

REDACTED DECISION -- 08-054 C -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on SEPTEMBER 16, 2008 -- ISSUED on OCTOBER 8, 2008

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER -- Under the 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).

Accordingly, a person who, as here, was an officer of a corporation in name only, that is, 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.

FINAL DECISION

On March 18, 2008, the Director of the Compliance "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a consumers' sales and service tax assessment against the Petitioner as an (alleged) officer who is responsible for the unpaid consumers' sales and service tax liability 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. This assessment was for the period between October 31, 2006 and December 31, 2007, for tax of \$_____, interest, through March

18, 2008, of \$_____, and additions to tax of \$_____, for a total assessed consumers' sales and service tax liability of \$_____. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by fax delivery on April 9, 2008, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2007] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. At the time that the corporation was incorporated on January 28, 1968, Petitioner was not listed as either an incorporator or stockholder of the corporation.

2. In the West Virginia Secretary of State's Business Organization Information System, effective March 1, 1968, Petitioner is listed as the President of the corporation; however, her name appears nowhere else in the public records.

3. Attached to a filing with the West Virginia Secretary of State's Office dated July 1, 2004, are minutes of the corporation's Board of Directors' meeting held in July, 2003, reflecting that Ms. A, Mr. B, and Ms. C were now the new officers of the corporation.

4. At the evidentiary hearing Petitioner's counsel placed into evidence signed affidavits from Ms. A and Mr. B wherein they attest to the fact that they obtained their stock ownerships through inheritance and that they, along with Ms. C, agreed to become officers in order to sell the assets of the corporation. They further attested that they were unaware of any action by the stockholders of the corporation to elect Petitioner as an officer of the corporation.

5. Attached to Petitioner's Exhibit Five (5) (West Virginia Alcohol Beverage Control Commission Retail License Renewal Application for 2003-2004), which lists Petitioner's name,* but no officer designation, is a May 28, 2003, letter from then President of the corporation, stating that he is the only surviving company member and that Petitioner is only the "manager."

6. Petitioner testified at the hearing that although she was called a "manager" at the corporation, her duties consisted of waiting on tables and working the bar.

7. Petitioner also testified that she was never an officer, director, or owner of the corporation and never owned any of the corporate stock.

8. Applying the relevant provisions of the consumers' sales and service tax regulations, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that the Petitioner, during the relevant time period, was an "officer" in name only, not in fact, of the company in question, and was not involved in the operations or actual management of the corporation.

DISCUSSION

The sole issue for determination is whether the Petitioner is one of the corporate officers who is personally responsible for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the time periods involved in the assessment of that tax in this matter.

For consumers' sales and service tax purpose, W. Va. Code § 11-15-17 [1978] provides that "[i]f the taxpayer is an association or corporation, the officers thereof shall be personally

* Although the listing of owners/officers, stockholders and manager of the corporation, for 2003-2004 is illegible as to what position Petitioner held for that period, Respondent's counsel was directed by the presiding administrative law judge and did, in fact, supplement that inquiry by stating, in State's Exhibit No. Four (4), that Petitioner's name on the designated line was that of manager.

liable, jointly and severally, for any default on the part of the association or corporation” with respect to that tax.

Effective on and after July 15, 1993, the consumers’ sales and service tax legislative regulations follow the broad reach of W. Va. Code § 11-15-17 [1978] by basing corporate officer liability for unpaid corporate consumers’ sales and service tax liability upon the corporate officer’s status as a corporate officer, as long as that officer, during the assessment period(s), had any actual managerial authority on behalf of the corporation, that is, he or she was not merely an officer in name only. Under this approach, the precise duties or the breadth of the authority of the officer are not determinative. Also, corporate officer liability for the unpaid corporate consumers’ sales and service tax liability is not dependent upon the corporate officer’s knowledge of the corporation’s default in filing such tax returns or in paying such taxes. The relevant portions of the current consumers’ sales and service tax regulations provide:

Sec. 4a.5. The officers of a corporation or association that are personally liable for consumer[s] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or bylaws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who perform 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 a personal liability.

....

Sec. 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.

W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993) (emphasis added). After reviewing these regulations, the Legislature approved them. *See* W.Va. Code § 64-7-6(rr) [1993].

In *Schmehl v. Helton*, No. 33379, ___ W. Va. ___, ___ S.E.2d ___, 2008 W. Va. LEXIS 13 (Feb. 27, 2008), Justice Starcher, writing for a 4-1 majority of the West Virginia Supreme Court of Appeals, upheld the corporate officer's liability for the corporation's unpaid consumers' sales and service tax. The court-authored 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.

Very curiously, the court majority in *Schmehl*, in discussing the reach of W. Va. Code § 11-15-17 [1978], fails to even mention W. Va. Code State R. §§ 110-15-4a.5 *et seq.* (July 15, 1993), the above quoted legislatively approved regulations, having the 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). These legislative regulations 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 the language from syl. pt. 3 of *Schmehl*.

The *Schmehl* majority’s failure to mention W. Va. Code St. R. §§ 110-15-4a.5 *et seq.* (July 15, 1993), is especially surprising because: (1) that same high court referred (with apparent approval) to those legislative regulations in *Frymier-Halloran v. Paige*, 193 W. Va. 687, 691, 458 S.E.2d 780, 784 (1995) (Cleckley, J., writing the unanimous opinion); and (2) the court majority in *Schmehl*, in discussing the statute of limitations issue, discusses and applies 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. 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.

In addition to the foregoing substantive law, the relevant procedural law is that, in a hearing on a petition for reassessment, the burden of proof is upon the person assessed, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 63.1 (Apr. 20, 2003).

CONCLUSIONS OF LAW

1. Under the 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 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. The Petitioner is not one of the corporate officers who is personally liable for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the time periods involved in the assessment of that tax in this matter.

DISPOSITION

WHEREFORE, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period October 31, 2006 and December 31, 2007, for tax of \$_____, interest, through March 18, 2008, of \$_____ and additions to tax of \$_____, for a total assessed consumers'

sales and service tax liability of \$_____, should be and is hereby **FULLY VACATED**, and no consumers' sales and service tax is due from the Petitioner on behalf of this corporation for the period in question.