

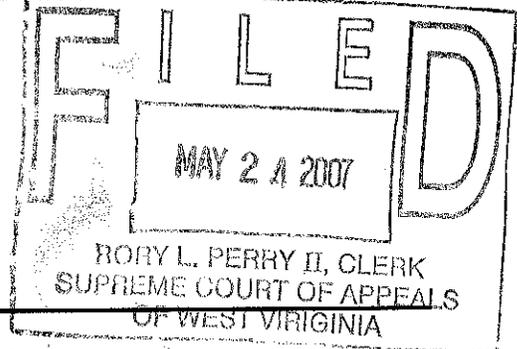
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

BARRY D. SCHMEHL, an individual
as an officer of Filly's of America, Inc.
Appellant,

v.

Docket No. 33379
From the Circuit Court of
Jefferson County, West Virginia
Civil Action No. 05-C-337

VIRGIL T. HELTON, State Tax
Commissioner of West Virginia,
Appellee.



APPELLANT'S BRIEF

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I. RULING FROM WHICH APPEAL IS TAKEN

This appeal is taken from the Order of the Circuit Court of Jefferson County, dated July 5, 2004 (hereinafter, the "Circuit Court's Order"), denying Appellant's Petition for Appeal of an administrative decision (hereinafter, the "Administrative Decision") issued by the West Virginia Office of Tax Appeals ("OTA") against the Appellant, Barry D. Schmehl, an individual (the "Appellant") as an officer of Filly's of America, Inc. (the "Corporation") and in favor of Virgil T. Helton, State Tax Commissioner of West Virginia (the "Appellee"). The Circuit Court's Order affirmed an assessment against the Appellant for the Corporation's liability for consumers sales and service tax, interest and penalties due to his status as an officer of the Corporation.

II. STATEMENT OF THE CASE

This appeal arises from the denial of the Appellant's Petition for Appeal from the Administrative Decision issued by OTA. At issue is whether the Circuit Court of Jefferson County (the "Circuit Court") erred as a matter of law in sustaining the Administrative Decision.

In contending that the Circuit Court so erred, the Appellant asserts that the Circuit Court's Order is clearly erroneous and based on incorrect legal standards in concluding: (1) that the Administrative Decision was supported by substantial evidence and by a rational basis; (2) that the Appellant had not carried his burden to prove that the Administrative Decision was erroneous or an abuse of discretion; and (3) that OTA had applied the correct legal standards.

III. RELEVANT PROCEDURAL HISTORY

On December 8, 2000, the Appellee issued an assessment against the Corporation as a result of its failure to remit consumers sales and service tax on its sales subject to that tax for the periods beginning February 1, 1999, through September 30, 2000 (the "Corporate Assessment"). The Corporate Assessment consisted of tax, interest and penalties in the amount of Seventy-six

Thousand Five Hundred Thirty-nine Dollars (\$76,539.00). The Corporation did not timely challenge the Corporate Assessment, and, as a result, it became legally final and unappealable on February 6, 2001.

Later, on November 4, 2004, a separate assessment of the Corporation's consumers sales and service tax liability was also issued against the Appellant by the Appellee, in which the Appellee asserted that the Appellant, as an officer of the Corporation, was liable for the Corporation's failure to remit consumers sales and service tax due on its sales during certain periods (the "Personal Assessment").

The Personal Assessment was for the periods starting with February 1, 1999, through September 30, 2000; May 1, 2002 through May 31, 2002; October 1, 2002 through May 31, 2003; and July 1, 2003 through December 31, 2003 ("the Assessment Periods"). The Personal Assessment was in the amount of tax of \$101,649.12, together with interest of \$27,230.53, and additions to tax (penalties) of \$43,436.98, for a total assessed liability of \$172,816.63.

The Appellant filed a timely petition for reassessment challenging the Personal Assessment of the Corporation's tax against him. Following a long-distance, video hearing and submission of briefs by the parties, on April 15, 2005, the OTA rendered the Administrative Decision adverse to the Appellant and in favor of the Appellee. In the Administrative Decision, the OTA affirmed the entire Personal Assessment of the Corporation's consumers sales and service tax, interest and penalties against the Appellant due to his status as an officer of the Corporation during the Assessment Periods.

On or about October 14, 2005, the Appellant timely filed its Petition for Appeal before the Circuit Court. Rather than allowing briefs or oral argument in the matter, the Circuit

Court Judge instructed the parties to file proposed orders containing findings of fact and conclusions of law and allowed the Appellant to present a response to the Appellee's proposed order.

As required by the governing statute, before the Appellant's appeal was considered on the merits, the matter of an appeal bond was addressed. W.Va. Code § 11-10A-19(e). In this case, following a hearing at which the Appellant testified, and based on his age, poor health and impecunious circumstances, the Court reduced the amount of the appeal bond from the total assessed liability (\$172,816.63) to a nominal sum of One Hundred Dollars (\$100.00).

However, the Circuit Court's Order affirmed the entire Personal Assessment of the Corporation's liability for consumers sales and service tax, interest and penalties, against the Appellant. The Appellant now herein respectfully asks this Court to overrule and reverse the Circuit Court's Order.

IV. STANDARD OF REVIEW

This Court reviews the decisions of a circuit court, when the latter is itself sitting as an appellate court, under the same standard by which a circuit court is required to review the decision of the lower tribunal or administrative agency in the first instance. Martin v. Randolph Cty Bd. Ed., 195 W. Va. 297, 465 S.E.2d 399 (1995); Corliss v. Jefferson Cty. Bd. of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (2003); Webb v. W. Va. Bd. of Med., 212 W. Va. 149, 569 S.E.2d 225 (2002) (*per curiam*).

The statute providing for appeals of matters of this nature states that the circuit court "shall hear the appeal as provided in [W.Va. Code § 29A-5-4, a/k/a The State Administrative Procedures Act or SAPA]." W.Va. Code §11-10A-19(f). The referenced SAPA provides, in pertinent part, as follows:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W.Va. Code § 29A-5-4.

...

In construing the language of an earlier statute governing comparable appeals (“the circuit court will determine anew all questions submitted to it on appeal from the determination of the tax commissioner” [W.Va. Code § 11-10-10(e)], this Court has expressly relied on and followed the foregoing provisions of the SAPA. Specifically, in the leading case addressing the standard of review in appeals of this nature, the Court has held that, as a result of a long line of earlier rulings, the circuit court was limited to a clearly erroneous and abuse of discretion standard for review of the [the agency’s] findings, unless the incorrect legal standard was applied. Frymier-Halloran v. Paige, 192 W.Va. 687, 458 S.E.2d 780 (1995), syl. pt. 3.

In Frymier-Halloran, this Court also recited the general rule that it reviews questions of statutory interpretation *de novo*. It then observed further that the clearly erroneous standard, otherwise applicable to proceedings such as this, does not protect factual findings made on the basis of incorrect legal standards. *Id.* at fn. 13. Rather, the Court stated that where an appellant, such as the Appellant here, can demonstrate that an administrative decision in a contested case was based on

a mistaken impression of the applicable legal principle, those findings “will be accorded diminished respect on appeal.” See id.

In this appeal, it is the Appellant’s contention that the OTA Decision was based on a clearly erroneous interpretation and application of the statutes and regulations governing the consumer’s sales and use tax treatment of the Appellant with respect to sales made by the Corporation, and on an abuse of OTA’s discretion. See W. Va. Code §§ 11-15-9(a)(6)(C), 11-15-11 and 11-15A-3(a)(2).

Accordingly, the Appellant respectfully urges this Court to review the interpretations of such laws as contained in the OTA Decision and affirmed by the Circuit Court and to accord them no more than the diminished respect the precedents of the Court say they deserve.

V. STATEMENT OF FACTS

The Corporation was engaged in the business of operating a restaurant and bar in Ranson, Jefferson County, West Virginia, throughout the Assessment Periods. The Appellant began employment with the Corporation as a bartender in February, 1999. Later, in the summer of the year 2000, he ceased being an employee of the Corporation, and instead, became an independent contractor performing bookkeeping services for it.

As bookkeeper, the Appellant was responsible for the clerical aspects of accounting for the Corporation’s receipts and paying its bills. Such duties included preparing and filing periodic consumers sales and service tax returns and remitting the tax. In conjunction with his duties as a bookkeeper, the Appellant was one of several persons authorized to sign checks on the Corporation’s bank account.

At all times during the Assessment Periods, when the Corporation's funds were insufficient to pay all its outstanding obligations, the exclusive and ultimate authority to determine which obligations were actually paid rested with the Corporation's president and majority stockholder, Paul Horn.

The Appellant's bookkeeping services and check-signing authority were interrupted for many months on several occasions during the period of the Assessment, including the twelve-month period from July, 2002 to July, 2003, following a heart attack he suffered.

In addition to the time he was absent recovering from the heart attack, the other times the Appellant did not provide bookkeeping services or sign checks for the Corporation were the result of his decision to quit working for the Corporation out of frustration for being unable to properly perform his duties.

Although he has never owned stock or been a director of the Corporation, the Appellant was given the nominal title of secretary of the Corporation beginning with its inception in 1999, for the sole reason of enabling the Corporation to satisfy certain residency requirements under West Virginia liquor regulations. Otherwise, the Appellant's only duty as secretary of the Corporation was to attend certain formal meetings of its directors and stockholders, of which there were few.

In addition to the president, another officer and stockholder of the Corporation, Angie Fraley, had check signing authority for its bank account during the Assessment Periods and she was responsible for preparing and filing its sales tax returns during various times of the Appellant's absence.

On December 8, 2000, as a result of the Corporation's failure to remit consumers sales and service tax on its sales subject to that tax for the periods beginning February 1, 1999, through September 30, 2000, the Appellee issued the Corporate Assessment against it. However, the Corporation did not timely challenge the Corporate Assessment, and, as a result, it became legally final and unappealable on February 6, 2001.

Later, on November 4, 2004, the Personal Assessment of the Corporation's consumers sales and service tax liability was also issued against the Appellant by the Appellee, in which the Appellee asserted that the Appellant, as an officer of the Corporation, was liable for the Corporation's failure to remit consumers sales and service tax due on its sales during certain periods

Neither Mr. Horn, nor Ms. Fraley, have been assessed for the Corporation's tax liabilities.

VI. POINTS AND LEGAL AUTHORITIES

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VII. ASSIGNMENTS OF ERROR.

- A. THE CIRCUIT COURT ERRED BY BASING ITS RULING IN PART ON A MISTAKENLY PERCEIVED CONTRADICTION IN THE APPELLANT'S TESTIMONY AT THE ADMINISTRATIVE HEARING WITHOUT GIVING THE APPELLANT AN OPPORTUNITY TO EXPLAIN THE PURPORTED CONTRADICTION BY WAY OF TESTIMONY OR BRIEFING BEFORE THE CIRCUIT COURT.
- B. THE CIRCUIT COURT ERRED IN UPHOLDING THE ADMINISTRATIVE DECISION'S CONCLUSION THAT THE APPELLANT HAD THE REQUISITE CORPORATE AUTHORITY NECESSARY TO IMPOSE PERSONAL LIABILITY ON HIM FOR UNPAID CORPORATE CONSUMER SALES AND SERVICES TAXES.
- C. THE CIRCUIT COURT ERRED IN UPHOLDING THE ADMINISTRATIVE DECISION'S CONCLUSION THAT PORTIONS OF THE ASSESSMENT ISSUED AGAINST THE APPELLANT WERE NOT TIME BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

VIII. DISCUSSION OF LAW

- A. THE CIRCUIT COURT ERRED BY BASING ITS RULING IN PART ON A MISTAKENLY PERCEIVED CONTRADICTION IN THE APPELLANT'S TESTIMONY AT THE ADMINISTRATIVE HEARING WITHOUT GIVING THE APPELLANT AN OPPORTUNITY TO EXPLAIN THE PURPORTED CONTRADICTION BY WAY OF TESTIMONY OR BRIEFING BEFORE THE CIRCUIT COURT.

The Circuit Court's Order, despite the Appellee's not having argued the point, "emphasizes that [Appellant] contradicted himself at the Tax Appeal Office's hearing by stating that he did not own stock in Filly's and then a few minutes later denying he owned stock." Order, at last page, first paragraph. Apparently influenced by this perceived contradiction, the Circuit Court then stated that "[t]herefore, the Court finds [Appellant's] self-serving testimony that he was only a contract worker and was not in fact an officer suspect." Id. The truth is that the Appellant never owned stock in the Corporation and never consciously claimed that he did. Likewise, he never denied his formal status as an officer of the Corporation.

In Frymier-Halloran v. Paige, 193 W. Va. 687, 458 S.E.2d 780 (1995), this Court of Appeals addressed the question of whether the circuit court erred in failing to grant petitioner a hearing before the circuit court to rebut the challenged administrative decision. See id. at 693, 786.

The Court ultimately held that, “unless the request to receive new evidence comes within the limited exceptions we authorize in this opinion, the circuit court only may permit the introduction of additional evidence by remanding the case to the Tax Commissioner for a new or supplemental hearing so that a complete record can be developed for judicial review.” Id. Specifically, the Court held that

certain circumstances may justify expanding review beyond the record or permitting some discovery at the circuit court level. For example, an allegation that the Tax Commissioner (1) failed to mention a significant fact or issue having a substantial impact on the tax liability of the taxpayer, (2) failed adequately to discuss some reasonable alternative, or (3) otherwise swept stubborn problems or serious criticism under the rug may be sufficient to permit the introduction of new evidence outside the administrative record.

Id. at 695-696. 788-789.

The “contradiction” to which the Circuit Court refers comes from the transcript of testimony at the OTA Hearing that states:

[291] MR. CARYL: Do you have any stock in the corporation?

[292] MR. SCHMEHL: Yes

.....
[328] MR. CARYL: Mr. Schmehl, do you have any stock in Filly’s of America, Inc.?

[329] MR. SCHMEHL: No.

Transcript of Proceedings, April 26, 2005.

At the outset, it is important to note that the hearing was conducted via video conference, with OTA Judge Piper and Appellee's counsel, but no court reporter, in Charleston and with Appellant, Appellant's counsel, and Appellee's witness, but no court reporter, in Martinsburg. Moreover, the transcript of the hearing was not prepared by a licensed court reporter, but by an employee of the OTA based on her listening to an audio tape. On the face of it, the transcript reveals audio difficulties involving the Appellant's testimony. Transcript, pp. 12-13. Those were due, in part, to the Appellant's speaking disability. Id. In addition, the context [and truth of the matter] of the Appellant's purported admission of stock ownership is more consistent with his giving an affirmative answer to the question of whether Angela Fraley, another corporate officer, had stock in the Corporation:

[289] MR. CARYL: OK, who is Angela Frailly (sic)?

[290] MR. SCHMEHL: She is vice-president of the corporation.

Thus, the question at line [291] far more likely was "Does she have any stock in the corporation?" (Emphasis added). Thus, the Appellant's truthful answer to that question, would have been "yes".

Moreover, the flaws of the purported transcript even extend to the "certification" of the "transcriptionist" at end where she recites (on the correctly numbered page 22) that it was from a hearing involving the Petition but on a date more than six (6) months earlier.

Finally, it is important to note that the Appellee never challenged the Appellant's credibility in these proceedings based upon the perceived contradiction in the above passages from the transcript.

In other words, the Circuit Court *sua sponte*, made this observation and conclusion, in its Final Order foreclosing any a proper opportunity for the Appellant to respond. Appellant and his counsel are willing to provide testimony, affidavits and any other information necessary to establish first, that the transcription is in error and secondly, that Mr. Schmehl does not and has never owned any stock in the Corporation. Post-ruling presentation of such evidence to OTA would have been fully within the parameters established in Frymier, and would in no way be prejudicial to Appellee because “[u]pon review, the circuit court is free to strike any supplemental materials that it decides are irrelevant or inappropriate.” Id. at 696, 789.

Thus, the weight given by the Circuit Court to the purported contradiction is inappropriate, prejudicial and inaccurate. Accordingly, at the very least, Appellant should be given the opportunity to respond to this allegation, whether by submission of additional evidence upon remand to the Circuit Court or to OTA.

B. THE CIRCUIT COURT ERRED IN UPHOLDING THE ADMINISTRATIVE DECISION'S CONCLUSION THAT THE APPELLANT HAD THE REQUISITE CORPORATE AUTHORITY NECESSARY TO IMPOSE PERSONAL LIABILITY ON HIM FOR UNPAID CORPORATE CONSUMER SALES AND SERVICE TAXES.

The substantive statute applicable to this matter is set forth at W. Va. Code

§11-15-17 and provides that:

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.

This Court has recognized that the above statute could be applied in an unconstitutional manner. State ex rel. Haden v. Calco Awning and Window Corp., 153 W.Va. 524, 170 S.E. 2d 362 (1969).

In State ex rel. Haden v. Calco Awning and Window Corp., 153 W.Va. 524, 170 S.E. 2d 362 (1969), individual officers of the taxpayer corporation contended, and the lower court agreed, that the statute was unconstitutional on its face because it purported to render them personally liable for the corporation's tax by mere virtue of their status as officers, thus taking their property without due process of law. Id.

While reversing the lower court's ruling, this Court remanded the case for a determination as to whether the application of the statute had been "unreasonable, arbitrary or capricious." Id.

Based upon the holding in State ex rel. Haden v. Calco Awning and Window Corp., 153 W.Va. 524, 170 S.E. 2d 362 (1969), it is clear that (a) to preserve its constitutionality, W. Va. Code §11-15-17 must be construed to require a reasonable and not an arbitrary or capricious application; and (b) one's mere status as an officer is alone insufficient to satisfy that construction.

This approach is comparable to the equivalent arrangement under the federal payroll tax system which imposes personal liability on persons actually responsible for satisfaction of a corporate employer's obligations thereunder. Specifically, Section 6672 of the Internal Revenue Code (the "Code") provides that:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or 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 to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over . . .

26 U.S.C. § 6672(a).

In O'Connor v. United States, 956 F.2d 48, 51 (4th Cir. 1992), the Fourth Circuit formulated the relevant factors to consider when imposing the trust fund recovery penalty, holding that:

t]he key element, however is whether that person has the statutorily imposed duty to make the tax payments. . . this duty is considered in light of the person's authority over an enterprise's finances or general decision making" [and] [T]his authority is general found in high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursement of funds. . . ." "a person cannot be assumed to be a responsible person merely from titular authority."

Id. at 51. (emphasis added) (internal citations omitted).

Reciting the Fourth Circuit, Judge Keeley observed that "to identify a 'responsible person' under §6672, the 'crucial inquiry is whether the person had the 'effective power to pay the taxes - - that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed.'" Secret v. United States, 373 F. Supp. 2d 619, 625 (2005) (quoting Plett v. United States, 185 F.3d 216, 219 (4th Cir. 1999)).

The Fourth Circuit enumerated the factors that serve as indicia of actual authority within the corporation to pay the taxes owed, including whether the employee:

(1) served as an officer of the company or as a member of its board of directors; (2) controlled the company's payroll; (3) determined which creditors to pay and when to pay them; (4) participated in the day-to-day management of the corporation; (5) possessed the power to write checks; and (6) had the ability to hire and fire employees. Plett, 185 F.3d at 219.

Reading directly from Plett, Judge Keeley stated in her opinion that “[w]eighing the totality of the circumstances, a court must undertake a ‘pragmatic, substance-over-form inquiry’ to determine whether an employee is a responsible person.” Secret, 373 F. Supp.2d at 625 (quoting Plett, 185 F.3d at 219). Also as quoted in her opinion, she said that “[t]hus a court’s analysis of whether the party had the ‘status, duty and authority to avoid the default’ is ‘necessarily fact intensive.” Secret, 373 F. Supp.2d at 625 (quoting De Alto v. United States, 40 Fed. Cl. 868, 875)).

Judge Keeley explained that in order to make her ruling, she needed the parties to “really hone in on the issues in this case” to help her make that pragmatic substance-over-form inquiry. (Secret v. U.S.A., Transcript from Bench Trial held on October 13, 2004, at p. 351, lines 6-11).

Another administrative decision cited with reliance in the Circuit Court’s Order does not consider the totality of the circumstances necessary to make such a substance-over-form inquiry that the federal courts require, that this Court has demanded and that our Legislature has encouraged and enacted through legislation. See Syl. Pt. 6, CB&T Operations Co. v. Tax Commissioner, 211 W. Va. 198, 564 S.E.2d 408 (2002) (“[i]n tax matters, it is the substance, not the form of a transaction that determines tax liability.”); See also W. Va. Code §§ 11-15-2(o) (2) and 11-15-8d (adopting a “substance-over-form” approach to transactions and relationships in the context of sales and use tax as it relates to contracting).

Rather, the cited administrative decision asserts a rigid rule that one who is an officer having any managerial authority is liable, “regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation and regardless of whether the officer knew of the corporation’s default with respect to its consumers’

sales and services tax obligations.” Sanitized Decision, No. 06-026C & 06-027 (W. Va. Office of Tax App. 2006).

In creating such a hard and fast rule, the Circuit Court, like OTA, apparently found persuasive the legislative regulation stating that “[a]n officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.” 110 C.S.R. 15, §41.5.2. Such language is present nowhere in the governing statute and for the reasons explained in Section C, *infra*, the Respondent cannot alter, amend or modify the statute through legislative regulations particularly, where as here, the tax should be liberally construed.

In this vein, it is well-settled that statutes which purport to impose tax are to be liberally construed in favor of the taxpayer and strictly construed against the State. See Calhoun County Assessor v. Consolidated Gas Supply Corp., syl. pt. 1, in part, 178 W. Va. 230, 358 S.E.2d 791 (1987) (“Statutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer.”); accord Consolidation Coal Co. v. Krupica, 163 W. Va. 74, 80, 254 S.E.2d 813, 816 (1979); Ballard’s Farm Sausage v. Dailey, 162 W. Va. 10, 246 S.E.2d 265 (1978); In re Estate of Evans, 156 W. Va. 425, 194 S.E.2d 379 (1973).

As this Court reiterated in a case concerning an appeal from a circuit court’s ruling that enjoined the Appellee from enforcing the health care provider tax, where “the statute to be interpreted concerns taxation, we usually construe the tax law in a manner that is favorable to the subject taxpayer.” Coordinating Council for Independent Living, Inc. v. State Tax Commissioner, 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001).

The Circuit Court's Order affirming the Administrative Decision is clearly erroneous and based upon an incorrect legal standard in failing to liberally construe in the Appellant's favor the statute that is the basis of the Personal Assessment. Employing the necessarily liberal construction of the governing statute to avoid its unconstitutionally unreasonable, arbitrary and capricious application in this case, the Appellant is not liable for the Corporation's tax because he, even as an officer, was unable to exercise the actual authority over the disbursement of its funds to pay such tax. Thus, the Appellant here, lacking such ultimate authority, cannot legitimately be held liable for any default by the Corporation in remitting sales taxes he may have calculated on applicable returns.

During the periods of July, 2002, through July, 2003, while absent to recover from his heart attack, and during various other months when he was not serving as bookkeeper, the Appellant had no authority, ultimate or otherwise, over the financial operations of the Corporation. Moreover, even during the portions of the periods at issue here, when he was among those approved to sign checks on the Corporation's bank account, the Appellant's exercise of such authority was, at all times, subject to the ultimate approval of the Corporation's president whenever its funds were insufficient to pay all its current obligations.

Federal courts addressing the issue have recognized this important distinction between the task of signing a check and the authority to write a check. As the First Circuit noted, "[t]he court's affording such weight to the check-signing factor without regard to whether check-signing authority was indicative of financial control is contrary to § 6672 precedent." Vinick v. United States, 205 F.3d 1, 12 (1st Cir. 2000) (citing Denbo v. United States, 988 F.2d 1029 (10th Cir. 1993)). See Fiataruolo v. United States, 8 F.3d 930, 940 (2nd. Cir. 1993) ("[i]n this context, check-signing authority and actual check-signing are slender reeds on which to rest a liability

determination under § 6672.”). See also O’Connor, 956 F.2d 48, 51 (quoting Godfrey v. United States, 748 F.2d 1568, 1575 (Fed. Cir. 1984) (“The mechanical duties of signing checks and preparing tax returns are thus not determinative of liability under § 6672.”)).

None of these functions that the Appellant performed were related to his limited duties as secretary of the Corporation. Those duties, even if they are seen as impliedly including the largely formalistic notice-giving, minute-taking, stock-certificate-signing, seal-fixing functions typical of corporate secretaries, do not expressly or impliedly include attending to the Corporation’s financial affairs or supervising the disbursement of its funds. It was not as an officer, but as its sometime, independent contract bookkeeper that the Appellant even had the subservient authority to sign checks, to prepare sales tax returns and to remit taxes due for the Corporation.

In light of the evidence which belies any determination that the Appellant, at any time when the Corporation’s taxes were not remitted, possessed, much less exercised, the ultimate authority to disburse its funds, the Personal Assessment against him is invalid. The Appellant is not liable for the Corporation’s tax liability merely because he was given the nominal title of its secretary and in finding otherwise, the Circuit Court’s Order is clearly erroneous and based upon an incorrect legal standard. Accordingly, this Court should overrule and reverse the Circuit Court’s Order.

C. THE CIRCUIT COURT ERRED IN UPHOLDING THE ADMINISTRATIVE DECISION’S CONCLUSION THAT PORTIONS OF THE ASSESSMENT ISSUED AGAINST THE APPELLANT WERE NOT TIME BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

The statute governing the time within which all assessments of tax, interest and penalties must be made provides as follows:

(a) *General rule.* – The amount of any tax, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable shall be assessed within three years after the

date the return was filed (whether or not such return was filed on or after the date prescribed for filing): Provided, That in the case of a false or fraudulent return filed with the intent to evade tax, or in case no return was filed, the assessment may be made at any time.

W.Va. Code § 11-10-15(a). (Emphasis added)

According to the legislative regulations applicable to matters of this kind, an officer can become liable for a corporation's tax liability whether the determination of that liability is based on filed returns or a legally final assessment against the Corporation. 110 Code of State Regulations (referred to herein as "CSR"), series 15, § 4a.4.

Here, the Corporation's liability for the periods ending in September, 2000, was determined in the Corporate Assessment dated December 8, 2000, which became legally final sixty (60) days thereafter, or February 6, 2001. However, the Personal Assessment against the Appellant, including the liability for the periods ending in September, 2000, was not issued by the Appellee until November 15, 2004, or more than nine (9) months after the third anniversary of the date on which the Corporate Assessment became legally final.

Accordingly, for the periods covered by the December 8, 2000 Corporate Assessment, the Personal Assessment against the Appellant is barred by the general three-year statute of limitations. W.Va. Code § 11-10-15(a); In re Bowen, 116 B.R. 477 (Bankr. N.D. W. Va. 1990) (finding responsible officer not liable for certain contested tax, additions to tax and interest owed by a corporation because the personal assessment against the officer was issued beyond the period of limitations established by W. Va. Code §11-10-15(a) for assessments of tax).

In the Administrative Decision, (although not argued by Appellee) the OTA erroneously relied upon the regulation set forth in 110 CSR 15, § 4a.7 to conclude that the Personal Assessment was simply a collection device and as such was not time-barred because it was made

within five years [or possibly, within ten (10) years, under the current, 1993 amendment to W. Va. Code §11-10-16(a)] after the Corporate Assessment was final. W. Va. Code §11-10-16(a) provides that:

Every proceeding instituted by the tax commissioner for the collection of the amount found to be due under an assessment which has become final of any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of this chapter to which this article is applicable, irrespective of whether such proceeding shall be instituted in a court or by utilization of other methods provided by law for the collection of such tax, additions to tax, penalty or interest, shall be brought or commenced within ten years after the date on which such assessment has become final. W. Va. Code §11-10-16(a).

In the only decision to interpret W. Va. Code §11-10-16(a), the United States Bankruptcy Court for the Southern District of West Virginia determined that W. Va. Code §11-15-17, imposing liability upon officers of a corporation, does not constitute a collection action imposed by W. Va. Code §11-10-16(a). In re Bowen, 116 B.R. 477, 480 (Bankr. N.D. W. Va. 1990).

In reaching this conclusion, the Bowen Court aptly noted that “plain reading of § 11-15-17 makes clear that as to officers of a corporation, payment in the amount of delinquent corporate sales tax and related liabilities is to be enforced against them as against the association or corporation which they represent.” Id. (Emphasis added).

That view is wholly consistent with the general statute governing the imposition of third-party liability for the trust fund tax obligations of another. Specifically, it is provided that:

Whenever any person is required ... to collect or withhold any tax from any person and to pay it over to the tax commissioner, the amount of tax so collected or withheld shall be deemed to be moneys held in trust for the state of West Virginia. The amount of such moneys shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. W.Va. Code § 11-10-5j. (Emphasis added).

Further, the Bowen Court noted that “[t]he West Virginia Code separately treats limitations on assessment and on collection in §§ 11-10-15 and 11-10-16. The West Virginia Code authorizes collection by foreclosure in § 11-10-12, or by levy and distraint in § 11-10-13.” Id

Because the Personal Assessment is not a collection action pursuant to W. Va. Code §11-10-16(a), the five [or ten] year statute of limitations set forth in that section is inapplicable to the Assessment and as such, the portion of the present Personal Assessment against the Appellant for periods ending September, 2000, but not issued until November 15, 2004, is barred by the general three-year statute of limitations set forth in W.Va. Code § 11-10-15(a).

In its Order, the Circuit Court places much reliance upon the fact that 110 C.S.R. 15, §4a.7 was not in effect at the time that the District Court issued its decision in In re Bowen, 116 B.R. 477, 480 (Bankr. N.D. W. Va. 1990). In doing so, the Circuit Court misses the point, to wit, administrative regulations, whenever issued, cannot alter, amend or modify the terms of the governing statute. Further, having determined that the plain language of W. Va. Code §11-15-17 provides for the same enforcement against corporations and their officers, the Circuit Court erred in holding that it cannot disregard the legislative rule. Indeed, this Court has mandated exactly that when such rule or the interpretation thereof conflicts with the governing statute.

In Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 466 S.E.2d 424 (1995), Justice Cleckley applied standard for when deference to legislative agencies is due:

In deciding whether the DMV's position should be sustained, we apply the standards set out by the United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We first ask whether the Legislature has 'directly spoken to the precise [legal] question at issue.' Chevron, 467 U.S. at 842, 104 S. Ct. at 2781, 81 L. Ed. 2d at 702-03. 'If the intention of the Legislature is

clear, that is the end of the matter.' *Id.* If it is not, we may not simply impose our own construction of the statute. 'Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [DMV's] answer is based on a permissible construction of the statute.' Chevron, 467 U.S. at 843, 104 S. Ct. at 2782, 81 L. Ed. 2d at 703. See Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696-98, 111 S. Ct. 2524, 2534, 115 L. Ed. 2d 604, 623-25 (1991). In the present case, it is clear that the Legislature has not spoken to the precise question at issue. Therefore, we review the DMV's decision to determine whether its construction is one the Legislature would have sanctioned. See United States v. Shimer, 367 U.S. 374, 383, 81 S. Ct. 1554, 1560-61, 6 L. Ed. 2d 908, 915 (1961).

Appalachian Power, 195 W. Va. at 582, 466 S.E.2d at 433 (quoting Sniffin v. Cline, 193 W. Va. 370, 456 S.E.2d 451, 454-55 (1995)).

Here, the governing statute is plain and unambiguous. However, even if the statute were ambiguous, the Appellee in the regulation would incorrectly apply Chevron standard because deference is due to an administrative agency only when the regulations promulgated interpreting the statute and the agency's application of them do not conflict with the plain language of the governing statute. See Appalachian Power, 195 W. Va. at 586, 466 S.E.2d at 437 (quoting National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 517 (1992) (deference is due so long as "the agency interpretation is not in conflict with the plain language of the statute"); K Mart Corp. v. Cartier, Inc., 486 U.S. at 292 ("if the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute").

To this end, Justice Cleckley explained that when looking at the language of a statute, "[i]f the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." Appalachian Power, 195 W. Va. at 587, 466 S.E.2d at 438.

Thus, since the statute is clear, there is simply no need to engage in an interpretation of the regulations. Rather,

Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency's] Rules and Regulations that it has in the statute.' Syl. pt. 4, Ranger Fuel Corp. v. West Virginia Human Rights Commission, 180 W. Va. 260, 376 S.E.2d 154 (1988).

Appalachian Power, 195 W. Va. at 587, 466 S.E.2d at 438 (quoting Chico Dairy Company v. Human Rights Comm'n, 181 W. Va. 238, 382 S.E.2d 75, syl. pt. 2 (1989)).

Even if the Appellee's regulations were entitled to some level of deference, such deference "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by' the Legislature." Appalachian Power, 195 W. Va. at 588-589, 466 S.E.2d at 439-440 (quoting Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983)). Indeed, as Justice Cleckley explained, "[j]udicial review must not become judicial abdication, and we must carefully consider each case to determine whether deference is warranted and if so, how much to accord." See id.

Time and again, this Court has admonished the Appellee for attempting to alter or amend a particular statute by adding limiting language to the regulations that it promulgates. See Syncor International Corporation v. Commissioner, 208 W. Va. 658, 662, 542 S.E.2d 479, 483 (2001) ("when the language of a statute is clear and unambiguous, an administrative agency's rules and regulations must give such language the same clear and unambiguous force and effect.") (quoting Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 466 S.E.2d 424 (1995)).

Here, the Appellee's regulations attempt to do just that by increasing the period of limitations beyond what is provided in the governing statute. This action must be seen as an attempted modification and interpretation of the plain and unambiguous language of the governing statute.

As this Court recently reiterated:

Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same and clear unambiguous force and effect that the language commands in the statute.

CNG Transmission v. Craig, 564 S.E.2d 167, 211 W.Va. 170, syl. pt. 4 (2002) (internal citations omitted). Therefore, any regulation purporting to interpret the governing statute must either be read in harmony with or give way to it and may not add to, subtract from or otherwise alter the statute's terms. See Syncor International Corporation v. Commissioner, 208 W.Va. 658, 524 S.E.2d 479, syl. pt. 3 (2001). In fact, when a regulation is "...unduly restricted and in conflict with the legislative intent, the agency's interpretation is inapplicable." Syncor, 208 W. Va. at 662, 542 S.E.2d at 483 (quoting Boley v. Miller, 187 W. Va. 242, 246, 418 S.E.2d 352,356 (1992)); Appalachian Power 195 W. Va. at 588, 466 S.E.2d at 439 ("[w]hen the agency's interpretation goes beyond that scope of whatever ambiguity the statute contains, no deference is due.") (emphasis added).

In CNG Transmission v. Craig, 564 S.E.2d at 172-173, 211 W.Va. at 175-176, this Court noted that "[i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency

functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.”

Thus, not only is a legislative regulation invalid if it does not adhere to the plain language of the statute that governs it, but a legislative regulation may not be given an “interpretation” by either an administrative agency or a quasi-judicial body that, in effect, alters the plain meaning of an otherwise ambiguous statute. See CNG Transmission v. Craig, 564 S.E.2d at 172, 211 W.Va. at 175 (“In sum, ‘[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”). Id. (quoting Syllabus Point 1, Consumer Advocate Div’n v. Public Service Comm’n, 182 W.Va. 152, 386 S.E.2d 650 (1989)).

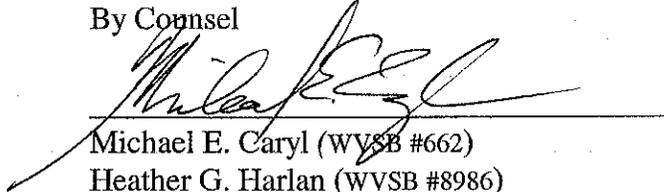
Because the governing statute is clear, any attempt by the Appellee to alter the substantive rule of the statute on the basis of 110 C.S.R. 15, § 4a.7.2.1 must be seen as an invalid exercise of legislative powers that he does not possess. See syl. pt. 1, Consumer Advocate Div’n v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989). Thus, the period of limitations for any assessment – including one against a corporate officer for the corporation’s default in tax compliance is three (3) years – not five (5) or ten (10) years.

Accordingly, the Circuit Court’s Order, upholding OTA’s conclusion that the Personal Assessment against the Appellant is timely, is erroneous and based upon an incorrect interpretation of the governing legal principles and therefore, this Court should overrule and reverse the Circuit Court’s Order.

IX. PRAYER FOR RELIEF

Based on the evidence in the record of this matter, the foregoing points and authorities, and the relevant statutory and case law in support thereof, it is respectfully submitted that the Circuit Court's Order denying Appellant's Petition for Appeal should be either reversed and overruled to set aside the Administrative Decision in its entirety or should be remanded to the Circuit Court so that it may take testimony or other pleadings from the Appellant to rebut the perceived contradiction upon which the Circuit Court's Order was based.

BARRY D. SCHMEHL Appellant,
By Counsel



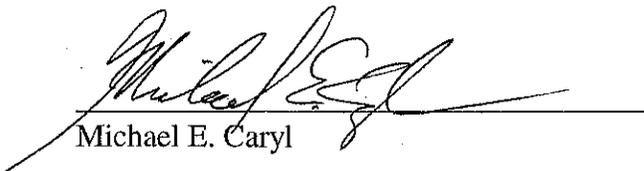
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CERTIFICATE OF SERVICE

I, Michael E. Caryl, Esquire, do hereby certify that a true and exact copy of the foregoing Appellant's Brief has been served, by United States Postal Service, postage prepaid, upon the following:

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