

**REDACTED DECISION – DOCKET # 08-227 C – BY GEORGE V. PIPER, ALJ – SUBMITTED FOR DECISION on APRIL 15, 2009 – ISSUED on OCTOBER 14, 2009.**

### **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 was a member of a member-managed limited liability corporation, that is, a person who did have the responsibility of performing duties, is 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 member-managed limited liability corporation so long as he or she was in a position to exercise actual managerial authority over the business.

**CONSUMERS SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER IS NOT APPLICABLE TO TIME PERIOD WHEN PETITIONER BY COURT DECREES NO LONGER HAD USE, POSSESSION OR OWNERSHIP OF BUSINESS AND NO ACTUAL MANAGERIAL AUTHORITY** -- Because temporary and final orders entered by family court judge awarded first temporary use, possession, proceeds and later sole ownership of business to Petitioner's spouse thereby negating Petitioner's actual managerial authority Petitioner is not personally liable after those dates for the unpaid consumers sales and service tax liability of the member-managed limited liability corporation.

### **FINAL DECISION**

On September 5, 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 individual who is allegedly 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 January 1, 2007 through March 31, 2008 for tax of \$\_\_\_\_, interest computed through September 5, 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 mail postmarked September 25, 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].

A notice of a hearing on the petition subsequently was sent to the parties and a hearing was held (after this tribunal granted the Petitioner's request for a postponement of the originally scheduled hearing) in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

During the course of the administrative hearing Respondent's counsel agreed that Petitioner was not liable for the unpaid consumers sales and service tax liability of the member-managed limited liability company after May 31, 2007 because two court decrees awarded Petitioner's spouse use, possession and finally ownership of the business.

#### **FINDINGS OF FACT**

1. Petitioner was assessed for the unpaid consumers sales and service tax debt of the corporation in his capacity as a member of the corporation.

2. During the time period involved in the assessment, Petitioner was listed as both an organizer and a member of the subject limited liability company in the official corporate records in the West Virginia Secretary of State's Office.

3. Consumers sales and service tax returns for tax periods prior to January 1, 2007 were mailed to the attention of Petitioner at the corporation's address.

4. The consumers sales and service tax liability arose because the corporation did not file consumers sales and service tax returns with Respondent during any portion of the assessment period.

5. Respondent based the tax liability upon actual consumers sales and service tax returns filed prior to the assessment period to arrive at the estimated assessment.

6. On May 31, 2007, a "Temporary Order" was entered in Petitioner's divorce action in the Family Court of a county in West Virginia, which order granted Petitioner's spouse temporary use and possession of the store and all of the proceeds from the operation of the corporation.

7. On November 21, 2007, a "Final Order" was entered in that same divorce action whereby Petitioner's spouse became the sole member and exclusive owner of the corporation, including its entire inventory, bank accounts and properties owned by or connected to the business.

### **DISCUSSION**

The sole issue for determination is whether the Petitioner is one of the corporate officers 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 purposes, W. Va. Code § 11-15-17 [1978] provides that “[i]f 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” 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).

At the hearing, Petitioner testified that he was unaware that the business was not filing consumers sales and service tax returns until he received the assessment; however he still considered himself liable for the January 1, 2007 through May 31, 2007 portion of the assessment period because he was officially an owner and operator of the business.

#### **CONCLUSIONS OF LAW**

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 an 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. 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).

3. Applying the relevant provisions of the consumers sales and service tax regulations, discussed below, to the evidence in this matter this tribunal finds that during the period January 1, 2007 through May 31, 2007 Petitioner was a "Member" of the member-managed limited liability company with the authority of an officer to perform duties or responsibilities in the management of the corporation.

4. Applying the relevant provisions of the consumers sales and service tax regulation to the evidence in this matter this tribunal finds that subsequent to May 31, 2007, Petitioner was not a "Member" of the member-managed limited liability corporation and did not have the authority of an officer to perform duties or responsibilities in the management of the corporation.

5. Having proven that pursuant to court decrees issued by the Family Court of a county in West Virginia he no longer had use, possession, or ownership of the business, thereby negating his actual managerial authority after a specified period of time, Petitioner has satisfied his burden of proving that he is not liable for the corporation's consumers sales and service tax liability for the period May 31, 2007 through March 31, 2008.

**DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers sales and service tax assessment issued against the Petitioner for the period of January 1, 2007 through March 31, 2008 for tax of \$\_\_\_\_, interest in the amount of \$\_\_\_\_, and additions to tax of \$\_\_\_\_ for a total assessed consumers sales and service liability of \$\_\_\_\_, should be and is hereby **MODIFIED** in accordance with the above conclusions of law for revised tax of \$\_\_\_\_ plus revised interest and additions to tax.