

REDACTED DECISION – DOCKET #S 09-004 C & 09-005 W – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on AUGUST 3, 2009 – ISSUED on FEBRUARY 3, 2010.

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX – LIABILITY OF CORPORATE OFFICER – DUE PROCESS PRINCIPLES – “Under the due process 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, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.” Syllabus point 3, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008).

CONSUMERS SALES AND SERVICE TAX – LIABILITY OF CORPORATE OFFICER – DUE PROCESS PRINCIPLES – It does not comport with the principles of due process, and it is unreasonable and is fundamentally unfair to impose liability on a corporate officer who never actively participated in the management of the business and who had no duty or authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation.

PERSONAL INCOME TAX WITHHOLDING – LIABILITY OF “RESPONSIBLE PERSON” – *W. Va. Code* § 11-10-19(a) provides, “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.

PERSONAL INCOME TAX WITHHOLDING – LIABILITY OF “RESPONSIBLE PERSON” – An individual who is a corporate officer but who did not actively participate in the management of the business and who had no duty or authority to account for, make return of or pay over the personal income tax withheld from the corporation's employees and who does not sign any checks in payment thereof, is not a “person responsible for the payment of personal income tax withheld.

FINAL DECISION

On November 3, 2008, the Compliance Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a consumers sales and service tax assessment against the Petitioner, in her capacity as an officer of a corporation. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of June 1, 2000, through December 31, 2003, for tax in the amount of \$____, interest in the amount of \$____, computed through November 3, 2008, and additions to tax in the amount of \$____, for a total assessed tax liability of \$_____.

Also, on November 3, 2008, the Commissioner (by the Division) issued a personal income tax withholding money penalty assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2004, through December 31, 2005, for a total assessed money penalty liability in the amount of \$_____.

Written notice of both assessments was served on the Petitioner.

Thereafter, by mail postmarked December 31, 2008, received on January 6, 2009, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner is the Secretary of the corporation.
2. The corporation was chartered on September 30, 1988, by her father and its corporate charter was revoked on October 10, 1997.

3. The Petitioner kept minutes of the few meetings that were held. She recalls a meeting in 1988, but is not sure when others took place.

4. The principals of the corporation probably observed at least some of the corporate procedural requirements until the early 1990s.

5. The Petitioner never resigned as Secretary.

6. The Petitioner is a school teacher.

7. The corporation sold and serviced small lawn and garden tools, such as lawn mowers, lawn trimmers, chain saws and tractors.

8. The Petitioner's father opened the original store in a city in West Virginia, prior to incorporating.

9. Her father opened a second store in another city in West Virginia, in 1986, and operated it until approximately 1994.

10. Her father operated both stores until he and his wife moved to a county in West Virginia in the early 1990s so that they could devote time to caring for his mother.

11. Thereafter her father operated the store in that county until it closed in the early 1990s, and his son operated the other store.

12. The only time the Petitioner worked for the corporation was for a short period of time when she was laid off as a teacher due to a reduction-in-force in a county in West Virginia's school system. She recalls that this was prior to the business incorporating.

13. The Petitioner cleaned and stocked shelves. At no time was she responsible for purchasing, selling or paying any bills.

14. The petitioner testified that her brother operated the corporation after her father ceased working in the business so that he and his wife could care for his mother.

15. The brother was the primary operator at the time of the assessments.
16. The Petitioner was never authorized to sign on the business bank account maintained by the corporation and never signed any checks on behalf of the corporation.
17. The consumers sales and service tax returns that were filed were signed by the brother.
18. The Petitioner never prepared, signed or filed any tax returns on behalf of the corporation, nor had any duty to do so.
19. Only four Forms W-2 were found for 2004. The total amount withheld for those four employees, including the brother and his wife, was \$582.00.
20. The Petitioner's father testified that he couldn't say with certainty how many employees the corporation had during 2004.
21. He testified that he is relatively certain that the corporation did not have more than the employees for which the Petitioner presented Forms W-2.
22. The petitioner does not recall more than one or two employees, other than her brother and sister-in-law.
23. After her parents moved to another county in West Virginia in the early 1990s, she would go to the store to visit with her parents when they were in visiting, to see her brother for personal reasons or to pick up her brother's children to take them to her house.
24. The Petitioner had no responsibility for the day-to-day operations of the business during the assessment period or for at least the ten preceding years.
25. The Petitioner was never compensated in her capacity as secretary of the corporation.

DISCUSSION

The first issue is whether the Petitioner is liable for consumers sales and service tax that was collected by the corporation from its customers, but not remitted to the State of West Virginia. The Petitioner, if she is liable, is liable pursuant to the provisions of W. Va. Code § 11-15-17, which provides in relevant part:

If the 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 by article ten of this chapter may be enforced against them as against the association or corporation which they represent.

While this provision is stated in terms that impose absolute liability on corporate officers, the absolute language of this section has been tempered by the decision of the West Virginia Supreme Court in *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008). Syllabus point 3 of *Schmehl* provides:

Under the due process 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, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.

In considering the facts of this case, this Office is of the opinion that the Petitioner has demonstrated the fundamental unfairness of imposing liability for the consumers sales and service tax on her.

The Petitioner was the Secretary of the corporation at the time of its incorporation and remained Secretary of the corporation until such time as it ceased operating as a viable business. The evidence clearly demonstrates that if she worked for the business after it was incorporated, it

was only for a short period of time when she was not working as a teacher due to a reduction-in-force in the late 1980s or perhaps the early 1990s. The Petitioner's employment did not entail any responsibility for the business's finances. She did not prepare, execute or file any consumers sales and service tax returns when she was employed there and she certainly did not do so for the periods covered by the assessment. The evidence demonstrates that to the extent that consumers sales and service tax returns for the assessment period that were prepared and executed, they were executed by the brother.

The Petitioner was not a signatory on the corporation bank account and never signed any checks on behalf of the corporation. The evidence shows that she clearly had no duty, authority or ability to pay the consumers sales and service tax.

Considering all of these factors together, it appears that it would violate fundamental fairness to hold the Petitioner liable for the corporation's consumers sales and service tax liability. The Petitioner was not an active participant in the business during the assessment period. She was not responsible for the management of the store. She did not prepare or execute consumers sales and service tax returns. She did not make any payments of consumers sales and service tax and had no duty, authority or ability to do so. She did not sign checks on behalf of the corporation. Based on these facts and circumstances, it must be held that the Petitioner is not liable for the consumers sales and service tax.

With respect to the personal income tax withheld from the pay of the corporation's employees, liability is imposed on a "responsible person" pursuant to W. Va. Code § 11-10-19, which provides, in relevant part:

(a) 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.

With respect to the withholding tax, the evidence is that the Petitioner did not sign any of the returns showing that personal income tax was withheld from the pay of the corporation's employees. She did not sign any checks in payment of tax withheld from the pay of the employees and no ability to do so. Since the Petitioner did not have any duty or authority to prepare, file or pay personal income tax withholding during the assessment period, the Petitioner was not a person "required" to collect, account for or pay over such tax. Thus, she is not liable for the taxes withheld from the pay of the corporation's employees.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. 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 § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. Syllabus point 3, *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008), provides:

Under the due process 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, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.

3. It does not comport with the principles of due process, and it is unreasonable and is fundamentally unfair to impose liability on a corporate officer who never actively participated in the management of the business and who had no duty or authority to account for, make return of or pay over the consumers sales and service tax collected by the corporation.

4. W. Va. Code § 11-10-19(a) provides:

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.

5. An individual who is a corporate officer but who did not actively participate in the management of the business, and who had no duty or authority to account for, make return of or pay over the personal income tax withheld from the corporation's employees and who did not sign any checks in payment thereof, is not a "person responsible for the payment of personal income tax withheld.

5. The Petitioner in this matter has carried her burden of proving that the assessments of taxes against him are erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers sales and service tax assessment issued against the Petitioner in her capacity as an officer of the corporation for the period of June 1, 2000, through December 31, 2003, for tax in the amount of \$____, interest in the amount of \$____, computed through November 3, 2008, and additions to tax in the amount of \$____, totaling \$____, should

be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that personal income tax withholding money penalty assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2004, through December 31, 2005, for a total assessed money penalty liability in the amount of \$_____ should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.