

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

REDACTED DECISION – DK# 17-131 CU-M

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 19, 2018
ISSUED ON JUNE 17, 2019**

FINAL DECISION

On March 17, 2017, the Tax Accounting Administration of the West Virginia State Tax Department (hereinafter “Tax Commissioner” or “Respondent”) issued an Officer Assessment letter (Letter Id# L_____) to Petitioner. This officer assessment was issued pursuant to the authority of the Respondent, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The officer assessment stated that an assessment had been made personally against the Petitioner as a responsible individual for a Limited Liability Company (LLC), for combined sales and use tax for tax year 2014 and the first quarter of 2015 for a total amount of \$_____.

The Petitioner timely filed her Petition for Reassessment with this Tribunal on May 1, 2017. Subsequently, a notice of hearing on the petition was sent to the parties and in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on September 11, 2018, and the matter became ripe for decision after post hearing briefs.

FINDINGS OF FACT

1. The Petitioner is an Officer of an LLC doing business as a WV Company (Tran.5-6, State's Exhibit 3).
2. Ms. A is also a Member of the LLC. (State's Ex 3).
3. The LLC is a clubhouse with a bar and restaurant and a convenience store on the upstairs level. It is situated within a County in West Virginia. (Tran. 25-26).
4. The LLC only has sales during the seasonal operational months of April through October due to an adjoining location being a seasonal business. (Tran. 26).
5. the LLC was organized by the Petitioner in West Virginia on March 27, 2007. (State's Ex. No. 3).
6. The ABCA license is in the Petitioner's name. (Tran. 7-8.).
7. Ms. A managed the day to day operations, the financial affairs of the business, and was the only employee for the LLC. (Tran. 24-25).
8. The LC was in operation from March 27, 2007 to November 17, 2017. (Tran. 24).
9. The Petitioner testified that she was never responsible for filing tax returns, collecting and remitting sales or use tax, or payroll. (Tran.5, 9-11).
10. The Petitioner further testified that she never signed payroll checks or checks for the payment of taxes. (Tran. 6, 10).
11. The Petitioner did not have the authority to make employee decisions. (Tran. 6).
12. The Petitioner has lived in Florida since January 2015. (Tran. 7).
13. The Petitioner testified that her only involvement with the LLC., was holding the ABCA license in her name. (Tran.7).
14. The Petitioner did not even realize that she was a Member of the LLC. (Tran. 22).

15. The Petitioner was unaware that the West Virginia Secretary of State's office has an amendment showing that she owned 49% of the LLC. (Tran. 24).

16. The Petitioner did not have any control or authority over the funds of the LLC. (Tran. 6).

17. The Petitioner was unaware of any tax issues until she received the Notice of Assessment in March or April of 2017. (Tran.17).

18. Upon receiving the Notice of Assessment, the Petitioner immediately contacted the Respondent. (Tran. 17).

19. After the Petitioner contacted the Respondent, she spoke with Ms. A about the assessment. (Tran. 18).

20. Upon discussing the tax assessment with the Petitioner, Ms. A went to the Respondent's local office to inquire about the outstanding sales taxes. (Tran.30).

21. Ms. A signed the tax returns, checks, and other financial instruments. (Tran 24-25).

22. Ms. A and the Petitioner did not consult about the operations of the business. (Id).

23. The Petitioner did not sign any tax returns, checks, loans, payroll, or other financial instruments. (Tran.26-27).

24. Ms. A testified that she was the only person who worked through the week at the business and on the weekends, she had friends who would voluntarily assist her. (Tran. 26).

25. The Petitioner's testimony is un rebutted.

DISCUSSION

The Petitioner is a Member of the LLC., dba as a WV Company., (hereinafter the LLC) which she and her daughter, Ms. A, are the only two members. The LLC was incorporated by the Petitioner on March 27, 2007 and ceased doing business on or around November 17, 2017. The LLC is a restaurant/bar/convenience store that operates within an adjoining business that operates from Easter weekend through Halloween, which is approximately March or April through October, depending upon if Easter falls in March or April.

The Petitioner is the incorporator and the holder of the ABCA license; however, she was not responsible for any financial aspect of the business. The Petitioner's testimony about her role in the business was un rebutted.

Ms. A testified that she was responsible for accounts payable, the collection and remittance of sales and use taxes, signing payroll checks, and the payment of taxes. The Petitioner testified to not knowing what was going on with financial matters as Ms. A was responsible for that aspect of the business. The Petitioner was never responsible for the filing of tax returns, the collection and remittance of sales tax, signing any official documents, or exercising any official capacity as a member of the LLC. The LLC operated in this manner during the time the Petitioner was a member. The Petitioner's un rebutted testimony was that she was unaware of any tax issues until she received the Notice of Assessment from the Respondent.

The Respondent asserts that the Petitioner's status as a member is such that she should be held personally liable for the combined sales and use tax liabilities of the LLC. To support his argument, the Respondent points to the Petitioner as being the sole holder of the ABCA license. The Respondent further argues that the LLC could not have sold liquor had the license not been in her name.

The issue in this case is whether the Petitioner is personally liable for combined consumer sales and use tax that was not remitted to the State of West Virginia for the LLC. A vendor such as the LLC sells tangible goods, such as food and alcohol, is required to pay a six (6) percent sales tax¹ on those goods to the State of West Virginia. Pursuant to West Virginia Code Section 11-15-3(a), “for the privilege of selling tangible personal property and of dispensing of certain select services...the vendor² shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code § 11-15-3(a). (West 2010). Under West Virginia. Code Section 11-15-4, “the Purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W.Va. Code §11-15-4 (West 2010).

Although the statute may appear to impose strict liability to corporate officers as being personally liable for corporate taxes, the West Virginia Supreme Court relaxed this statute in syllabus point 3 of *Schmehl v. Helton*, 222 W.Va. 98, 662 S.E. 697 (2008):

Under the due process clause 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, giving due deference to the statute’s general authorization for the imposition of such liability.

Schmehl, at Syl. pt. 3.

¹ The amount of consumer sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” W. Va. Code Ann. §11-15-3(b) (West 2010).

² A vendor is defined as “any person engaged in the state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. §11-15-2(z) (West 2010).

Upon review and consideration of West Virginia Code Section 11-15-17 and syllabus point 3 of *Schmehl*, the evidentiary hearing, and the parties' arguments and briefs, this Tribunal finds that it would be fundamentally unfair to impose personal liability for the company's taxes on the Petitioner.

Although the Petitioner was the incorporator of the company and held the ABCA license in her name, she had no job duties. The Petitioner did not have financial control over the company, she never wrote any checks to the State of West Virginia for sales and use tax, or write checks on behalf of the business. She never filed or signed a sales tax return on behalf of the business and did not even realize there was a tax issue until receiving notice from the Respondent. She had made no business decisions, but instead, was a member in name only. The very purpose of syllabus point 3 in *Schmehl* would be abrogated by holding the Petitioner liable for the outstanding taxes under these unrebutted facts. Therefore, this Tribunal finds the Petitioner has met her burden to prevail in the instant matter and holds that she is not personally responsible for combined sales and use taxes on behalf of the LLC.

CONCLUSIONS OF LAW

1. It is the duty of the Respondent to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W.Va. Code Ann. § 11-1-2 (West 2010).

2. "For the privilege of selling tangible personal property and of dispensing of certain select services...the vendor³ shall collect from the purchaser the tax as provided under this article,

³ A vendor is defined as "any person engaged in the state in furnishing services taxed by this article or making sales of tangible personal property." W.Va. Code Ann. §11-15-2(z) (West 2010).

and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code § 11-15-3(a). (West 2010).

3. “The Purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W.Va. Code § 11-15-4 (West 2010).

4. “If a 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...may be enforced against them as against the association or corporation which they represent.” W.Va. Code Ann. § 11-15-17 (West 2010).

5. Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, “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.” *Schmehl v. Helton*, Syl. Pt. 3, 222 W.Va. 98, 662 S.E.2d 697 (2008).

6. Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious, and unreasonable to impose liability on a corporate officer who held a nominal officer title, who did not have any financial or tax responsibility, and did not make collection of or remit consumer sales and use tax for the business.

7. 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 her is erroneous, unlawful, void, or otherwise invalid. *See* W.Va. Code Ann. § 11-10A-10(e)(West 2010); W.Va. Code R. §§ 121.1-1-63.1 and 69.2 (2003).

8. Petitioner in this matter has carried her burden of proving that the assessment of taxes against her is erroneous, unlawful, void, or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the combined consumer sales and use tax assessment issued against the Petitioner in her capacity as an officer of the LLC for a total amount of \$_____, should be and is hereby **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

Date Entered