

REDACTED DECISION – DK# 19-484 OFFICER

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 13, 2021
ISSUED AND REVISED ON JUNE 8, 2022**

FINAL DECISION

On June 13, 2019, the Tax Accounting Administration of the West Virginia State Tax Department (hereinafter “Tax Commissioner” or “Respondent”) issued two officer assessment letters (Letter Id# L0682677184 and L1679627200) and on July 19, 2019, issued (Letter Id# L2128104384) to Petitioner Jane X (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 June 13, 2019, officer assessments stated that an assessment had been made personally against the Petitioner as a responsible individual of Alpha Company, LLC, (hereinafter “Alpha LLC”) for combined sales and use tax for tax year 2015 and tax periods ending September 30, 2017-May 31, 2018, in the amount of \$_____ and the money penalty for withholding taxes for tax period ending March 31, 2018 in the amount of \$_____. The July 19, 2019, officer assessment stated that an assessment had been made personally against the Petitioner as a responsible individual of Alpha LLC for combined sales and use tax for tax period ending June 30, 2018, in the amount of \$_____.

The Petitioner timely filed her Petition for Reassessment with this Tribunal on September 17, 2019. 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 24, 2021, in Charleston, West Virginia, and the matter became ripe for decision after post hearing briefs.

FINDINGS OF FACT

1. Alpha LLC is a West Virginia limited liability company. Pet’r. Ex. No. 1.

2. Alpha LLC operated Beta Company (hereinafter “Beta Company”) in a city, West Virginia. TR. 6-7.
3. The sole member of Alpha LLC is Gamma Company, LLC (hereinafter “Gamma LLC”). Pet’r. Ex. No. 1.
4. John Y is listed as a member of Gamma LLC for the tax years at issue, 2015, 2017 and 2018. Resp’t. Ex. Nos. 5 and 7.
5. The Petitioner is not an officer or member of Alpha LLC or Gamma LLC. Pet’r. Ex. Nos. 1 and 2.
6. The Petitioner was an employee for Alpha LLC. Tr. 20.
7. The Petitioner testified that she was the bookkeeper of Beta Company and other businesses. Tr. 6-7, 53.
8. The Petitioner had power of attorney for Alpha LLC and Gamma LLC. Tr. 65.
9. The Petitioner had check signing authority, was on the business bank accounts, and signed many tax returns with their corresponding checks. Resp’t. Ex. No. 1., Tr. 58-59.
10. The Petitioner negotiated prices and purchases for supplies. Tr. 60.
11. The Petitioner processed payroll and made payroll disbursements for Alpha LLC. Tr. 60.
12. The Petitioner made Federal Income Tax withholding payments. Tr. 60-61.
13. The Petitioner paid West Virginia Sales and Use Tax payments and withholding payments. Tr. 11.
14. The Petitioner signed the cessation of business activity form for Alpha LLC. Resp’t. Ex. No. 1.
15. The Petitioner had authority to hire and fire employees of Alpha LLC. Tr. 59.

16. The Petitioner managed the daily operations, including managing employees, paying utility bills, supplies, etc., for Beta Company. Tr. 51, 59.

DISCUSSION

The issue in this case is whether the Petitioner is personally liable as an officer for unremitted combined consumer sales and use tax and withholding taxes to the State of West Virginia for Alpha LLC. Alpha LLC operated Beta Company which is a private club that offered adult entertainment and sold alcohol, and therefore is 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).

The controlling statute for officer liability cases in West Virginia is as follows:

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. (Emphasis added.)

W. Va. Code Ann. § 11-15-17 (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. §11-15-3(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).

Although the above statute may appear to impose strict liability to corporate officers as being personally liable for business 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 evidence, giving due deference to the statute's general authorization for the imposition of such liability.

Schmehl, at Syl. pt. 3.

In the instant case, the Petitioner was an employee of Alpha LLC, and had many operational duties. She was responsible for the employees, paid bills and vendors, signed tax returns, and wrote checks. She, in fact, had a significant amount of involvement with Alpha LLC. However, she is not an officer or member of Alpha LLC. The sole member of Alpha LLC is Gamma LLC, and the only member of Gamma LLC during the assessment periods is John Y. Prior to the assessment periods the only member of Gamma LLC was Robert Y. The Petitioner has never been an owner, officer, or member of either business. The Respondent assessed the Petitioner under the officer liability statute arguing that she is a responsible person.

The Petitioner argues that she was not a responsible person because she was not an officer, and that Gamma LLC is the responsible party for Alpha LLC. The Petitioner further argues that West Virginia Code Section 11-15-17 could be applied in an unconstitutional manner under *Haden v. Calico Awning and Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969). The Petitioner argues there was only the *possibility* of personal liability for the taxpayer corporation being construed upon

owners and officers. As she was neither an owner nor officer of Alpha LLC or Gamma LLC, then she cannot be held liable.

The Petitioner further avers statutes interpreting taxation are generally construed in favor of the taxpayer and against the government, citing to *Coordinating Council for Independent Living, Inc., v. State Tax Commissioner*, 209 W.Va. 274, 546 S.E.2d 454 (2001).

Finally, the Petitioner argues that she was not liable to pay the Alpha LLC's tax liability because she did not possess or exercise ultimate authority over the disbursement of funds because she paid them at the behest of John Y.

The Respondent counters that any individual can be a "responsible person" for a corporation or association's tax liabilities who is *not an officer*. West Virginia Code Sections 11-10-4 defines the term "person" and 11-10-19(a) which describes the situations under which penalties may be assessed and 11-10-19(d) describes penalties collected. The Respondent makes the argument that when read together, a person who is a bookkeeper, officer manager, corporate officer, or any other individual who is responsible for paying tax debts regardless of their officer status, may be held personally liable for the tax debts of a business. The Respondent further stretches this argument to not only impute someone who fails to collect and remit taxes but also to any individual could write checks even if that individual does not actually write any checks.

The Respondent concedes there are no West Virginia Supreme Court cases on the application of West Virginia Code Section 11-10-19 and the definition of responsible person. Instead, the Respondent supports his argument with persuasive authority from the federal code and federal case law.³ However, as discussed *supra*, the controlling law in West Virginia is West Virginia Code Section 11-15-17 which is void of any mention of an *employee* being held personally responsible for taxes. The Respondent further attempts to confer responsibility of an officer to an employee by

³ See 26 USC 6672, *Thomsen v. United States*, 887 F.2d 12 (1989), *Gephart v. United States*, 818 F.2d 469 (1987).

relying on West Virginia Code of State Regulations Sections 110-15-4a., et seq. These regulations describe officers and how they would be personally liable for defaulted taxes. Again, the Petitioner is not an officer or member of Alpha LLC or Gamma LLC. Furthermore, if this Tribunal would accept that premise, then officer liability could be shifted from an owner who receives all the benefits of business ownership to an employee who receives none of those benefits yet absorbs unlimited tax risks.

Additionally, the Respondent insists that imposing personal liability to the Petitioner is not arbitrary, capricious, or unreasonable under *Schmehl*. In *Schmehl*, a bookkeeper who was also a corporate officer for a restaurant and bar business was held personally responsible for unremitted consumer sales tax. The court further held that it was not fundamentally unfair or arbitrary, capricious, or unreasonable to hold him personally liable. In the instant case, the Petitioner was a bookkeeper who filed tax returns and remitted sales taxes on behalf of Alpha LLC and Gamma LLC. Unlike Mr. Schmehl, she is not an officer and does not meet the basic requirements of West Virginia Code Section 11-15-17. Therefore, it would be fundamentally unfair to hold her personally liable as an officer of Alpha LLC or Gamma LLC under *Schmehl*.

The Respondent also argues that the Petitioner is an officer of Gamma LLC, the sole member of Alpha LLC. The reliance upon the Petitioner being an officer is unsupported. The Respondent relies upon the West Virginia Secretary of State's Business Organizational Database listing that has officers and type of officer. The listing has as a Member, John Y, and below it has Organizer, Jane X. *See* Pet'r. Ex. No. 2. However, the Respondent does not cite to any West Virginia authority about how an organizer of a corporation is the same as an officer or a member. If she were a member, she would be listed as such. Accordingly, we find this argument without merit.

The Respondent further attempts to cast the Petitioner as a member by directing us to Alpha LLC's annual report where the Petitioner is listed under the Member section as "having

authority to sign filings” but the word “member” is scratched out and the word “organizer” is handwritten above it and signed by Mary Smith, as a member of Alpha LLC on October 23, 2013. Ms. Smith clearly designates that the Petitioner is an organizer and not another member of Alpha LLC. *See Resp’t. Ex. No. 6, pg. 5.* More importantly, this 2013 document does not pertain to the time frame of the assessments, which are 2015 and 2017-2018. This Tribunal finds this exhibit as substantively inaccurate in an attempt to confer liability on the Petitioner and that is it also outside the assessment period. Therefore, this argument is without merit.

The Respondent relies on several Annual Reports to argue that the Petitioner is a member of Gamma LLC. However, these reports first list Robert Y as the sole member for tax years 2013 and 2014 which are not part of the assessment years. The Annual Reports list John Y as the sole member of Gamma LLC for tax years 2015-2018 which are the assessment periods. The Petitioner is listed as the power of attorney and the agent of process on these annual reports but **not one** of these reports lists Jane X as a member. *See Resp’t. Ex. No. 7.* Accordingly, this Tribunal finds that argument is without merit.

Lastly, the Respondent again argues that even if the Petitioner does not meet the requirements under West Virginia Code Section 11-15-17, that she should still be found as a “responsible person” under West Code Sections 11-10-4 and 11-10-19. He reiterates that this Tribunal should follow federal persuasive authority and find that *Thomsen* and *Gephart* apply to the instant case. However, West Virginia has a binding, applicable statute, and this Tribunal cannot ignore it and substitute persuasive authority in its stead.

The Petitioner handled many managerial, operational, and financial tasks for Alpha LLC. This Tribunal certainly understands the Respondent’s arguments and if the Petitioner had been an officer,

owner, or member, it would have likely found her as a responsible person. However, it cannot expand West Virginia Code Section 11-15-17 to include employees who hold no member or officer status.⁴

The Respondent also assessed the Petitioner a money penalty for withholding taxes pursuant to West Virginia Code Section 11-10-19 for the tax period ending March 31, 2018, for \$639.00. West Virginia Code Section states the following regarding 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 (West).

West Virginia Code Section 11-21-71 requires employers to deduct and withhold taxes on employee's wages as follows:

General.- Every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's West Virginia adjusted gross income of wages received during such calendar year.

W. Va. Code Ann. § 11-21-71 (West).

West Virginia Code Section 11-21-75 details an employer's liability:

Every employer required to deduct and withhold tax under this article is hereby made liable for such tax. To the extent not inconsistent with

⁴ This Tribunal expressly overrules docket number 13-143 where it held that an officer manager who was an employee and not an officer as a "responsible person" by relying upon persuasive federal authority. This Tribunal now holds that this decision was error and that there has been binding West Virginia authority on this issue. This Tribunal will continue to follow West Virginia Code Section 11-15-17 until the West Virginia Supreme Court of Appeals or the West Virginia Legislature directs it to follow something to the contrary.

the provisions of this article, all of the provisions of article ten of this chapter and section ninety-two of this article twenty-one, relating to assessment and collection of taxes, and to penalties, additions to tax and interest in respect thereto, shall apply to every employer required to withhold tax under this article. For such purposes any amount required to be withheld and paid over to the tax commissioner shall be considered the tax of the employer. Any amount of tax actually deducted and withheld under this article shall be held to be a special fund in trust for the tax commissioner. No employee shall have any right of action against his employer in respect to any moneys deducted and withheld from his wages and paid over to the tax commissioner in compliance or in intended compliance with this article.

W. Va. Code Ann. § 11-21-75 (West).

West Virginia Code Section 11-21-76 deals with failure to withhold:

If an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

W. Va. Code Ann. § 11-21-76 (West).

Upon reviewing the withholding statutes, they collectively are discussing the duties, liabilities, and failures of **employers**. Employers are required to withhold payroll taxes in trust on behalf of its employees. Employers are liable for these amounts and if they do not pay them, they are assessed penalties, interest, and additions. In the instant case, the Petitioner is an employee and not an employer. These statutes are devoid of any mention of an employee being responsible for withholding taxes. As an employee, she could not be held accountable for the withholding taxes. Therefore, she cannot be liable for the money penalty for withholding assessed against her in this matter.

In summation, there is only one statutory provision under West Virginia law, which holds individuals liable for payment of another's tax obligations, and that is West Virginia Code Section 11-15-17. However, Section 17, by its plain language, only applies to officers of associations and corporations, and the Petitioner in this matter is neither. Nor is she a "person" required to collect,

account for, and pay over any tax as that term is used in West Virginia Code Section 11-10-19. This Tribunal is cognizant of the Tax Commissioner's moral argument that certain employees are knowingly participating in their employer's violations of West Virginia's tax laws, however, that is a situation that necessitates legislative action.

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 vendor⁵ 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 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 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).

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. 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).

7. “Every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee’s wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee’s West Virginia adjusted gross income of wages received during such calendar year.” W. Va. Code Ann. § 11-21-71 (West).

8. “Every employer required to deduct and withhold tax under this article is hereby made liable for such tax. To the extent not inconsistent with the provisions of this article, all of the provisions of article ten of this chapter and section ninety-two of this article twenty-one, relating to assessment and collection of taxes, and to penalties, additions to tax and interest in respect thereto, shall apply to every employer required to withhold tax under this article. For such purposes any amount required to be withheld and paid over to the tax commissioner shall be considered the tax of the employer. Any amount of tax actually deducted and withheld under this article shall be held to be a special fund in trust for the tax commissioner. No employee shall have any right of action against his employer in respect to any moneys deducted and withheld from his

wages and paid over to the tax commissioner in compliance or in intended compliance with this article.” W.Va. Code Ann. § 11-21-75 (West).

9. “If an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.” W.Va. Code Ann. § 11-21-76 (West).

10. 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 issued against the Petitioner for \$____ and the money penalty for withholding taxes in the 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