

BY CHIEF ADMINISTRATIVE LAW JUDGE A.M. "FENWAY" POLLACK
SUBMITTED FOR DECISION ON JUNE 13, 2018
ISSUED ON NOVEMBER 2, 2018

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On January 27, 2016, a Regional Office of the West Virginia State Tax Commissioner's Office (hereinafter "the Tax Department or the Respondent") issued an officer liability assessment against the Petitioner, personally, as a responsible officer of Company A. The assessment is for various quarters in tax years 2014 and 2015 and indicated interest due in the amount of \$_____, and additions to tax in the amount of \$_____, for a total assessed liability of \$_____.

On February 18, 2016, the Petitioner timely filed a Petition of Appeal with this Tribunal. In May of 2017, the Petitioner filed a Motion for Summary Judgement. On June 13, 2018 a hearing was held on the Petitioner's Motion, and the matter became ripe for a decision at that time.¹

FINDINGS OF FACT

The Petitioner attached an affidavit to his Summary Judgement Motion, which he states contain all of the material facts in this matter. At the hearing on the Petitioner's Motion, the Tax

¹ Because no testimony was presented in this matter, the record is unclear as to why the assessment at issue does not include any taxes due, or why it only involves certain quarters of 2015 and 2014.

Commissioner agreed that the material facts in this matter were contained in the affidavit. There are only two material facts in this matter. First, that the Petitioner formed Company A in the summer of 2012, and second, that he is the sole member.

DISCUSSION

This Tribunal regularly hears matters such as this, involving officers of corporations who have been personally assessed for the unpaid taxes of the corporation. Normally, those matters are resolved by answering questions regarding the duties of the person assessed within the corporation or organization. Those hearings would typically answer the other questions discussed above, such as the unpaid sales taxes, and the periods involved. In this matter, the Petitioner asserts that none of those facts are relevant, and that the Tax Commissioner cannot assess him, as a matter of law, because he formed a single member limited liability company. More specifically, the Petitioner argues that as a sole member LLC, Company A is not an association or a corporation, and therefore, its sole member cannot be held liable for its unpaid taxes.

The assessment in this matter was issued pursuant to West Virginia Code Section 11-15-17, which states:

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 2018)

There are regulatory provisions regarding officer liability and they contain a definition of both corporation and association.

An association is any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit.

W. Va. Code R. § 110-15-4a.3 (1993).

The Petitioner completes his argument by pointing out that West Virginia Code Section 11-15-17 was promulgated in 1978, that the regulatory definition of association was promulgated in 1993, and that West Virginia enacted the Uniform Limited Liability Company Act in 1996. Therefore, he states that West Virginia Code Section 11-15-17 simply needs to be updated, to reflect current West Virginia law, which allows for single member LLCs. However, until the statute is changed, there is no provision which makes him liable for the unpaid taxes of Company A.

For his part, the Tax Commissioner does not dispute any of the Petitioner's arguments. Nor does he argue that Section 17 is ambiguous. Instead he argues that other sections control, specifically West Virginia Code Sections 11-10-4 and 11-10-19. Section 4 is merely a definition section under Article 10, the West Virginia Tax Procedure and Administration Act. It defines "person" as, among other things, an individual.

(c) "Person" shall include, but is not limited to, any individual, firm, partnership, limited partnership, copartnership, joint venture, 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 an 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

W. Va. Code Ann. § 11-10-4(c) (West 2018).

Section 19 deals with penalties. -

(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 any 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 for any offense to which this subsection is applicable.

W. Va. Code Ann. § 11-10-19(a) (West 2018).

The Tax Commissioner argues that “While West Virginia Code Section 11-15-17 seems to impart almost a “strict liability” standard on officers for sales tax, the general officer liability provision in West Virginia Code Section 11-10-19 applies to all individuals who meet the definition of “person” found in West Virginia Code Section 11-10-4 (including officers).” *See* “Respondent’s Reply to Petitioner’s Motion for Summary Judgement” at P. 4.

During the hearing on the Petitioner’s Motion, counsel for the Tax Commissioner expanded on this argument and argued that someone had to have been responsible for collecting and paying the taxes of Company A, and because the Petitioner was the only member, it must have been him. While we recognize the Tax Commissioner’s frustration with the facts of this matter, we are unable to rule in his favor, for a variety of reasons.

First, and foremost, the assessment in this matter clearly states, on its face, that it is issued to the Petitioner as a responsible individual of Company A, pursuant to West Virginia Code Section 11-15-17. Under the plain language of Section 17, it only applies to taxpayers that are associations or corporations, and Company A is neither. Assuming we were willing to ignore these facts and apply West Virginia Code Section 11-10-19 to this matter, the Tax Commissioner still could not prevail. As cited above, Section 19 provides for a money penalty against any person who willfully fails to pay over any tax that person is required to collect. The Tax Commissioner argues that in

this matter that person is the Petitioner, but he is incorrect, at least according to West Virginia law. The Tax Commissioner's argument is predicated on the assumption that the definition of "person" in West Virginia Code Section 11-10-4(c), means just individuals. However, the definition includes virtually every type of conglomeration of people, including firms, and organizations. The record in this matter does not show what type of business Company A was in, but neither the Petitioner nor the Tax Commissioner is disputing that it, as a vendor, had a duty to collect and remit sales taxes.² Therefore, Company A as either a firm or organization, as those terms are used in West Virginia Code Section 11-10-4 was the "person" that had a duty to pay and collect over sales taxes. If it failed to do so, then according to Section 19, it could be assessed a money penalty.³ The Tax Commissioner has not directed this Tribunal to any statutory or regulatory authority that states that Petitioner had any duty regarding the collecting or remitting of taxes based upon the sales conducted by Company A. To be clear, this is because, under the facts of this matter, the petitioner was never a vendor.

We understand the Tax Commissioner's arguments in this matter, and his frustration. But his arguments are ones of a practical, not a legal nature. Yes, it is probably correct that as the sole member of the LLC, the Petitioner either directly or indirectly failed to collect sales tax or failed to remit it. However, legally, the entity that had the duty to collect and pay over was Company A. The only statutory authority holding a third party responsible for the failure to collect or pay over sales taxes is West Virginia Code Section 11-15-17, and as counsel for the Petitioner has correctly argued, it does not apply under these facts. Simply put, counsel for the Petitioner has discovered

² "For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article." W. Va. Code Ann. §11-15-3(a) (West 2010).

³ Article 15 contains an additional Section, 4a, which provides for personal liability for any vendor that fails to collect the necessary sales and service tax.

a loophole that needs legislative attention. Until that time, this Tribunal cannot rewrite Section 11-15-17 in the name of fairness.

CONCLUSIONS OF LAW

1. “For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article” W. Va. Code Ann. § 11-15-3(a) (West 2010).
2. If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect. *See* W. Va. Code Ann. § 11-15-4a (West 2010).
3. Regarding the assessment at issue in this matter, the vendor, as that term is used in Article 15, is Company A.
4. West Virginia Code Section 11-10-19(a) states “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 any 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.” W. Va. Code Ann. § 11-10-19(a) (West 2018).

5. Based upon conclusion of law number 3 above, the “person” required to collect, account for and pay over the taxes due in this matter, as that term is used in Subsection 19(a), is Company A.
6. The assessment that forms the basis of this matter was issued pursuant to West Virginia Code Section 11-15-17, which states: “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 2018).
7. An association is any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. W. Va. Code R. § 110-15-4a (1993)
8. Company A is not a corporation.
9. Company A is not an association, as that term is used in West Virginia Code Section 11-15-17 or Section 4a.3 of Title 110, Series 15 of the West Virginia Code of State Rules, because it is not made up of two or more persons engaged in business. As such, the officer liability provisions of Section 17 are not applicable to the petitioner.
10. 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 it 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).

11. The Petitioner in this matter has carried his burden of proving that the January 27, 2016, assessment issued against him was erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on January 27, 2016, in the amount of \$_____, is hereby **VACATED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date