

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

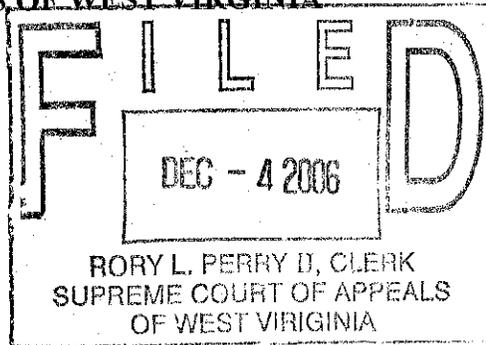
**BARRY D. SCHMEHL, an individual
as an officer of Filly's of America, Inc.**

Petitioner,

v.

**VIRGIL T. HELTON, Acting
State Tax Commissioner of
West Virginia,**

Respondent.



**THE WEST VIRGINIA TAX COMMISSIONER'S
RESPONSE TO PETITIONERS'
PETITION FOR APPEAL**

Respectfully submitted,

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the State of West Virginia,

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TABLE OF CONTENTS

NATURE OF PROCEEDING IN LOWER TRIBUNAL 1

FACTS 2

LAW AND ARGUMENT 4

 I. THE CIRCUIT COURT DID NOT *SUA SPONTE* CONCLUDE THAT THE
 PETITIONER'S TESTIMONY REGARDING STOCK OWNERSHIP IN
 THE CORPORATION WAS SELF -SERVING. 4

 II. THE PETITIONER'S POSITION AS CORPORATE SECRETARY
 RENDERS HIM PERSONALLY LIABLE FOR THE TAXES AT ISSUE HERE
 5

 III. THE CIRCUIT COURT DID NOT ERR IN RULING THAT THIS
 MATTER WAS NOT TIME BARRED BY THE LIMITATIONS
 CONTAINED IN WEST VIRGINIA CODE SECTION 11-10-15. 6

RELIEF PRAYED FOR 10

TABLE OF AUTHORITIES

CASES

<u>State ex rel. Haden v. Calco Awning and Window Corp.</u> , 170 S.E.2d 362 (1969)	5
<u>United States v. Galletti</u> , 541 U.S. 114, 124 S. Ct. 1548 (2004)	10

STATUTES

W.Va. Code § 11-10-15(a)	3, 5, 7, 9
West Virginia Code Sections 11-10-16	8
W.Va. Code § 11-15-17 (2002)	5, 7, 8

OTHER

W. Va. Code State R. Tit 110 §110-15-4a.7.1 (1993)	3, 6, 8
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**VIRGIL T. HELTON, Acting
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Respondent.

RESPONDENT'S REPLY TO PETITIONER'S PETITION FOR APPEAL

Pursuant to Rule 3(f) of the Appellate Rules of Procedure, Virgil T. Helton, West Virginia State Tax Commissioner ("Respondent ") submits this Response to the Petition For Appeal previously filed by Barry D. Schmehl ("Petitioner").

NATURE OF PROCEEDING IN LOWER TRIBUNAL

The Petitioner has appealed an Order from the Circuit Court of Jefferson County entered on July 5, 2006. In this Order-the Honorable Thomas W. Steptoe Jr. dismissed the Petitioner's Petition for Appeal. The Petitioner had appealed to the Circuit Court a Final Order from the West Virginia Office of Tax Appeals ("OTA") dated August 15, 2005. In this Final Order the OTA upheld an assessment for unpaid consumer sales taxes against the corporation for which the Petitioner worked and further affirmed that the Petitioner, as an officer in the corporation, was personally liable for payment of the same.

FACTS

On December 8, 2000, the Respondent issued an assessment of tax liability against Fillys of America, Inc. The assessment was for unpaid Consumer Sales and Service Taxes in the amount of fifty-eight thousand, four hundred and fifty-eight dollars (\$58,458.00).

From Fillys inception as a corporation in 1999, the Petitioner was the corporation's Secretary. *See* OTA, Transcript of Proceedings on April 26, 2005. page 14. The Petitioner became the corporation's Secretary to allow Fillys the ability to obtain a West Virginia liquor license. Tr. page 14.

In addition to being the corporations Secretary, at various times the Petitioner provided bookkeeping services to Fillys. Tr. page 18. In approximately June or July of 2000 the Petitioner became aware that Fillys was collecting consumer sales taxes from its customers and **was not** remitting the same to the State of West Virginia. The aforementioned December 2000 fifty-eight thousand dollar assessment was never satisfied by Fillys.

To facilitate collection, on November 15, 2004 the Respondent issued a Notice of Assessment against the Petitioner, as a responsible party. This Notice of Assessment was for the period covered by the December 2000 assessment, and also included the later periods May of 2002, October 2002 through May 2003 and July 2003 through December 2003. The assessment amount, including interest and additions to tax was one hundred and seventy-two thousand, eight hundred and sixteen dollars and sixty-three cents (\$172,816.63).

At the time of the November 15, 2004 Notice of Assessment against the Petitioner, he still was an officer (Secretary) in the corporation. Tr. page 15. The Petitioner timely filed a Petition for

Reassessment with the West Virginia Office of Tax Appeals. A hearing on the Petitioner's Petition was held on April 26, 2005.

During this hearing the Petitioner testified that except for the periods when he was ill or had left Fillys' employ, he was responsible for preparing and remitting the corporation's consumer sales and service tax returns. Tr. pages 17 & 18.

The Petitioner further testified that at times he failed to remit the proper amounts of consumer sales taxes collected, purportedly based upon lack of approval from the owner, Tr. pages 17&18.

In a decision dated August 15, 2005, Administrative Law Judge George V. Piper (hereinafter ALJ)affirmed the assessment against the Petitioner. The ALJ ruled that as an officer of the corporation the Petitioner was personally liable for the default of the corporation with respect to consumer sales taxes. The ALJ further ruled that the Petitioner's defense of deferring to the purported higher authority of the owner was also without merit. Lastly, the ALJ ruled that the assessment against the Petitioner was not barred by the general three year statute of limitations on assessments, contained in West Virginia Code Section 11-10-15(a).

The Petitioner appealed this matter to the Circuit Court of Jefferson County and in an Order entered on July 5, 2006 the Honorable Thomas W. Steptoe Jr. denied the Petitioner's appeal. The Circuit Court ruled that the November 2004 Notice of Assessment to the Petitioner was a collection action pursuant to West Virginia Code of State Rules Title 110, Series 15, Section 4a.7.1, and as such was not barred by a three (3) year statute of limitations. The Circuit Court also ruled that the Petitioner was personally liable for the corporation's tax debts, pursuant to West Virginia Code Section 11-15-17.

LAW AND ARGUMENT

I. THE CIRCUIT COURT DID NOT *SUA SPONTE* CONCLUDE THAT THE PETITIONER'S TESTIMONY REGARDING STOCK OWNERSHIP IN THE CORPORATION WAS SELF-SERVING.

The Petitioner characterizes the Circuit Court's findings regarding his suspect testimony on stock ownership as being *sua sponte*, that is incorrect. The second finding of fact in the OTA decision states "On page 16 of the hearing transcript Petitioner testified that he has stock in the corporation; however, on page 18 of said transcript, Petitioner testified that he had no such stock." See Decision from Office of Tax Appeals, dated August 15, 2005.

There was no error or improper *sua sponte* taking of new evidence on the Circuit Court's part. The error is the Petitioner's attempts at this late date to ask for a remand, or the opportunity to submit new evidence on this fact. The Petitioner received a copy of the transcript of the administrative hearing prior to briefing this matter before the OTA. The Petitioner also received a copy of the OTA's decision, and was on notice at that time that his contradictory testimony was considered by that tribunal. Therefore, the Petitioner had two opportunities to correct these alleged transcription problems, in his briefs to the OTA and to the Circuit Court, he availed himself of neither. As such, his attempts to supplement the record at this time are unfounded.

As this Court is well aware, pursuant to West Virginia Code Sections 11-10A-19 and 29A-5-4 the Circuit Court hears administrative appeals from the OTA on the record. All the Circuit Court did in this matter was sign an Order containing findings of fact and conclusions of law, based upon the record below. The Petitioner cites no authority for the proposition that the Circuit Court has committed an error in this regard.

II. THE PETITIONER'S POSITION AS CORPORATE SECRETARY RENDERS HIM PERSONALLY LIABLE FOR THE TAXES AT ISSUE HERE

The Petitioner's statement that the holding in State ex rel. Haden v. Calco Awning and Window Corp., 170 S.E.2d 362, 366 (1969) makes it "clear" that one's mere status as an officer is insufficient to satisfy the liability requirements of West Virginia Code Section 11-15-17 is absolutely incorrect. On the contrary, the Calco Awning Court stated

Let us examine the defendant's position. Actually they are saying that officers of a corporation who have the duty and responsibility to collect and remit this tax may be held personally liable therefor. They complain, however, that because they statute may be applied so as to attach liability to an officer who has no possible responsibility in relation to the tax, such statute is unconstitutional. **This position is contrary to the well-established principles of statutory construction and is entirely without merit.**

State ex rel. Haden v. Calco Awning and Window Corp., 170 S.E.2d 362, 366 (1969) (emphasis added).

The Petitioner is also incorrect in his assertion that the OTA and the Circuit Court failed to liberally construe West Virginia Code Section 11-15-17, which states:

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 Ann. § 11-15-17 (2002) (emphasis added). Section 17 requires no construction, because it is clear and unambiguous. If an association or corporation fails to pay its West Virginia taxes, the officers are personally liable. The Petitioner was an officer in a corporation that failed to pay its taxes and under West Virginia law he is liable for that debt. The Petitioner fails to offer **any**

persuasive authority to the contrary. Rather, he cites an Internal Revenue statute (and associated case law) which does not pertain to the issues before this Court.

Lastly, the Petitioner suggests that if the Circuit Court had undertaken a substance over form analysis of this matter, somehow that would be beneficial to his case. This from a corporate secretary and bookkeeper **who testified that he was responsible for remitting taxes and knew the corporation was not remitting the proper amount!** Incredibly, the Petitioner seems to suggest in his Petition to this Court that 11-15-17 calls for an even deeper analysis; a inquiry beyond whether he is an officer, an inquiry beyond the fact that he had actual authority to sign checks on behalf of the corporation and to remit taxes. However, pursuant to 11-15-17 the Petitioner is liable for the unpaid taxes of the corporation **even if** he had no check writing or taxpaying authority. The Petitioner offers no authority for the proposition that because the president of the corporation purportedly would not let him remit the proper amount of taxes, he is relieved of liability under 11-15-17.¹

III. THE CIRCUIT COURT DID NOT ERR IN RULING THAT THIS MATTER WAS NOT TIME BARRED BY THE LIMITATIONS CONTAINED IN WEST VIRGINIA CODE SECTION 11-10-15.

The Petitioner states that administrative regulations cannot alter, amend or modify the terms of the governing statute, but then he misidentifies that statute. This matter is a collection action against a corporate officer for an unpaid sales taxes assessment against the corporation that had become final. As such, it is governed by West Virginia Code Sections 11-10-16, 11-15-17 and West Virginia Code of State Rules Title 110, Series 15, Section 4a.7.1.

¹ Aside from his own testimony, the Petitioner offered no other evidence to show that he was prevented from remitting the proper amount of taxes to the State of West Virginia.

West Virginia Code Section 11-10-15(a) states

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) (2002) (emphasis added)

West Virginia Code Section 11-10-16(a) states:

Where assessment is issued.--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 Ann. §11-10-16(a) (2002)

West Virginia Code Section 11-15-17 states:

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 Ann. § 11-15-17 (2002)

Section 4a of Title 110, Series 15 of the West Virginia Code of State Rules states:

An assessment against officers is considered to be a proceeding for the collection of the tax liability of the corporation or association. If the liability of the corporation or association is determined to be due by an assessment which has become final, as

assessment against an officer must be made within five years after the assessment against the corporation or association has become final. If the liability of the corporation or association has become final. If the liability of the corporation is determined to be due by methods provided by law other than an assessment, an assessment against an officer must be made within five years after the date on which the corporation or association filed its annual return, or if no annual return is required, five years after the latest periodical return required to be filed in any year is filed.

W. Va. Code State R. Tit 110 §110-15-4a.7.1 (1993)

Here, in December of 2000 the Tax Commissioner assessed Filly's, the corporation for which the Petitioner worked for unpaid sales taxes. This assessment had a tax due amount of fifty-eight thousand, four hundred and fifty-eight dollars (\$58,458.00). Those taxes were never paid and the assessment then became final. Thereafter, in November of 2004 the Tax Commissioner, in an attempt to collect the aforementioned fifty-eight thousand dollars, issued a Notice of Assessment against the Petitioner, as an officer of the corporation. This assessment was a collection pursuant to Section 4a7.1 of Title 110, Series 15 of the West Virginia Code of State Rules and West Virginia Code Sections 11-10-16 and 11-15-17. This is borne out by the fact that the first line of the Notice of Assessment against the Petitioner shows a tax due of fifty-eight thousand, four hundred and fifty-eight dollars (\$58,458.00).² This was **not** a new assessment, but rather it was clearly and unequivocally a "proceeding instituted by the Tax Commissioner for the collection of the amount found to be due under an assessment which has become final . . ." W.Va. Code Ann. §11-10-16 (2002). How else could the Tax Commissioner's action be characterized; the corporation was assessed fifty-eight thousand, four hundred and fifty-eight dollars (\$58,458.00) in 2000; those

²This November 2004 assessment addressed other periods of unpaid sales taxes on the part of the corporation. Those assessments are not part of the Petitioner's statute of limitations argument.

monies were never paid and the assessment became final; then the Tax Commissioner attempt to collect the exact same amount from the secretary of the corporation. As such, what the Petitioner erroneously attempts to characterize as a “personal assessment” was no such thing. Rather it was a “proceeding for the collection of the tax liability of the corporation” as those terms are used in Section 4a7.1 of Title 110, Series 15 of the West Virginia Code of State Rules.

These facts render the Petitioner’s assertion that the Tax Commissioner has some how violated the statute of limitations contained in West Virginia Code Section 11-10-15 incorrect. As quoted above, Section 15 states that **the amount** of tax due must be established within certain time frames. Here, the fifty-eight thousand dollars that the corporation owed was assessed within three years, as called for in Section 15.

That West Virginia Code Sections 11-10-16 and 11-15-17 are the governing statutes for Section 4a7.1 of Title 110, Series 15 of the West Virginia Code of State Rules is further borne out by the fact that all relate to proceedings or enforcement for collection of assessments that have become final.

This interpretation of the relationship between West Virginia Code Section 11-10-16 and Section 4a7.1 of Title 110, Series 15 of the West Virginia Code of State Rules is bolstered by the United States Supreme Court’s decision in United States v. Galletti. In Galletti the Supreme Court was faced with a fact scenario almost identical to the one before this Court. There, the Internal Revenue Service (hereinafter the “IRS”) assessed a partnership for unpaid employment taxes. This assessment was done within the three (3) year statute of limitations called for under United States law. Thereafter, the IRS attempted to collect the unpaid taxes from the partners individually by filing a proof of claim in Bankruptcy Court. The partners argued in similar fashion to the Petitioner

here, that in order for the ten (10) year statute of limitations regarding collections to apply, the IRS must have assessed them individually within the aforementioned three (3) year statute of limitations. The Court disagreed, noting that taxes are assessed, not taxpayers, and that “[O]nce a tax has been properly assessed, nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer’s debt.” United States v. Galletti, 541 U.S. 114, 123, 124 S.Ct. 1548, 1554 (2004).

Here, the same reasoning applies; as stated above, the notice that was sent to the Petitioner in November of 2004 was not a separate, new or “personal assessment” as the Petitioner erroneously refers to it. Rather, it was notice to the Petitioner that the Tax Commissioner was seeking to collect the assessment that had previously been issued against the corporation in which he was an officer.

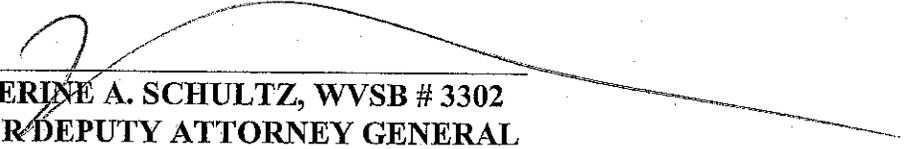
RELIEF PRAYED FOR

For all the reasons set forth above, the Tax Commissioner therefore respectfully requests that the Petitioners’ Petition for Appeal should therefore be refused.

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

By counsel

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CERTIFICATE OF SERVICE

I, A. M. "Fenway" Pollack, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing **Respondent's Reply to Petitioner's Petition for Appeal** which was served by depositing the same postage prepaid in the United States Mail, this 4th day of December 2006, addressed as follows:

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