

REDACTED DECISION – DK# 17-064 CU-M

**BY: CRYSTAL S. FLANIGAN ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 17, 2019
ISSUED ON MAY 19, 2020**

FINAL DECISION

On November 28, 2016, the Tax Accounting Administration of the West Virginia State Tax Department (hereinafter “Tax Commissioner” or “Respondent”) issued an Officer Assessment letter (Letter Id# L0231289024) to James X (hereinafter “Petitioner”). The 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 of Company A, for combined sales and use tax for tax periods July 31, 2015, through June 20, 2016, in the amount of \$_____, in unpaid sales and use tax liability, interest of \$_____, and penalties and additions in the amount of \$_____, for a total sales tax liability in the amount of \$_____.

The Petitioner timely filed a Petition for Reassessment with this Tribunal on January 26, 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 June 5, 2019, in Martinsburg, West Virginia, and the matter became ripe for decision after post hearing briefs.

FINDINGS OF FACT

1. The Petitioner is the President and 80% owner of Company A, (hereinafter “Company A”) which was incorporated on April 8, 1985. (Tr. 7,15, Respondent’s Nos. 3 & 4).

2. John X is the Petitioner's son, the Officer and 10% owner of Company A. (Tr. 16, Respondent's Nos. 3 & 4).

3. Jane X is the Petitioner's daughter, the Officer and 10% owner of Company A. (Tr. 15, Respondent's Nos. 3 & 4).

4. Company A was incorporated in [REDACTED], [REDACTED], West Virginia as a grocery store, which later evolved into a restaurant and bar, named [REDACTED] (hereinafter "Diner"). (Tr. 7, 42, 48, Respondent's Ex. No. 3).

5. Company A ceased doing business on June 30, 2016, and the Petitioner signed the Intent to Cease Business Activity form as President of Company A. (Tr. 30, Respondent's Ex. No. 6).

6. The Petitioner had check signing authority on Company A's operating and lottery accounts. (Tr. 13, 49-50).

7. The Petitioner charged items on credit cards for the benefit of Company A. (Tr. 14).

8. The Petitioner prepared sales and use tax returns, paid income and withholding taxes, paid utility bills, and routinely made financial decisions for Company A. (Tr. 14-15, 18, 51).

9. The Petitioner supplied multiple capital infusions into Company A, including a 20 year loan of \$____ on or around 1996/1997 where the Petitioner was the only Guarantor on the loan. On or about 2008/2009, the Petitioner refinanced the loan of approximately \$____ and obtained additional funds of \$____. (Tr. 13-14 & 44-48).

10. The Petitioner testified that Jane X's position was for the sole purpose of obtaining the ABCA license. (Tr. 16).

11. The Petitioner would assume his son's duties, such as making food orders, paying bills, and handling employee and customer issues at the Diner when his son was often unavailable. (Tr. 17-18, 53-54).

12. The Petitioner assumed these duties for his son because he was a high school football coach. He worked at the Diner approximately 4 hours a day, 3-4 days a week, every week when his son was gone coaching high school football during August, September, October, and November of each season. (Tr. 54-55).

13. The Petitioner signed contracts on behalf of Company A with the West Virginia Department of Transportation for condemnation and easements. (Tr. 58-59).

14. The Petitioner signed approximately one half of Company A's sales and use tax returns. (Tr. 66, Respondent's Ex. No. 8).

DISCUSSION

The Petitioner was the President of Company A, which was incorporated on April 8, 1985, and ceased doing business on June 30, 2016. Company A began as a grocery store in [REDACTED], [REDACTED], West Virginia. It later evolved into a restaurant and bar, named [REDACTED] throughout the assessment period.

The Petitioner testified that he started the business for the benefit of his children, John X, Vice-President, and Jane X, Secretary/Treasurer. The Petitioner claims that he was an officer in name only and had a limited role in the business. Additionally, he avers that he never received a salary, was never on payroll, and often had to infuse money into the business. However, the Petitioner admitted to having check writing authority on the business accounts, could charge goods and services for the business, and routinely made financial decisions. Furthermore, he paid utilities, signed half of the sales and use tax returns, paid withholding taxes, paid income taxes,

and made the decision of which creditors to pay when Company A had insufficient funds. The Vice-President of Company A was also a high school football coach and was absent from the Diner during the fall months of the year. In his son's absence, the Petitioner would assume the Vice-President's duties and spent several hours a day, several days per week, managing the Diner.

The Respondent asserts that the Petitioner's status as an officer is such that he 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 President of Company A, having financial access and ability, and that he would assume the Vice-President's duties at the restaurant during the months of August-November. The issue in this case is whether the Petitioner is personally liable for unremitted combined consumer sales and use tax to the State of West Virginia for Company A, due to his status as the President of Company A. A vendor such as Company A provides restaurant/bar food and services and is therefore, required to pay a six (6) percent sales tax¹ 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 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).

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. §11-153(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).

Pursuant to West Virginia Code § 11-15-17, “[I]f a taxpayer is an association or corporation, the officers 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 is imposed...may be enforced against them as against the association or corporation which they represent.”³ 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.

The Petitioner started Company A in 1985 as a grocery store and then it later became a restaurant/bar. The Petitioner had financial control over the company, as he wrote checks to the State of West Virginia for sales and use tax, paid withholding, entered contracts on behalf of Company A, and wrote checks for business operating expenses. He signed several sales and use tax returns on behalf of the business and admitted that Company A owes the outstanding sales and use taxes.

The Petitioner has failed to prove that he was an officer “in name only” and that his son was the only responsible party for Company A. The Petitioner had as much control over the operation of

³ Neither party disputes that the Petitioner has defaulted on unpaid sales and use taxes.

business as the Vice-President and full authority regarding the financial affairs of the business, including but not limited to, collecting and remission of taxes to the State of West Virginia.

The Petitioner clearly made financial and managerial decisions, including the founding of the business in 1985 and cessation of the business in 2016, two of the most fundamental aspects of any business. The Petitioner borrowed \$_____ dollars in 1996/1997 to transform the grocery store into a restaurant and he was the only signer on this loan. In 2008/2009, the Petitioner refinanced the outstanding balance of \$_____ and borrowed additional funds of \$_____. He was a signer on the refinanced loan but could not recall if his son was also a signer. The Petitioner was President of Company A for 31 years, guaranteed large loans for Company A, had financial and managerial control of Company A, signed tax returns, entered contracts on behalf of Company A, and solely ran Company A 4 months a year. Clearly, all these activities do not point to an absentee officer who has little or no financial or managerial control.

Therefore, this Tribunal finds the Petitioner has not met his burden to prevail in the instant matter and holds that he is personally responsible as an officer 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 vendor⁴ shall collect from the purchaser the tax as provided under this article,

⁴ 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 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 may be 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 his 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. Imposing liability on a corporate officer who had managerial and financial control over business operations, paid employee withholding, paid various creditors, signed contracts on behalf of Company A, and prepared and signed consumer sales and use tax returns for the business, meets the fundamental fairness test in *Schmehl*.

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

8. Petitioner has failed to carry 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 combined consumer sales and use tax assessment issued against the Petitioner in his capacity as an officer of Company A for a total amount of \$_____, for combined sales and use tax, is **AFFIRMED** in its entirety.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. See W. Va. Code Ann. § 11-10-17(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

Crystal S. Flanigan
Administrative Law Judge

Date Entered