

REDACTED DECISION – DK#'S 17-285 W, 17-286 CU

FILED

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE

SUBMITTED FOR DECISION ON MAY 27, 2019

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS**

**FINAL DECISION**

On October 10, 2017, the Tax Accounting Administration of the West Virginia State Tax Department (hereinafter “Tax Commissioner” or “Respondent”) issued two Officer Assessment letters (Letter Id# L\_\_\_\_\_ and #L\_\_\_\_\_) to Petitioner (hereinafter “Petitioner”). These officer assessments were 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 assessments stated that an assessment had been made personally against the Petitioner as a responsible individual of Company A., for combined sales and use tax for tax year 2016 in the amount of \$\_\_\_\_\_ and the money penalty for withholding taxes for tax year 2015 in the amount of \$\_\_\_\_\_.<sup>1</sup>

The Petitioner timely filed her Petition for Reassessment with this Tribunal on December 18, 2017.<sup>2</sup> 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 February 5, 2019, in Charleston, West Virginia, and the matter became ripe for decision after post hearing briefs.

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<sup>1</sup> There remains some question regarding whether the Tax Commissioner has the authority to issue an officer liability withholding assessment. As this authority was not challenged, it will remain an issue for another day.

<sup>2</sup> The Petitioner received the Notice of Assessments on October 21, 2017, which meets jurisdictional requirements.

## FINDINGS OF FACT

1. The Petitioner was one of the two members and co-founders of Company A, which was established on June 16, 2009, and terminated on November 1, 2016. (Tr.1, State's Ex. 3).
2. Mr. B was the other member and co-founder of Company A (Tr. 6, 41, State's Ex.3).
3. Company A was a contracting and construction company whose principal place of business was in a County of West Virginia. The mailing address of Company A was also the Petitioner's residence. (Tr. 6, 31, 41, 94).
4. The Petitioner holds Undergraduate and Masters' Degrees from a University. (Tr. 36).
5. Petitioner's work experience has been in marketing and sales along with advertising and she has been working in another sales industry since 1998. (Tr. 36-38).
6. At no time in Petitioner's employment history did she have responsibilities or duties regarding preparation of tax returns for any employer or with regard to collection of withholdings taxes or consumer sales and service tax. (Tr. 37).
7. In the mid to late 2000's, Petitioner had a personal relationship, was dating Mr. B. During this time period, Mr. B encouraged her to obtain a contractor's license. (Tr. 42).
8. These encouragements from Mr. B to the Petitioner occurred for a time period prior to the organization of Company A on June 16, 2009. (Tr. 42).
9. Petitioner had no knowledge of construction practices or protocol at the time period Mr. B was encouraging her to take the contractor's license test. (Tr. 42).

10. Mr. B observed to her that he believed that she would be able to pass the contractor's test and that someone needed to pass the contractor's test so Company A could have a license. (Tr. 42-43).

11. After taking the contractor's examination on two (2) occasions, the Petitioner successfully passed the State of West Virginia Department of Labor contractor's board test and was the only license holder of Company A. (Tr. 43).

12. Nothing in preparing for the contractor's test or taking of the contractor's test involved tax return or wage payments for employees of a contracting business. (Tr. 43).

13. Nothing in the materials which the Petitioner studied in order to take the contractor's test included any materials with regard to withholding of wages for employees of contracting businesses or collecting consumer sales and service tax for construction business or filing returns regarding withholdings or consumer sales and service tax. (Tr. 44).

14. Nothing in preparing or taking the test involved the operation or running of a general contractor's business. (Tr. 44).

15. During the time period that the Petitioner studied for and took the contractor's test prior to June of 2009, she was working full time in another sales capacity spending approximately fifty (50) to sixty (60) hours per week in that profession along with the full time responsibility of raising three (3) children. (Tr. 45).

16. As a sales representative, Petitioner had no employees working for her for whom she was required to file any returns or reports. (Tr. 46).

17. During the time period that Petitioner was studying for taking the contractor's exam (2009), Petitioner was involved in extracurricular activities for her middle school and high school aged children. (Tr. 47-48).

18. During the entire time period of the existence of Company A, Petitioner worked a full time job in the other sales position of at least fifty (50) to sixty (60) hours per week. (Tr. 48).
19. Petitioner contributed no capital funds or cash to the startup of Company A and did not pay for the cost to take the contractor's test; said cost being paid by Mr. B. (Tr. 49).
21. Petitioner loaned no monies to Company A for its startup nor contributed tools, equipment or tangible assets of any kind to the business of Company A. (Tr. 50).
22. Throughout the time period of the existence of Company A, Petitioner loaned no monies to Company A or paid any contributions to capital of Company A or contributed any tangible property of Company A. (Tr. 50).
23. Company A conducted no business from her residence in a County in West Virginia. (Tr. 50- 51).
24. For the most part, the business of Company A was conducted by Mr. B "out of his vehicle." (Tr. 51).
25. Company A had no member transfer restriction agreement, operating agreement or member agreement among the members. (Tr. 51).
26. Company A had no member meetings. (Tr. 51).
27. In exchange for her time invested in studying for and successfully taking the contractor's license examination on behalf of Company A, Mr. Stiles agreed that the Petitioner should receive ten percent (10%) of the profits of Company A. (Tr. 52).
28. Petitioner at no time executed any contracts as a member of Company A to do construction projects. (Tr. 52).
29. Petitioner at no time went to the office of Company A in a County in West Virginia to conduct business on behalf of Company A. (Tr. 53).

30. During the time period of the existence of Company A, which was from June 16, 2009, to November 1, 2016, approximately seven years (7), the Petitioner received a total of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_). (Tr. 53).

31. In 2015, the year in which certain tax liabilities of Company A accrued owed to the State of West Virginia, Petitioner received \_\_\_\_\_ Dollars (\$ \_\_\_\_\_). (Tr. 53).

32. In 2016 when tax liabilities were accrued by Company A owed to the State of West Virginia, Petitioner received no income from Company A. (Tr. 54).

33. The Petitioner was never provided any statement of profit and loss or report of gross income or costs of doing business by Company A. (Tr. 54).

34. The Petitioner had no knowledge of any records of the business that may have existed and specifically never reviewed any operating records or financial documents regarding Company A. (Tr. 54-55).

35. The Petitioner had no knowledge or information with regard to any business records of Company A until after the State of West Virginia filed and served upon her a proposed assessment of personal responsibility for certain tax liabilities of Company A. (Tr. 55).

36. The mailing address for Company A was in a County in West Virginia and was also the Petitioner's home address. (Tr. 10)

37. All mail addressed to Company A was mailed to this address but was never opened by the Petitioner or any other resident. It was placed in a specific location at the home for later transfer or pickup by Mr. B as testified by Mr. C, Ms. D, and Mr. E, the Petitioner's adult children. (Tr. 10-11, 16, 22-24).

38. Mr. C lived with the Petitioner during 2009 through 2013 and Ms. D lived with the Petitioner during spring 2012 through the end of 2015. (Tr. 10-11, 16).

39. An undisputed proffer of evidence was accepted from Mr. E, an adult child of the Petitioner, who lived 3 blocks from the residence and business address also observed the same mail protocols for Company A and/or Mr. B during the time period of 2010 when he was a frequent visitor to the Petitioner's home. (Tr. 22-24).

40. Ms. F was employed as a project sales and project manager for remodeling projects at Company A in 2013. (Tr. 26-27).

41. Ms. F never encountered the Petitioner at any job site of Company A, never received a paycheck signed by the Petitioner, had no business interactions with the Petitioner related to Company A, and further testified that the Petitioner "did nothing" for Company A other than hold the contractor's license. (Tr. 26-30).

42. Mr. B prepared all bidding for home repair remodeling projects, employee management at job sites, signed all payroll checks for Company A. (Tr. 27, 30).

43. Petitioner is unfamiliar with State's Exhibit Number 4, the document filed with the West Virginia Office of Business Registration for Company A, had never seen the form prior to the hearing February 5, 2019. (Tr. 40).

44. The State's Exhibit Number 4 was executed by Mr. B as owner of Company A. (Tr. 40).

45. Petitioner is identified as "an organizer of Company A" but has no knowledge of the legal definition of organizer of a limited liability company. (Tr. 41).

46. When the Petitioner received the assessment she contacted Mr. B who advised her that all tax liabilities of Company A owed to the State of West Virginia were paid and current. (Tr. 55).

47. The Petitioner contacted Money Matters after receiving the proposed assessment to obtain copies of tax returns and other financial information of Company A. (Tr. 55).
48. Prior to receiving the assessment, Petitioner had never reviewed or seen any of the tax records of Company A. (Tr. 56).
49. Petitioner obtained records from Money Matters regarding Company A in an effort to try and reconstruct the financial affairs of Company A to support her position. (Tr. 55, 56).
50. After Petitioner was served with the proposed assessment, she also contacted United Bank at which said institution Company A maintained a bank account. (Tr. 56).
51. Petitioner was aware that Company A had a bank account and that she was an authorized signatory for the account, but during the time period 2009 to 2015 only opened on one (1) occasion a bank statement for Company A. (Tr. 56).
52. After being served with the proposed assessment, Petitioner contacted United Bank and paid out of pocket expenses in excess of Three Hundred Dollars (\$300.00) to obtain copies of bank records and images of checks issued by Company A. (Tr. 57-58).
53. Petitioner reviewed personally page by page all bank statements provided by United Bank from 2011 to 2015 to see if she had signed any checks for Company A. (Tr. 59, Petitioner's Ex. A).
54. In the five (5) years of bank records of United Bank for Company A, one (1) check bore the Petitioner's signature being a contribution to a high school project graduation fundraiser. (Tr. 60).
55. Petitioner maintained an office area in her home with regard to her sales representative profession. In that area adjacent to her kitchen, she had a segregated stack for

incoming mail for Company A and approximately once per week would contact Mr. B to advise him that mail accumulated, and would be put out on the porch unopened. (Tr. 62).

56. The Petitioner obtained documents from Money Matters being photocopies of tax returns and records filed by Company A after she received the Notice of Proposed Assessment. (Tr. 64).

57. Prior to being served with the Proposed Assessment, Petitioner had had no meetings or discussions with personnel at Money Matters regarding the preparation of tax returns for Company A. (Tr. 64).

58. No Internal Revenue Service 941 report forms for the period 2011 to 2015 for Company A were signed by the Petitioner. (Tr. 65, 66, Petitioner's Ex. B).

59. The 941 documents filed on behalf of Company A reflect execution by Mr. B as owner. (Tr. 66, Petitioner's Ex. B).

60. Prior to obtaining the records from Money Matters after being served with the Proposed Assessment, Petitioner had no knowledge or background regarding the preparation of IRS form 941 for Company A. (Tr. 66).

61. Petitioner obtained copies of IRS report forms 940 for Company A for 2011 to 2015 after being served with the Proposed Assessment. (Tr. 67, Petitioner's Ex. C).

62. The Petitioner had no knowledge, information or other data regarding the preparation of IRS form 940 reports by Money Matters prior to the Proposed Assessment issued by the State Tax Department and executed no 940 reports for Company A. (Tr. 68, Petitioner's Ex. C).

63. The 941 reports for Company A reflect Mr. B as owner. (Tr. 68, Petitioner's Ex. C).



64. The Petitioner obtained copies of the State of West Virginia quarterly report of withholdings taxes from Money Matters after she received the Proposed Assessment from the State of West Virginia. (Tr. 70).

65. Quarterly reports filed for Company A with the State of West Virginia reflect Mr. B as the owner. Mr. B had complete charge of the financial records of Company A. (Tr. 71, 72, 86).

66. No quarterly reports filed with the State of West Virginia on behalf of Company A reflect the Petitioner as owner of Company A. (Tr. 72, Petitioner's Ex. D).

67. The Petitioner undertook no job duties on behalf of Company A for sales, marketing promotional, or project management, performed no estimates, quotes or bids to customers of Company A, never met with customers of Company A, never issued invoices to customers, never handled accounts receivables, and never went to any job sites of Company A. (Tr. 73-74).

68. The Petitioner did not hire, give work/job site assignments, supervise, or terminate employees for Company A. (Tr. 74)

69. The Petitioner at no time prepared bank deposits for Company A, signed paychecks for Company A or established rate of pay for employees of Company A. (Tr. 75).

70. The Petitioner never prepared weekly, monthly or quarterly bookkeeping reports for Company A or any tax returns for Company A. (Tr. 75).

71. The Petitioner did not arrange any contractual relationships with vendors or suppliers or subcontractors of Company A. (Tr. 75).

72. Petitioner paid no utility bills for Company A. (Tr. 75).

73. Company A had no phone line, no office furniture or personal property of any kind at Petitioner's home. (Tr. 76).

74. Petitioner never rented real estate or entered into agreements to purchase or rent equipment for Company A. (Tr. 76).

75. Petitioner received no compensation or rental fee for collecting mail of Company A from her home. (Tr. 76).

76. The Petitioner at no time filed any building permits on behalf of Company A with any city or county in West Virginia. (Tr. 77).

77. The Petitioner did not request an opportunity to review records of Company A as relates to any payments to her of ten percent (10%) profits. (Tr. 78).

78. The Petitioner was not involved in the business affairs of Company A in any manner and therefore considered any modest monies that she might be paid for exchange for her having successfully passing the contractor's exam to be "better than nothing." (Tr. 78).

79. Company A did conduct repair work at the Petitioner's home for which she was invoiced and paid a full fee for the services rendered to her home by Company A. (Tr. 80).

80. The Petitioner undertook no actions to run, operate or control the business of Company A. (Tr. 81).

81. At the time the Petitioner sought to obtain records from the United Bank with regard to the checking accounts of Company A in approximately October 2017, the account had been closed. (Tr. 85).

82. The Petitioner negotiated no corporate purchases, leases, contracts or loans or close any bank accounts on behalf of Company A. (Tr. 88).

83. The Petitioner did not counter sign any corporate checks on behalf of Company A or cosign any bank loans of Company A or make any deposits for Company A. (Tr. 88).

84. The Petitioner did not authorize any payroll checks, prepare federal tax returns for income or excise taxes or sign any such tax returns. (Tr. 88, 89).
85. The Petitioner did not authorize payment of federal tax deposits, review federal tax returns for Company A or determine any fiscal policy for Company A. (Tr. 89).
86. Other than the documents obtained from Money Matters, Petitioner had no knowledge with regard to any financial statements prepared for Company A nor any knowledge of any outside CPA or accountant of Company A other than Money Matters. (Tr. 89).
87. The Petitioner had limited knowledge with regard to the identity of any employees of Company A. (Tr. 90).
88. The Petitioner handled no contacts with the West Virginia State Tax Department on behalf of Company A. (Tr. 90).
89. Petitioner had no knowledge of any financial obligations of Company A being paid while the taxes for which Petitioner has been assessed accrued. (Tr. 92).
90. Petitioner had no knowledge with regard to any payrolls, net or otherwise, being made by Company A during the time that the tax liabilities in question accrued. (Tr. 93).
91. Petitioner had no obligations of Company A to employees or former employees. (Tr. 93).
92. Petitioner had no knowledge in terms of any decisions made or who would make decisions to pay or partially pay bills if there were inadequate funds for bill paying. (Tr. 93).
93. Petitioner had no knowledge of any person or organization providing any funds to Company A to pay payrolls. (Tr. 93).
94. The only investment of any kind in Company A made by the Petitioner was her time involved in studying for and taking the contractor's license test. (Tr. 94).

95. Petitioner made no decisions as to who would be paid or not paid with regard to invoices, billings or debts of Company A. (Tr. 95).

96. Of the hundreds of checks included in Petitioner's Group Exhibit A of which one (1) was signed by Petitioner, the remaining checks for Company A were signed by Mr. B. (Tr. 95).

### **DISCUSSION**

The Petitioner was one of the two only Members of Company A, which was incorporated by them on June 16, 2009, and ceased doing business on or around November 1, 2016. Company A is a construction and contracting company that operates in a County in West Virginia.

The Petitioner and Mr. B incorporated Company A and the Petitioner was the only holder of the contractor's license; however, she was not responsible for any financial or managerial aspect of the business. The Petitioner's testimony was unrebutted.

The Petitioner testified that she had no role in the business other than passing the contractor's examination and being the only holder of the contractor's license. The Petitioner testified to not knowing what was going on with financial matters as Mr. B was responsible for that and all other aspects of the business. The Petitioner was never responsible for any accounts payable, signing payroll checks, 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. Company A operated in this manner during the entire time the Petitioner was a member. The Petitioner's unrebutted testimony was that she was unaware of any tax issues until she received the Notice of Assessment from the Respondent. Upon receiving the Notice of Assessment, the Petitioner immediately contacted the bank where the business accounts were held, contacted Mr. B, and Money Matters regarding outstanding taxes.

The Respondent asserts that the Petitioner's status as a member is such that she should be held personally liable for the tax liabilities of Company A. To support his argument, the Respondent points to the Petitioner as being the sole holder of the contractor's license. The Respondent takes the position that had it not been for the Petitioner's holding of the contractor's license that Company A could not have been in existence.

The issue in this case is whether the Petitioner is personally liable for unremitted combined consumer sales and use tax and withholding taxes to the State of West Virginia for Company A due to her status as a member of the LLC. A vendor such as Company A provides services such as repair and remodeling work, and therefore is required to pay a six (6) percent sales tax<sup>3</sup> on those services 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 vendor<sup>4</sup> 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).

Pursuant to West Virginia Code §11-15-17, "[I]f 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

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<sup>3</sup> 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).

<sup>4</sup> 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 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).

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.

Although the Petitioner was an incorporator of the company and held the contractor’s license in her name, she had no job duties in any capacity, and that is where her role in Company A began and ended. 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, no withholding checks, or write checks on behalf of the business for any reason.<sup>5</sup> 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.

There is nothing in the record to base a determination that the Petitioner had any knowledge that there were any unpaid tax liabilities of Company A at any time. The uncontroverted evidence

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<sup>5</sup> The Petitioner did write one business check during the existence of Company A. It was a contribution check for her son’s project graduation fundraiser when he was graduating from high school. It was not to pay a vendor, taxes, payroll, or any other business obligation of Company A.

is that the acting managing member of Company A assured her that the taxes were in fact, paid. The Petitioner has clearly proven that the operation of business and all authority with regard to the financial affairs of the business, including but not limited to, collecting and remission of taxes to the State of West Virginia was accomplished under the control of Mr. B. Because the Petitioner had no knowledge of the tax delinquency or accruals of tax by Company A, and until such time as the State of West Virginia served her with the Assessments, she had no opportunity to exercise any potential authority she may have had as a member of Company A to see to the taxes being paid.

She clearly 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 assessments on behalf of Company A.

### 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 vendor<sup>6</sup> 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).

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<sup>6</sup> 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).

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 and withholding assessments issued against the Petitioner in her capacity as an officer of Company A for a total amount of \$ \_\_\_\_\_, for withholding taxes, and \$ \_\_\_\_\_ for combined sales and use tax, and should be and is hereby **VACATED** in its entirety.

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
Crystal S. Flanigan  
Administrative Law Judge

\_\_\_\_\_  
Date Entered