability may not be imposed on just any corporate officer. It may only be imposed on a corporate officer with some managerial responsibility. Even though the Supreme Court did not address the legislative rules in *Schmehl*,

they comport with the fundamental fairness requirements imposed by the Supreme Court in *Schmehl*.²

In *Schmehl*, in discussing the reach of W. Va. Code § 11-15-17 [1978], the Court did not mention the provisions of W. Va. Code St. R. §§ 110-15-4a.5, *et seq.* (July 15, 1993). However, Court previously referred to the very same legislative rules in *Frymier-Halloran v. Paige*, 193 W. Va. 687, 691, 458 S.E.2d 780, 784 (1995), and did so with apparent approval. These legislative rules do “set[] 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],” quoting from syl. pt. 3, *Schmehl, supra*. The provisions of W. Va. Code St. R. §§ 110-15-4a.5 *et seq.*, having been properly promulgated and having received legislative approval, have the full force and effect of a statute, *see* W. Va. Code § 29A-1-1 [1982], and have controlling weight, *see, e.g.*, syl. pt. 8, *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007).

The decision in *Schmehl* appears to have overlooked W. Va. Code St. R. §§ 110-15-4a.5 *et seq.* (July 15, 1993). This is surprising because: (1) the Court previously referred to the very same legislative rules in *Frymier-Halloran v. Paige, supra*, with apparent approval; and (2) in *Schmehl*, while discussing the statute of limitations issue, the Court discussed and applied the virtually adjacent provisions of W. Va. Code St. R. § 110-15-4a.7.1 (July 15, 1993). In any event, the broad reach of syllabus point 3 of *Schmehl* breaks no new ground in this state but, instead, is consistent with: (1) the language utilized in W. Va. Code § 11-15-17 [1978]; (2) W. Va. Code St. R. §§ 110-15-4a.5 *et seq.* (July 15, 1993); (3) syl. pt. 1, *Frymier-Halloran*; (4) syl.

² Since its inception, this Office has always applied the legislative rules in these types of cases. Consequently, this Office is of the opinion that it has complied with the West Virginia Supreme Court’s requirements, even though it has done so without any direct, express mandate.

pt. 2, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W. Va. 524, 170 S.E.2d 362 (1969); and (5) the published precedents of this specialized and independent state tax tribunal since the inception of our operations in January, 2003, involving corporate officer liability for the corporation's unpaid consumers' sales and service tax obligations. The fact that the legislative rule is consistent with syl. pt. 3 of *Schmehl* appears to validate this tribunal's application of the legislative rule both in this instance, and in its past decisions. It further seems to indicate that future application of the rule will be viewed favorably.

Withholding Tax

West Virginia Code § 11-10-19(a) provides:

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. No additions to tax shall be imposed under section eighteen for any offense to which this subsection is applicable.

This statute imposes a higher standard than the consumers' sales and service tax statute and legislative rule. In order for a corporate officer to be held liable for withholding tax under this statute, the officer must have been "*required* to collect, account for and pay over" the tax withheld," and the failure to truthfully account for and pay over such tax must have been "willful." This statute clearly requires more than mere exercise of any managerial authority, as is required by W. Va. Code St. R. § 110-15-4a.5 (July 15, 1993).

Accordingly, it is clear that the Petitioner is less liable for withholding tax than he is for consumers' sales and service tax. The evidence shows that he was not a person who was required to collect, account for and pay over the tax withheld from the pay of the Corporation's

employees. In those instances in which he collected money for the Corporation by selling beer and other items working at the bar, he merely took the proceeds, presumably tallied them and placed them in the hands of another for determination as to how they should be used for the benefit of the Corporation. There is no evidence to show that the Petitioner ever had any authority to make or directly supervise the day-to-day financial decisions of the Corporation. As such, he is not liable for the withholding tax money penalty.

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. The Petitioner, having presented evidence sufficient to show that he did not perform any duties or responsibilities in the management of the Corporation, is not liable for its consumers' sales and service tax as a corporate officer or "trustee" thereof.

3. The Petitioner, having presented evidence sufficient to show that he was not a person required to collect, account for and pay over tax withheld from the pay of employees of the Corporation, and that he was not a person who willfully failed truthfully to account for and pay over such tax, is not liable for the payment of its withholding tax as a corporate officer or "trustee" thereof.

4. The Petitioner in this matter has carried his burden of proving that any assessment of taxes against him 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 liability assessment against the Petitioner, in his capacity as an officer of the Corporation, for the periods of March 1, 1997, through July 31, 2000, and for the periods September 1, 2000, through September 30, 2000, October 1, 2000, through October 31, 2000, November 1, 2000, through November 30, 2000, and December 1, 2000, through December 31, 2000, for tax in the amount of \$_____, interest in the amount of \$_____, computed through August 2, 2007, and additions to tax in the amount of \$_____, for a total assessed tax liability of \$_____, is **HEREBY VACATED**, and the Petitioner owes no further such tax liability for the period in question.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that withholding tax money penalty assessment issued against the Petitioner, also in his capacity as an officer of the Corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the periods of April 1, 2000, through June 30, 2000, July 1, 2000, through September 30, 2000 and October 1, 2000, through December 31, 2000, for money penalty (tax) in the amount of \$_____.the should be and is hereby **VACATED**, and the Petitioner owes no further such tax liability for the period in question.