

**SANITIZED DECS. – 02-343 C, 02-344 W, 02-345 W, 02-346 W & 02-338 C – BY
GEORGE V. PIPER – ISSUED – 7/16/03 – SUBMITTED FOR DECISION – 6/5/03**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- CORPORATE OFFICER PERSONALLY LIABLE -- Although Petitioner attempted to mislead administrative law judge by not truthfully divulging the fact that he was the corporate president during the relevant tax periods, evidence presented during the briefing process, and never refuted, showing that Petitioner had filed for voluntary bankruptcy protection as its corporate president, which included employing an attorney to represent corporation in bankruptcy proceeding, clearly proves that Petitioner, as a corporate officer, is personally liable for the entire consumers' sales and service tax debt of the corporation.

WITHHOLDING TAX – CORPORATE OFFICER PERSONALLY LIABLE -- Notwithstanding Petitioner's perjurious testimony, the clear facts are that Petitioner remained President of the corporation throughout the tax periods in question and was responsible for seeing that the tax debts of the corporation were paid on time; such officer is personally liable for the failure of the corporation to pay state withholding taxes while he was a corporate officer and as a "person" who was responsible to remit same, as required by W. Va. Code §§11-10-19 and 11-10-4b.

FINAL DECISION

The Unit Manager of the Accounts Monitoring Unit issued a consumers' sales and service tax assessment against the Petitioner, pursuant to the provisions of W. Va. Code Chapter 11, Articles 10 and 15. This assessment was for the period of January 1, 1996 through September 30, 2000, for tax, interest, through March 15, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, on March 15, 2002, the Commissioner issued a withholding tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of February 1, 1995 through October 31, 1997, for a withholding tax money penalty.

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Written notice of this assessment was served on the Petitioner.

Also, on March 15, 2002, the Commissioner issued a withholding tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of November 1, 1997 through October 31, 2000, for a withholding tax money penalty.

Written notice of this assessment was served on the Petitioner.

Also, on March 15, 2002, the Commissioner issued a withholding tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of November 1, 2000 through April 30, 2001 for a withholding tax money penalty.

Written notice of this assessment was served on the Petitioner.

Also, on May 15, 2002, the Commissioner issued a consumers' sales and service tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the period of October 1, 2000 through November 30, 2001, for tax, interest, through May 15, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked May 5, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals petitions for reassessment.

FINDINGS OF FACT

Although Petitioner testified that he retired from all control and ownership of the corporation after 1993, Petitioner's counsel does not dispute that in the year 2001 Petitioner did the following:

a. On December 19, 2001, he filed, as its President, a voluntary petition in bankruptcy in the United States Bankruptcy Court for the northern district of West Virginia, which was numbered.

b. In that same filing Petitioner employed an out-of-state law firm to represent the corporation before the bankruptcy court.

c. In that same filing Petitioner declared under penalty of perjury "that I am the President and that he is authorized and directed to execute and deliver all necessary documents on behalf of the corporation in connection with such bankruptcy case.

d. On its "statement of financial affairs" appended to the bankruptcy filing, Petitioner declares under penalty of perjury that he is in fact president of the corporation.

DISCUSSION

The first issue is whether Petitioner is personally liable for the default of the corporation in not paying its consumers' sales and service tax debt.

In W. Va. Code § 11-15-17 it states:

If the taxpayer is an association or a 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 addition 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.

Petitioner's counsel relies totally on his client's testimony, to wit: (1) In 1993, Petitioner retired from the business; (2) subsequent thereto, he had no control over the activities of the corporations' employees, contracts, leases, operations, etc., and no access to its books and records; (3) after 1993, Petitioner did not sign any sales tax or withholding tax returns; and (4) the Internal Revenue Service did not find him personally responsible for the federal trust taxes.

In response to Commissioner's counsel's reply brief, which informed this Tribunal of Petitioner's participation in the corporation's bankruptcy and which included his admission that he is still its President, Petitioner's counsel argues deception in that he was never given an opportunity to refute same at hearing.

This Tribunal believes it is clearly disengenuous for Petitioner's counsel to argue deception when the only real deception was perpetuated by his client in making untruthful statements under oath at the hearing. Moreover, Petitioner's counsel should have sought to refute Commissioner's counsel's findings in his reply brief, if inaccurate, but he did not do so.

Accordingly, it is **DETERMINED** that the Petitioner is in fact a responsible officer of the corporation by his own written admission, in that his signature under oath declares same.

As a responsible officer pursuant to W. Va. Code § 11-15-17, he is personally liable for the entire consumers' sales and service tax liability of the corporation.

The second issue is Petitioner, an individual as officer of the corporation, is personally liable for the corporation's withholding tax money penalty debt.

The applicable statutes are W. Va. Code § 11-10-19 which states:

(a) Failure to collect, account for, and pay over tax, or attempt to defeat or evade tax. 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 y 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 [§ 11-10-18] for any offense to which this subsection is applicable. [Emphasis added].

and

W. Va. Code § 11-10-4b:

(b) "Person" shall include, but is not limited to, any individual, firm, partnership, limited partnership, copartnership, joint adventure, association, corporation, municipal corporation, organization, receiver, estate, trust, guardian, executor, administrator, and also any officer, employee or member of any of the foregoing who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of this article and the provisions of any of the other articles of

this chapter which impose taxes administered by the tax commissioner, unless the intention to give a more limited or broader meaning is disclosed by the context of this article or any of the other articles of this chapter which impose taxes administered by the tax commissioner. [Emphasis added].

What is so damning to the Petitioner's case is his statement that when he was President, "until 1993," all taxes were paid and that the problem began after he retired.

The truth is that he remained President until at least December 2001, so it is clear that as a person and even a fortiori as an officer (its president), he remains liable for the trust debts of the corporation pursuant to W. Va. Code §§ 11-10-19 and 11-10-4b.

The issue presented in this matter involves the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just "lip service" to two general points: (1) rather than utilizing a so-called "de novo" scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an "issue of law," when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not merely reflect the administrative agency's position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency's answer is based on a permissible construction of

the statute.” Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical manner; he [, or she, or the Office of Tax Appeals] need only write a rule [or a decision] that flows rationally from the statute.” Id., 195 W. Va. at 588, 466 S.E.2d at ____ (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” Appalachian Power, 195 W. Va. at 589, 466 S.E.2d at ____ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

CONCLUSION(S) 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-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e).
2. The Petitioner in this matter has failed to carry the burden of proof with respect to the issue of whether he was personally liable for the trust tax debts of the corporation.

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, 1996 through September 30, 2000, for tax, interest, updated through June 30, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** 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 October 1, 2000 through November 30, 2001, for tax, interest, updated through June 30, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the period of February 1, 1995 through October 31, 1997, should be and is are hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the period of November 1, 1997 through October 31, 2000, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the period of November 1, 2000 through April 30, 2001, should be and is hereby **AFFIRMED**.