

REDACTED DECISION – DK# 16-020 CU-M

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON DECEMBER 21, 2017
ISSUED ON DECEMBER MARCH 12, 2018**

FINAL DECISION

On November 13, 2015, the Tax Accounting Administration of the West Virginia State Respondent’s Office (hereinafter “Tax Commissioner ” or “Respondent”) issued an Officer Assessment letter (Letter Id#____) to Petitioner in Account Number _____. This officer assessment was issued pursuant to the authority of the State 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 an officer of Company A, for combined sales and use tax.

The Petitioner timely filed his Petition for Reassessment with this Tribunal on January 11, 2016. 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 March 28, 2017, in Martinsburg, West Virginia, and the matter became ripe for decision after post hearing briefs.

FINDINGS OF FACT

1. The Petitioner is the Vice-President of Company A¹ (Tran.13, L.13-16).

¹ Company A was started in the 1960s by the Petitioner’s father.

2. The Petitioner oversaw production in a plant in a West Virginia County (Tran.5, L.3-11).

3. The Petitioner's older brother, Mr. A., is the President of Company A., (Tran.6, L.1-11).

4. The Petitioner's older sister, Ms. B, is the Treasurer of Company A (Tran.6, L.15-20).

5. The President and Treasurer had offices beside each other in the back of the show room of Company A, but the Petitioner had an office in the back of the plant, which was across the road from the show room (Tran.6, L.21-22; Tran.7, L.1-7).

6. The Petitioner testified that he was never responsible for filing tax returns, collecting and remitting sales or use tax, or payroll (Tran.7, L.11-19; Tran.8, L.1-2).

7. The Petitioner testified that he never signed payroll checks or checks for the payment of taxes (Tran.7, L.20-23).

8. The Petitioner believes that at one time he was a shareholder of the corporation and believes that there may have been one shareholder meeting but he was never in attendance of any shareholder's meetings (Tran.8, L.6-22; Tran.9, L.1-2).

9. The Petitioner is unaware of being on the Board of Directors or any Board of Directors' meetings that may have been held (Tran.9, L.3-7).

10. The Petitioner's siblings, Mr. A., and Ms. B were in charge of the financial operations of the business (Tran.9, L.8-11).

11. The Petitioner was unaware of any tax issues until he attempted to refinance his mortgage on or about the Fall of 2013 (Tran.12, L.18-22).

12. The Petitioner attempted to get complete corporate documents from the President and an attorney for Company A., to provide them to the mortgage company, but had to get them from Ms. C, a new accountant at the company (Tran.13, L.1-8).

13. The Petitioner believes that he was denied a mortgage by the mortgage company due to the taxes owed by the company (Tran.13, L.8-10).

14. The Petitioner asked the accountant, Ms. C, to send him the current taxes owed once she received them. However, he never received anything from her regarding taxes and believes that it was because the President and Treasurer informed her not to release them to him (Tran.13, L.11-12).

15. The Petitioner was terminated “as an employee” by his brother, Mr. A., President of Company A, on March 19, 2014 (Petitioner’s Ex. No.1).

16. Mr.B provided the requested documents on March 27, 2014, after the Petitioner’s termination (Petitioner’s Ex. No 2).

17. The Petitioner was fired because he would not release his retirement funds to the President and Treasurer for them to use to pay outstanding taxes (Tran.10, L.18-21).

18. After his termination, the Petitioner received unemployment compensation for six months² (Tran.11, L.10-19).

19. On or about November 2013, the Petitioner attempted to remove himself as an officer with the Secretary of State’s office, but could not be removed due to outstanding taxes (Tran.12, L.1-13).

20. The Petitioner did not become aware of the outstanding taxes until he was denied a mortgage (Tran.13, L.7-10).

² Although not admitted into evidence, the Petitioner attached to his Petition for Appeal, a Deputy’s Decision from Workforce West Virginia dated April 3, 2014, authorizing unemployment compensation.

21. The Petitioner did not sign official documents as Vice-President of the corporation and did not exercise any official capacity as Vice-President (Tran.13, L.17-22).

22. The President and Treasurer did not consult the Petitioner as an officer of the corporation (Tran.14, L.1-3).

23. The Petitioner was contacted by authorities regarding a criminal investigation involving the President and Treasurer, who had allegedly signed the Petitioner's name on bank notes at a County Bank for \$_____ (Tran.14, L.4-20).

24. The Petitioner had a named Bank checkbook approximately 15-20 years ago for miscellaneous items (Tran.16, L.13-23).

25. The Petitioner signed for one SBA loan regarding the business approximately 30 years ago, but no other loans (Tran.19, L.6-13).

26. The Petitioner could hire and fire employees in the manufacturing plant, but had no authority to hire any corporate employee, salesperson, or accountant (Tran.19, L.21-23; Tran.20, L.1-5).

27. The Petitioner had to get approval and payment from the Treasurer to pay for general business costs for the plant (Tran.21, L.3-17).

28. The Petitioner's testimony is un rebutted.

DISCUSSION

The Petitioner is the Vice-President of Company A., which is a family owned business that was started by his father in the late 1960's. The Petitioner's older brother, Mr. A., is the President, and his older sister, Ms. B is the Treasurer of Company A., and they ran the corporate aspect of the business. To the Petitioner's recollection and un rebutted testimony, Ms. B was responsible for

accounts payable, the collection and remittance of sales and use taxes, signing payroll checks, and the payment of taxes. The Petitioner oversaw manufacturing in the plant, but had no other authority in the corporation. The Petitioner testified to not knowing what was going on with financial matters as his brother and sister handled that aspect of the business. The Petitioner was never responsible for the filing of tax returns, the collection and remittance of sales tax, signing any official documents, exercising any official capacity as Vice-President of the corporation, or ever being consulted as an officer of the corporation. The corporation operated in this manner during the time the Petitioner was an officer.

The Petitioner had signed a few checks from a Bank approximately fifteen (15) to twenty (20) years ago for insignificant amounts. The Petitioner testified that the other officers of the corporation signed for several loans, but he only signed for one SBA loan approximately thirty (30) years ago, which has been paid off. Although as an officer of Company A., the Petitioner testified to having only the authority to fire and hire employees in the plant. Moreover, any expenditure for the manufacturing facility had to be approved and paid by the Treasurer.

The Petitioner's un rebutted testimony was that he was unaware of any tax issues until he attempted to refinance his home³, which would have been approximately November 2013.⁴ The mortgage company wanted corporate tax returns and his brother, President of Company A., had given him the Articles of Incorporation, but it was missing the critical page regarding the Petitioner's ownership in the corporation. The Petitioner went to Mr. B, attorney for the corporation, and requested the corporate documents, but Mr. B did not release them to the

³ The Petitioner's mortgage was with a financial institution that did not require additional documents to refinance. However, he was seeking a loan on the secondary mortgage market, and the mortgage company required documentation regarding the Petitioner's ownership in the company.

⁴ Although the exact date was not admitted into evidence during the evidentiary hearing, the Petitioner testified that it was within a year of attempting to remove his name as a corporate officer.

Petitioner. The new accountant, Ms. C, gave the Petitioner what she had and he then, gave them to the mortgage company.

The Petitioner testified that the Treasurer had wanted him to release his retirement account valued at \$_____ to her to pay their tax bills. She had given him an ultimatum to release his retirement money or be terminated. The Petitioner further testified that on March 18, 2014, the President and the Treasurer had a private meeting with a consultant, Mr. C, in the back office. After this meeting, the President, the Treasurer, and the Petitioner had a meeting in the parking lot where he was given the ultimatum of releasing his retirement funds to them or being fired. As the Petitioner refused to release his retirement funds to the President and the Treasurer to pay outstanding taxes, he was terminated as an employee on March 19, 2014. As he could not previously obtain the proper corporate documents from the company President, he sent two certified letters to Mr. B, attorney for the company, and received them from him on March 27, 2014.

The Respondent asserts that the Petitioner's level of managerial duties and responsibilities were such that he should be held personally liable for the combined sales and use tax liabilities of the corporation. To support his argument, the Respondent points to the Petitioner having access to, and signatory power on, one checking account at a bank used by Company A, where he had signed a few checks about fifteen (15) years ago, and was still a signatory. The Respondent further argues that because the Petitioner admitted that he was the Vice-President, had been aware that he was the Vice-President, that he signed for an SBA loan for the business approximately thirty (30) years ago, and his signature was necessary to obtain corporate financing although it had been allegedly forged by his siblings that he should be held personally liable for the company's outstanding taxes.

The Respondent also relies upon the Petitioner having the ability to hire and fire employees in the manufacturing plant, and that he could expend funds on the company's behalf. The Respondent points to the transcript as follows:

PETITIONER: I did some hard, dirty, nasty work. I mean, at one point we had,

I guess, a 60 horsepower compressor that was very critical. And I mean, it broke down.

ATTORNEY WAGGONER: Well, okay. When it broke down, how did you get it fixed?

PETITIONER: I went to the local rental place and rented a compressor, and plugged it in.

I mean ---.

ATTORNEY WAGGONER: Okay. So ---.

PETITIONER: When it come down to it, I'd do whatever to try to keep the manufacturing going.

(Respondent's Supplemental Brief, p. 8, Evidentiary Hearing Transcript, P. 20, L.16-22, P. 21, L.1-2).

The Respondent further argues that the above testimony supports the proposition that the Petitioner could (and would) purchase or rent equipment on the company's behalf to keep the manufacturing operation running, and that he was charged with handling issues that arose from OSHA and DEP for the company. The remaining portion of the transcript states the following regarding the Petitioner's involvement in the company:

ATTORNEY WAGGONER: Okay. So when you went and rented this equipment to get it back up and running, how did you pay for it?

PETITIONER: Well, my sister would have paid for it. I mean, there are certain things that's necessary to keep the business going. I mean, generally, any big-ticket item, I wouldn't just go out and get. I'd always get approval, ---

ATTORNEY WAGGONER: Right.

PETITIONER: --- as far as something like that breaking down and shutting the whole plant down.

ATTORNEY WAGGONER: Okay. But little stuff. How would you pay for that?

PETITIONER: I guess she would. I mean, I don't know that I ever personally paid for any of that.

ATTORNEY WAGGONER: Okay.

PETITIONER: Even the little to the bigger stuff, I generally get approval. Basically, they gave me what they didn't want to deal with. As far as dealing with OSHA, DEP, all that, I got all that fun stuff.

(Evidentiary Hearing Transcript, P.21, L.3-17).

The issue in this case is whether the Petitioner is personally liable for combined consumer sales and use tax that was not remitted to the State of West Virginia for Company A. A vendor such as Company A., that sells tangible goods, such as product, is required to pay a six (6) percent sales tax⁵ on those goods 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

⁵ 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).

select services...the vendor⁶ 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).

Corporation officers are personally liable for the payment of taxes pursuant to West Virginia Code Section 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.

W.Va. Code § 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.

⁶ 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).

Upon review and consideration of West Virginia. Code Section 11-15-17 and syllabus point 3 of *Schmehl*, the evidentiary hearing, and the parties' arguments and briefs, this Tribunal finds that it would be fundamentally unfair to impose personal liability for the company's taxes on the Petitioner.

Although the Petitioner was the Vice-President of the company, he was only in charge of the plant, he could only hire and fire employees in the plant, and he dealt with governmental agencies for the plant because his brother and sister didn't want that job duty. He had no true corporate or decision-making authority, and instead, was treated like an employee as opposed to an officer of a corporation. In fact, the Petitioner had so little power that he was fired as an employee in the parking lot by his older brother and sister, and provided a letter by the President stating that he was fired as an employee. The Petitioner did not have financial control over the company, he never wrote any checks to the State of West Virginia for sales and use tax, he did not write checks on behalf of the corporation, his name was allegedly forged on a bank loan by the President and Treasurer, he even had to get approval and payment for a compressor for the very manufacturing plant that he managed, and whose only control in the corporation was much like a supervisor or a shop foreman. The very purpose of syllabus point 3 in *Schmehl* would be abrogated by holding the Petitioner liable for the outstanding taxes under these unrebutted facts. Therefore, this Tribunal finds the Petitioner has met his burden to prevail in the instant matter and holds that he is not personally responsible for combined sales and use taxes on behalf 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 vendor⁷ 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. 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. Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious, and unreasonable to impose liability on a corporate officer who held a nominal officer title, who did not have any financial or tax responsibility, did not make collection of or remit consumer sales and use tax for the corporation, who was required to get approval and payment

⁷ 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).

from the Treasurer for any business expense, and only managed the manufacturing facility, while the President and Treasurer managed the financial and business operations of the corporation.

7. An individual who is a corporate officer who had signed for a SBA loan thirty (30) years ago, which has been long paid off, had check writing ability at a company bank fifteen (15) to twenty (20) years ago, but not since, did not actively participate in the day to day business or financial operations of the business, and where the other officers withheld financial and shareholder information, should not be held personally accountable for consumer sales and use taxes.

8. 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 it 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).

9. Petitioner in this matter has 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 assessment issued against the Petitioner in his capacity as an officer of the corporation for the period of November 30, 2012, through April 30, 2015, for the tax in the amount of \$_____, interest in the amount of \$_____, and additions to tax in the amount of \$_____; for the period of May 31, 2015, for the tax amount of \$_____, interest in the amount of \$_____, and additions to tax in the amount of \$_____; for the period of June 30, 2015, for the tax amount \$_____, interest in the amount of

\$_____, and additions to tax in the amount of \$_____; for the period of July 31, 2015, for the tax amount of \$_____, interest in the amount of \$_____, and additions to tax in the amount of \$_____; for the period of August 31, 2015, for the tax amount of \$_____, interest in the amount of \$_____, and additions to tax in the amount of \$_____ for a final total 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