

**SANITIZED DECISION -- 06-044 W -- BY GEORGE V. PIPER, ALJ --
SUBMITTED for DECISION on JUNE 2, 2006 -- ISSUED on JUNE 26, 2006**

SYNOPSIS

WITHHOLDING TAX -- PETITIONER NOT LIABLE FOR “MONEY PENALTY” (TAX) AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO “WILLFULLY” FAILED TO DO SO -- Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil “money penalty” (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) he or she was “required” to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she “willfully” failed truthfully to perform these responsibilities on behalf of the corporation.

A person was “required” to collect, account for and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

The term “willfully” failed truthfully to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the money penalty tax assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

Accordingly, a person not associated with the corporation at the time in question is not personally liable for the unpaid withholding tax liability of the corporation if one or both of the two requirements for personal liability are lacking.

FINAL DECISION

On December 15, 2005, the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a West Virginia withholding tax “money penalty” assessment against the Petitioner, as a person allegedly responsible for that tax on behalf of a certain non-profit corporation. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. This assessment was for the years 2001 through 2004, for a “money penalty” (tax, excluding

interest and additions) and a total assessed withholding tax liability of \$. Written notice of this withholding tax money penalty assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 23, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W.Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. At the inception the Petitioner was listed in the official corporate records in the West Virginia Secretary of State's Office as the treasurer of the corporation.

2. Written documentation supplied at the hearing and immediately thereafter revealed that an individual other than the Petitioner was remitting taxes to the West Virginia State Tax Commissioner's Office prior to periods covered in the estimated tax assessment.

3. Testimony from both the Petitioner and his wife indicated that at no time was Petitioner the treasurer of the corporation and he was never involved in the financial or management operations of same.

4. Respondent presented no evidence at all that Petitioner had filed any of the corporation's tax returns or had anything to do with its financial operations during the assessment period.

5. Applying the withholding tax substantive and procedural law, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that (1) the Petitioner has shown that he was not one of the persons “required” to collect, account for, and pay over the withholding tax on behalf of the corporation.

6. In addition, the Petitioner, prior to the withholding tax money penalty assessment against him was not aware of the default of the corporation with respect to its withholding tax liabilities, having never been involved in any of its tax obligations.

DISCUSSION

With respect to the withholding tax assessment, the issue is whether the Petitioner is one of the individuals who is personally responsible for all or any portion of the unpaid withholding tax liability of the corporation for the periods involved in the assessment of that tax in this matter.

An employer is liable for withholding taxes withheld from employees’ wages but not remitted, W. Va. Code § 11-21-75 [1990], and the withheld-but-not-remitted withholding taxes are trust fund moneys belonging to the West Virginia State Tax Commissioner. W. Va. Code § 11-10-5j [1986].

The West Virginia Tax Procedure and Administration Act, specifically, W. Va. Code § 11-10-19(a) [1978], provides (in relevant part) as follows:

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 person who willfully attempts in any manner

to evade or defeat any such tax or the payment thereof, shall . . . be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over.

(emphasis added) For purposes of the West Virginia Tax Procedure and Administration Act, a “person” is defined by W. Va. Code § 11-10-4(b) [1979] to include a “corporation . . . and also any officer, employee or member [thereof] . . . who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of this article[.]” The question, then, is which persons are responsible for collecting, accounting for, and paying over a corporation’s withholding tax liabilities.

W. Va. Code § 11-10-19(a) [1978], quoted previously, is derived from and is virtually identical to section 6672(a) of the Internal Revenue Code of 1986 (and its predecessors). *See also* Treas. Reg. § 301.6672-1 (1986). Therefore, precedents deciding issues under that federal tax provision are very persuasive in deciding the same issues under W. Va. Code § 11-10-19(a) [1978].

Generally, a “person required” to collect, account for, and pay over a withholding tax, for purposes of Internal Revenue Code § 6672(a) -- and, therefore, for purposes of W. Va. Code § 11-10-19(a) [1978] -- is any person who had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, such as deciding which corporate debts, including taxes, would be paid. *See, e.g., O’Connor v. United States*, 956 F.2d 48 (4th Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993) (Faber, J.).

Under Internal Revenue Code § 6672(a), and, therefore, under W. Va. Code § 11-10-19(a) [1978], the “willful” failure to prevent or to correct the corporation’s withholding tax default is usually the key element in deciding who is personally liable for that default. In the context of these civil penalty statutes, the term “willful” failure to collect, account for, and pay over a withholding tax does not require a criminal intent, such as an evil motive to defraud. On the other hand, these statutes require more than a negligent failure to collect, account for, and pay over the tax. Instead, the person in question must knowingly or recklessly fail to collect, account for, and pay over the withholding tax. *See, e.g., Turpin v. United States*, 970 F.2d 1344 (4th Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993).

In addition to the foregoing substantive law, the relevant procedural law is that, in a hearing on a petition for reassessment, the burden of proof is upon the person assessed to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002].

CONCLUSIONS OF LAW

1. Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil “money penalty” (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) if he or she was “required” to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she “willfully” failed truthfully to perform these responsibilities on behalf of the corporation.

2. A person was “required” to collect, account for, and pay over a withholding tax,

within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

3. The term “willfully” failed truthfully to collect, account for, and pay over the withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the withholding tax money penalty assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

4. The Petitioner is not personally liable for the unpaid withholding tax liability of the corporation for the periods involved in the assessment of that tax in this matter.

DISPOSITION

Wherefore, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the years of 2001 through 2004, for tax (excluding interest and additions) and a total assessed liability of \$, should be and is hereby **FULLY VACATED**, and no withholding tax is due from the Petitioner on behalf of this corporation for the periods in question.