

REDACTED DECISION – DK# 17-249 W, 17-284 CU-M

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 9, 2019
ISSUED ON JUNE 5, 2020**

FINAL DECISION

On September 6, 2017, the Tax Accounting Administration of the West Virginia State Tax Department (hereinafter “Tax Commissioner” or “Respondent”) issued two Officer Assessment letters (Letter ID# L0348680896 and Letter ID# L2028655296) to John Smith (hereinafter “Petitioner”). The 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 state that assessment had been made personally against the Petitioner as a responsible individual of Acme LLC, for combined sales and use tax for tax periods July 31, 2013 through November 31, 2015, 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 \$_____. However, the Tax Commissioner included two tax periods, October 2015 and November 2015, in this assessment that are subsequent to the Petitioner’s ownership as a member. Accordingly, these two tax periods will not be included in this assessment (Letter ID# L0348680896) and therefore, reducing the amount due \$_____. The Petitioner’s assessment for the money penalty for withholding tax for tax periods June 30, 2014 through December 31, 2014, in the amount of \$_____. The Petitioner’s October 21, 2017 statement of account (Letter ID# L0264800960) for unpaid combined sales and use tax for tax periods July 31, 2013 through November 30, 2015, in the amount of \$_____, interest of \$_____, and penalties and additions in the amount of \$_____. However, this statement of account also included tax periods October 2015 and November 2015, and accordingly, these tax periods will

not be included in the outstanding taxes due (Letter ID# L0264800960) thus, making the amount due in unpaid combined sales and use tax for tax periods July 31, 2013 through September 30, 2015, in the amount of \$_____ for unpaid sales and use tax liability, interest of \$_____, and penalties and additions in the amount of \$_____, for a total tax liability of the \$_____.¹

The Petitioner timely filed a Petition for Reassessment with this Tribunal on November 6, 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 was a manager/organizer of Acme Company, LLC, (hereinafter “Acme LLC”) which was organized on February 18, 2005. (Respondent’s No. 5).
2. Jane Doe, formerly Smith, (hereinafter “Jane Doe” or “Ms. Doe”) is the Petitioner’s ex-wife, and was also a manager/organizer of Acme LLC. (Respondent’s No. 5).
3. Acme LLC was incorporated in River County, Rivertown, West Virginia as a restaurant/bar which operated as Baker Company LLC. (Tr.83, Respondent’s Ex. No. 5).
4. The Petitioner is a retired police officer of Terrapin County, Maryland where he worked for 28 years. Ms. Doe had work experience in the restaurant industry. (Tr. 7).
5. The Petitioner and Ms. Doe decided to open a restaurant and it was financed with the Petitioner’s assets and a bank loan. (Tr. 7-11).

¹ The Petitioner wished to have the evidentiary hearing on all outstanding taxes, including the statement of account (Letter ID # L0264800960) so that he would only have to have one hearing as opposed to two separate hearings with the same facts. (Tr. 2-4).

6. The restaurant originally had only four picnic tables but on or about 2007/2008, the Petitioner and Ms. Doe decided to expand the business with additional seating financed by a loan obtained by the Petitioner. (Tr.8-11).

7. The Petitioner testified that he had invested approximately \$_____ in the business through his retirement and bank loans from BB&T to finance costs to open the business and refinanced the loan to pay for the building's additional square footage. (Tr. 62-64).

8. All credit accounts for food distributors were established in the Petitioner's name due to Ms. Doe's poor credit. (Tr. 10).

9. The Petitioner also had checking signing authority and signed checks for the restaurant. (Tr. 58-59).

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

11. From 2005 through 2008, the Petitioner spent a considerable amount of time working at the restaurant in a variety of capacities. (Tr. 9).

12. Starting in 2009, the Petitioner was diagnosed with end-stage organ disease, was hospitalized, and began kidney dialysis four hours a day, three days a week until April 2010. (Tr, 9).

13. In April 2010, the Petitioner had an organ transplant at Johns Hopkins Hospital. Consequently, the Petitioner spent less time at the restaurant during 2009, 2010, and 2011. (Tr. 9, 56-58, 86).

14. In August 2012, the Petitioner started employment with the Department of Defense as a contractor and only went back to the restaurant periodically, but he admits that he could have signed business checks. (Tr. 9, 86, 89).

15. In 2012, the Petitioner and Ms. Doe decided to sell the business. (Tr. 10).

16. Mary Roe is Ms. Doe's first cousin and had worked at the restaurant as a bar manager from its inception. (Tr. 48-49).

17. Ms. Roe testified that the Petitioner had an active role in the beginning but as the years progressed the business was solely operated by Ms. Doe. (Tr. 49).

18. Ms. Roe also testified that she would often sign the name of Ms. Doe to various checks but never signed the Petitioner's name. (Tr. 53).

19. The Petitioner did not hire, terminate, or manage employees, or negotiate with suppliers, leases, contracts, or equipment rentals. (Tr. 64).

20. The Petitioner signed tax returns that were prepared by an accounting firm in the early years of the business. (Tr. 65).

21. The Petitioner could not remember if he had signed tax returns during the 2013-2015 tax years but admitted that it was possible that he could have. (Tr. 88).

22. The Petitioner conceded that he probably authorized payments for federal taxes, federal withholding, social security, and unemployment in early years of the business. (Tr. 65).

23. The Petitioner was unaware of the outstanding taxes until he received the officer liability assessments. (Tr. 66).

24. In the early years of the business, the Petitioner and Ms. Doe shared equally in dealing with the accountants and the taxes, but the Petitioner is unaware of who did them during the assessment years. (Tr. 68, 88).

25. On September 9, 2015, the Petitioner signed his interest in the business over to an accountant and Ms. Doe with the business name changing to Baker Company. (Tr. 10-11, Petitioner's Nos. 5 & 8).

DISCUSSION

The Petitioner was a police officer with Terrapin County, Maryland and retired from there after 28 years. His ex-wife, Jane Doe, had significant experience in the restaurant industry and had worked at Anthony's in Little Italy and the Havana Club. Based on her restaurant experience and the difficulty she was having obtaining employment, they decided to open their own business. The Petitioner and Ms. Doe were both managers/organizers of Acme LLC, which was organized on February 18, 2005, and ceased doing business on September 9, 2015. Acme LLC operated as a restaurant known as Baker Company in Rivertown, West Virginia.

The Petitioner admits that he had an active role in the business during 2005-2008. The Petitioner and Ms. Doe started the business with his assets and a bank loan. He had check signing authority and filed and remitted West Virginia sales and use tax, signed federal tax returns and authorized payments for federal taxes, federal withholding, social security, and unemployment in the early years of the business. Despite his role in the business, he avers that he never received a salary, was never on payroll, but infused money into the business, including the cost of increasing square footage of the restaurant in 2007/2008.

In 2009, the Petitioner began to have health problems and ultimately, an organ transplant at Johns Hopkins Hospital in April of 2010. According to the Petitioner and Mary Roe's testimony, it was during this time and through the closure of the business that Ms. Doe was the member primarily in charge of the operations and finances. Ms. Roe is Ms. Doe's first cousin and was the bar manager since the inception of the business. She testified that the Petitioner was active in the business in the first four years but that he reduced his role in the business after 2009. Ms. Roe often signed Ms. Doe's name to checks but never signed the Petitioner's name.

The Petitioner avers that he had a very reduced role from 2009-2011 due to his illness and recovery from organ failure and an organ transplant. By 2012, the Petitioner and Ms. Doe concluded that they should sell the restaurant due to it not being profitable. In 2012, the Petitioner also started working with the Department of Defense as a contractor and only went back to the restaurant periodically but admits that he could have signed business checks. Thereafter, the Petitioner was unaware of who was filing the returns or handling the tax issues during the assessment periods of 2013-2015. The Petitioner also admitted that he couldn't remember if he had signed tax returns during this time, but that it was possible that he could have. Moreover, he did not have any knowledge of the assessments at issue until he received the September 6, 2017 notices.

The only issue in this case is whether the Petitioner is personally liable for unremitted combined consumer sales and use tax and withholding to the State of West Virginia for Acme LLC, due to his status as a member of Acme LLC. A vendor such as Acme LLC provides restaurant/bar food and services and is therefore, required to pay a six (6) percent sales tax² 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 vendor³ 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

² 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).

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).

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 Section 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.” 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 and Ms. Doe started Acme LLC in 2005, and up and until 2009, the Petitioner had a very active role in the operations and finances of the restaurant. As time moved forward, he had a severe illness where he substantially reduced his role by 2012. After 2012, Ms. Doe was primarily in charge of the finances, taxes, and operations of the restaurant. The Petitioner testified that he was unaware of the outstanding taxes during the assessment periods until he received the notice of assessments.

This Tribunal has carefully weighed all the facts and law of this matter and is sympathetic to the Petitioner's health and social situation. Certainly, the phrase "no good deed goes unpunished" clearly comes to mind with this case. The Petitioner had spent a large amount of money, credit, energy, effort, and time to start this business with his ex-wife which was essentially to provide her a job. Ms. Doe came to the business with no financial investment and bad credit. All the Petitioner's efforts were later repaid by a notice of assessment for unpaid taxes. The business relationship between the Petitioner and his ex-wife was obviously one-sided to her benefit. While this Tribunal certainly understands this situation, it cannot rule based upon sympathy alone. We must rule only upon the facts and the law of case before us.

The Petitioner certainly had an active role in the business from 2005-2008. He and Mary Roe both testified that after 2009 his activity was substantially reduced. While his role was lessened, he still had some financial activity, access, and control over the business. There are tax returns that confirm that he signed checks and returns post 2009 and did not remove his name from the business charter until he signed it over in September 2015. Furthermore, he could not unequivocally deny that he never again signed a check or tax return after 2009 but admitted that he could have and "wouldn't be surprised if he did."

The crux of the Petitioner's theory is that his reduced role should absolve him from the any tax liability. He further argues that Ms. Doe was the primary manager of operations and finances and as such, she should be solely liable. There are limited circumstances, under *Schmehl's* fundamental fairness test where, sole liability to one member to the exclusion to other members may occur.

For example, one member of a two-member limited liability company could prohibit the other member from entry to the business and to the books. In that situation, the prohibited member could be absolved from tax liability. Another circumstance may include one member of a multi

member business, only working in the plant or operations and having no financial access and control, may be found not liable. Another example is if one member was the sole license holder and was not involved in managing the business, had no financial access or control, and was essentially an officer in name only, then that member could be absolved of tax liability. Thus, had Ms. Doe denied the Petitioner access to the business by prohibiting him from entering the property or denying him access to checks and financial records, then he may have been absolved from tax liability. However, those are simply not the facts of this case.

The Petitioner asks this Tribunal to accept the argument that he could still have financial access and control, but at the same time be able to disregard any financial accountability. An officer or member of a business cannot ignore financial responsibilities because of reduced activity, especially after being extremely involved and knowing what is financially required. This is especially true for a small limited liability company where there are only two active members accountable for paying the bills, taxes, payroll, etc. On the contrary, tax liability may not occur where there is a several member limited liability company or a multi officer corporation that has an accounting department dedicated to handling the finances of the business.

Therefore, this Tribunal finds the Petitioner has not met his burden to prevail in the instant matter and holds that he is personally responsible for outstanding taxes as an officer of Acme 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 vendor⁴ 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).

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 member of a limited liability company who had managerial and financial control over business operations, had check writing authority, had credit in his name for the business, invested approximately \$_____ into the business, paid various business expenses, paid withholding, paid federal tax returns, and prepared and signed

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).

West Virginia consumer sales and use tax returns for Acme LLC, 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 in this matter has not carried 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 and withholding assessments issued against the Petitioner in his capacity as a member of Acme LLC for a total amount of \$_____ is AFFIRMED.⁵

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

By: _____
Crystal S. Flanigan
Administrative Law Judge

Date Entered

⁵ This amount does not include the tax periods of October 2015 and November 2015 as they are subsequent to the Petitioner's ownership of the business as further explained *supra*, pgs. 2 and 3.