

**REDACTED DECISION – 09-441 C – BY GEORGE V. PIPER, ADMINISTRATIVE
LAW JUDGE – SUBMITTED FOR DECISION on NOVEMBER 9, 2010 – ISSUED ON
APRIL 29, 2011**

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER -- DUE PROCESS PRINCIPLES --“Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory 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.” Syllabus point 3, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008).

CONSUMERS SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER -- DUE PROCESS PRINCIPLES -- It does not comport with the principles of due process, and it is unreasonable and fundamentally unfair to impose liability on an individual whose status as a corporate officer was predicated solely upon his obtaining a liquor license in his own name because he was a West Virginia resident; who had no authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation, who had no signature authority whatsoever, no management or financial responsibility and whose only job responsibility was that of bartender.

FINAL DECISION

On October 22, 2009, the Compliance Division of the West Virginia State Tax Commissioner’s Office (the Respondent) issued a consumers sales and service tax assessment against the petitioner, an individual as an officer of the business. 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 period of June 1, 2006, through June 30, 2008, for tax in the amount of \$____, interest in the amount of \$____, computed through October 22, 2009, and additions to tax in the amount of \$____, for a total assessed tax liability of \$_____.

Written notice of the assessment was served on the petitioner as required by law.

Thereafter, by mail postmarked December 6, 2009, received on December 8, 2009, the petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment pursuant to West Virginia Code Sections 11-10A-8(1) and 11-10A-9.

Subsequently, notice of a hearing on the petition was sent to the petitioner and a hearing was held pursuant to West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. Petitioner, is listed on the West Virginia Secretary of State's Information System as corporate secretary.
2. The business liquor license for tax year 2006 is in the name of Petitioner as per documents obtained from the West Virginia Alcohol Beverage Control.
3. West Virginia Alcohol Beverage Control requires that a person in whose name the liquor license is held must be a corporate officer.
4. The co-owners of the business were Mr. B and Mr. C with Mr. C acting as President.
5. Petitioner testified that because Mr. C was not a West Virginia resident, Petitioner who was a West Virginia resident was asked to get a liquor license in his own name.
6. Petitioner testified that at all times, until he quit, his job was that of bartender and that he never performed any management or corporate functions; never had signature authority, never had his name on the bank account, never prepared tax returns and never knew that the consumers sales and service tax was not being remitted to the State of West Virginia.
7. Petitioner's witness, Mr. E, testified that he was the bouncer at the club and that he and everyone else knew that Petitioner was only the bartender and that Petitioner had nothing to do with the operation of the business.

8. Neither Petitioner's testimony nor the testimony of his witness was rebutted by the Respondent.

9. Respondent's counsel proffered that a review by the Tax Department's Huntington regional office did not reveal a single document pertaining to the business which evidenced Petitioner's name other than the liquor license.

DISCUSSION

The sole issue is whether Petitioner is liable for consumers sales and service tax that was collected by the business from its customers, but not remitted to the State of West Virginia. The petitioner, if liable, is liable pursuant to the provisions of West Virginia Code Section § 11-15-17, which provides in relevant part:

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

W.Va. Code Ann. § 11-15-17 (West 2010)

While this provision is stated in terms that impose absolute liability on corporate officers, the absolute language of this section has been tempered by the decision of the West Virginia Supreme Court in *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008). Syllabus point 3 of *Schmehl* provides:

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

Schmehl, at Syl. Pt. 3

It would be fundamentally unfair to impose liability for the consumers sales and service tax debt of the corporation upon Petitioner whose job was always that of a bartender and who never had anything to do with the management or financial part of the business. He was merely a salaried employee who took out the liquor license in his name only because the co-owners of the bar needed a West Virginia resident for that purpose.

The evidence demonstrates that none of the consumers sales and service tax returns were prepared or signed by Petitioner nor did Petitioner have any knowledge that the corporation was not remitting sales taxes to the State of West Virginia.

Considering all of these factors together, it appears that it would violate fundamental fairness to hold the Petitioner liable for the corporation's consumers sales and service tax liability. The Petitioner was not an active participant in the business during the assessment period. He was not responsible for the management of the bar. He did not prepare or execute consumers sales and service tax returns. He did not make any payments of consumers sales and service tax and had no responsibility for doing so. He never signed checks on behalf of the corporation and never functioned as a corporate officer. Based on these facts and circumstances, it must be held that the petitioner is not liable for the consumers sales and service tax.

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 Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

2. In *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008), the West Virginia Supreme Court of Appeals created a test to ascertain corporate officer liability pursuant to West Virginia Code Section 11-15-17. The Court ruled:

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

Schmehl, at Syl., Pt. 3

3. It does not comport with the principles of due process, and it is unreasonable and is fundamentally unfair to impose liability on an individual whose status as a corporate officer was predicated solely upon his obtaining a liquor license in his own name, who had no authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation, who had no signature authority on the corporate bank account, no management or financial responsibility and whose only job responsibility was that of bartender.

4. The petitioner in this matter has carried his burden of proving that the 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 consumers sales and service tax assessment issued against the petitioner in his capacity as an

officer of the business for the period of June 1, 2006, through June 30, 2008, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, totaling \$____, should be and is hereby VACATED, and the Petitioner owes no further tax liability for the period in question.