

**REDACTED DECISION – DK#S 14-131 W-M, 14-132 CU-M**

**BY: HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON MARCH 15, 2016  
ISSUED ON SEPTEMBER 13, 2016**

**FINAL DECISION**

**I. INTRODUCTION**

Petitioner is disputing two officer liability assessments issued by the West Virginia State Tax Department, ("Respondent") against her as an officer of Company A. One assessment was for Combined Sales and Use Tax totaling \$ \_\_\_\_\_, for the time period ending June 30, 2012. This assessment includes tax of \$ \_\_\_\_\_, interest of \$ \_\_\_\_\_, and additions of \$ \_\_\_\_\_. Petitioner was also assessed for Withholding Tax. This assessment was for a money penalty of \$ \_\_\_\_\_ and also for the time period ending June 30, 2012.

The Tribunal agrees with Respondent that this case is somewhat unique in that Petitioner failed to appear at her hearing in this matter. Petitioner failed to personally present any evidence regarding her corporate role, or lack thereof, in Company A. Petitioner did have her husband, Mr. B testify at the hearing as to Petitioner's role in the company. Notably, Mr. B has a companion case before this Tribunal. This testimony states that Petitioner was a corporate officer in name only, and that Mr. B and Petitioner owned all the stock in Company A. Petitioner here is attempting to contest the underlying assessment against Company A. Company A originally was issued assessments by Respondent's Auditing Division. Company A never responded to those assessments, and therefore that liability has become final. Subsequent to that final liability, the assessments in this matter were issued against the Petitioner as an officer to collect that final liability.

### **I. FINDINGS OF FACT**

1. Company A is a septic tank cleaning and disposal company.
2. Mr. B is president of Company A.
3. Mr. B, in his capacity as President of Company A, received correspondence from Respondent's Auditing Division, requesting an audit of Company A.
4. Mr. B, in his capacity as President of Company A, did not respond to that correspondence.
5. Mr. B, in his capacity as President of Company A, then received two Notice of Assessments for Company A (the "Corporate Assessment").
6. Mr. B, in his capacity as President of Company A, did not respond to those Notices of Assessment, nor file the appropriate appeal of those assessments at the Office of Tax Appeals.
7. At all times relevant thereto, Mr. A, CPA (the "Expert"), prepared the tax returns, including the withholding and sales and use tax returns for the 2009-2013 tax years.
8. Respondent asserts that the tax returns were filed by the Corporation and paid in full.
9. Subsequent to the issuance of the Corporate Assessment, Respondent filed the assessment against Petitioner that is the subject of Petitioner's Petition for Appeal (the "Assessment").
10. Petitioner is an officer and co-owner with Mr. B of Company A.

### **III. SYNOPSIS AND CONCLUSIONS OF LAW TAXATION; STATUTORY LAW; ADMINISTRATIVE REGULATIONS**

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is on the petitioner to show that any assessment of tax or penalty is erroneous,

unlawful, void or otherwise invalid. See W.Va. Code §11-10A-10(e)(2002); W.Va. Code Rules Section 121-1-63.1 (2003).

2. Notices of Assessment must be appealed to the Office of Tax Appeals within 60 days of receipt or the liability becomes final. W. Va. Code § 11-10-8 (2002).

3. There is a default by the corporation or association resulting in officer liability when the liability of the corporation is determined by an assessment and such assessment is final and not subject to administrative or judicial review. W.Va. Code R. §1 10-15-4a.4 (1993).

4. If a liability of a corporation or association is determined to be due by an assessment which has become final, an assessment against officers is considered to be a collection action for that liability. W.Va. Code R. §110-15-4a.7.1 (1993).

5. Officers of an association or corporation "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 ... may be enforced against them as against the association or corporation which they represent." W.Va. Code§ 11-15-17 (1978).

6. "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 present." W.Va. Code R. §110-15-4a.1 (1993).

7. "The officers of a corporation or association that are personally liable for consumers 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 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 liability." W.Va. Code R. §110-15-4a.5 (1993).

8. 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) if 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. W. Va. Code § 11-10-19(a) (1978).

#### IV. ANALYSIS

This Tribunal agrees that indeed, the only issue in this case is whether Petitioner is a responsible person or corporate officer for the purposes of Combined Sales and Use Tax, and Withholding Tax. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is on the petitioner to show that any assessment of tax or penalty unlawful, void or otherwise invalid. See W.Va. Code §11-10A-10(e) (2002), and W.Va. Code R. § 121-1-63.1 (2003). In this case, to carry her burden, Petitioner must adduce some sort of evidence tending to prove that she, in fact, was not as she asserts, a corporate officer or a person deemed statutorily responsible for the taxes assessed against Company A.

In this case, to carry her burden, Petitioner would need to prove she was neither a corporate officer nor responsible person for the taxes assessed against Company A. Here, however, Petitioner neither testified nor produced any documents herself. Rather, her husband testified that

she was not a responsible person for tax purposes. Instead, without any documentation or other substantiating evidence, her husband states that she was an officer "in name only" for the purpose of registering Company A with the West Virginia Secretary of State's office. Such an assertion, however, without more, is simply insufficient to satisfy Petitioner's burden of proof here.

#### DISPOSITION

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner's petition for refund is **DENIED** and the Assessments are hereby **AFFIRMED**.

#### WEST VIRGINIA OFFICE OF TAX APPEALS

By: /s/ Heather G. Harlan  
Heather G. Harlan  
Chief Administrative Law Judge

September 13, 2016  
Date Entered

Certified and Entered Copy:

\_\_\_\_\_  
Stephen P. Lee  
Executive Director and Clerk of Court