

No. 33379 – *Barry D. Schmehl, an individual as an officer of Filly’s of America, Inc. v. Virgil T. Helton, acting State Tax Commissioner of West Virginia*

**FILED**

**April 4, 2008**

Albright, Justice, concurring, in part, and dissenting, in part:

released at 3:00 p.m.

RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

While I concur with the new syllabus point in the majority opinion fixing a clear legal standard for imposing liability for unpaid sales taxes on individual corporate officers, application of that standard to impose tax liability against Appellant under the facts of this case is both unreasonable and fundamentally unfair. The very benchmarks adopted by the majority for determining when a corporate officer can be held personally responsible – “when such imposition is in an individual case not arbitrary and capricious or unreasonable” – are clearly incapable of being met in this case.

The factual circumstances presented in the instant case all but demand a ruling that Mr. Schmehl should not be held personally liable for unpaid corporate sales tax based on both his intermittent employment as a corporate bookkeeper for Filly’s of America and the limited financial authority or control he had when serving as the corporate bookkeeper. While clearly downplayed by the majority, Mr. Schmehl offered discerning factual and legal arguments in support of his position that personal imposition of tax liability is indefensible in the case *sub judice*. Among the particulars he identified was the fact that for an entire year of the period covered by the personal tax assessment levied against him, he was not

even working for the company as he was recovering from a heart attack which he suffered in July 2002.<sup>1</sup>

Rather than fully discuss the inconstant pattern of Mr. Schmehl's employment<sup>2</sup> and the numerous bases he offers as to why tax liability should not be imposed, the majority opts to gloss over the critical facts that clearly tip the scales of justice away from imposing personal tax liability in this particular case. A careful, unbiased review of the facts of this case reveals that Mr. Schmehl did in fact have responsibility for both preparing corporate tax returns and for preparing consumer sales and service tax returns, which included remitting the actual tax payments. Admittedly, Mr. Schmehl was one of several persons authorized to sign checks on the corporate bank account. Overlooked by the majority, however, is the fact that when the corporate funds were insufficient to pay all of the outstanding corporate obligations, the exclusive and ultimate authority to determine which obligations would be paid rested not with Appellant, but with the corporation's president and majority stockholder, Paul Horn. In addition to the one-year period in which he did not work for the corporation due to his recovery from a heart attack, Mr. Schmehl states that he did not continually serve as the corporate bookkeeper out of his frustration over not being able to fully execute the duties of his job .

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<sup>1</sup>Mr. Schmehl states that he did not resume working for Filly's until July 2003.

<sup>2</sup>The trial court's order recognized the "on and off" nature of Mr. Schmehl's employment as a bookkeeper for Filly's.

Although the trial court acknowledged Mr. Schmehl's contention that his lack of ultimate authority regarding the disbursement of corporate funds weighed against imposing personal tax liability, the trial court wholly discounted Mr. Schmehl's position, and apparently his credibility, based on a representation made by the State that Mr. Schmehl owned stock in the corporation. In light of the fact that Appellant's stock ownership in Filly's has recently been disestablished, the undue emphasis the trial court placed on this issue in rendering its opinion suggests that the ruling below is untenable:

The Court emphasizes that Petitioner contradicted himself at the Tax Appeal Office's hearing by stating he did own stock in Filly's and then a few minutes later denying he owned stock. Therefore, the Court finds his self-serving testimony that he was only a contract worker and was not in fact an officer suspect. For the same reason the Court finds the Tax Appeal Office's view that Petitioner cannot escape liability by claiming that superiors had the final authority is rational.

Between the time of the trial court's ruling in this matter and this Court's decision in this case, Stephen P. Lee, Executive Director, Clerk of the Court of the West Virginia Office of Tax Appeals, executed an affidavit pertaining to the evidentiary hearing of this matter. That affidavit contains averments that Mr. Lee conducted an independent review of the audio recording of the transcript and that after listening to the recording at least ten times, he came to the following conclusion:

[I]t is perfectly clear that a clerical error by the transcriptionist is set forth in the written transcript as follows.

On page 16, line 291, of this hearing transcript, the Petitioner's counsel, Mr. Caryl, is conducting a line of questions toward his witness, the Petitioner Barry Schmehl. The existing written transcript states here: "Do you have any stock in the corporation?" My thorough review of the audio recording discloses that the actual question clearly was: "She have any stock in the corporation?" In context, this question appears to be referring to an Angela Frailly, whom the witness just identified as the vice-president of the corporation.

The significance of this evidentiary conclusion is that the trial court presumed, as its order clearly demonstrates, that when Mr. Schmehl answered "yes" as to Ms. Frailly's stock ownership, he was responding in reference to his ownership of corporate stock, rather than that of the corporation's vice president.

Relegating any discussion of this issue to a footnote, the majority cursorily acknowledges that "[t]he transcript of the hearing in the instant case in which Mr. Schmehl testified suggests, on balance, that he did not own stock in Filly's. . . ." and further recognizes that "[t]he lower court referred to Mr. Schmehl's inconsistent recorded answers about stock ownership as a factor in upholding the Tax Commissioner." Rather than recognize the significance of this conclusion regarding Mr. Schmehl's lack of stock ownership and the effect the stock ownership issue clearly had on the trial court's decision, the majority chose to "deem[] it immaterial to our ruling."

From the quoted portion of the trial court’s order above, there is no question that the trial court chose to discount the arguments Mr. Schmehl raised on the issue of his lack of final authority to make corporate tax payment-related decisions. The court characterized Mr. Schmehl’s testimony as “self serving” and offered the contradictory<sup>3</sup> evidence on the issue of his ownership of stock in Filly’s as the sole basis for its opinion that Mr. Schmehl was devoid of credibility. From the record before this Court, we have to presume that if the issue of Mr. Schmehl’s lack of stock ownership had been known to the trial court, the issue of Mr. Schmehl’s credibility, if not the ultimate decision itself, might have been altered.

The issue of whether Mr. Schmehl was merely a titular office holder<sup>4</sup> and not one with actual managerial authority is significant. The law is clear that corporate title holding alone is not sufficient to impose personal tax liability for unpaid corporate taxes. *See State ex. rel Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969) (upholding W.Va. Code § 11-15-17 as constitutional as applied against corporate

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<sup>3</sup>The trial court viewed the evidence as “contradictory” based on Mr. Schmehl’s denial of stock ownership while at the same hearing answering “yes” when responding to a query regarding the stock ownership held by Ms. Frailly, the corporate vice president. As discussed above, the trial court mistakenly thought Mr. Schmehl’s answer of “yes” concerned his personal ownership of corporate stock.

<sup>4</sup>Mr. Schmehl argued that he was only made a corporate officer in the first instance to meet a residency requirement. His lack of corporate stock seems to confirm this possibility.

officers who in fact acted as officers of corporation, rejecting claim that election flaws negated imposition of personal tax liability); Admin. Dec. 06-026C, 06-027W, W.Va. Office of Tax Appeals (April 7, 2006) (ruling that “[e]ffective on and after July 15, 1993, the consumers’ sales and service tax legislative regulations follow the broad reach of W.Va. Code § 11-15-17 [1978] by basing corporate officer liability for unpaid corporate consumers’ sales and service tax liability upon the corporate officer’s status as a corporate officer, as long as that officer, during the assessment period(s), had any actual managerial authority on behalf of the corporation, that is, he or she was not merely an officer in name only”). Consequently, the argument that Mr. Schmehl raised below as to his lack of decision-making authority as to the tax payments in issue was deserving of more scrutiny than that accorded by either the trial court or the majority.

On balance then, I can only reach the conclusion that the decision to impose personal tax liability against Mr. Schmehl – an individual who held a corporate title but no stock and who did not continuously occupy the position of corporate bookkeeper as one that is arbitrary, capricious, and clearly unreasonable under the facts of this case. Accordingly, I must respectfully dissent from the result reached by the majority.