

REDACTED DECISION – DOCKET #S 08-286 W & 08-287 C – BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED FOR DECISION on JULY 8, 2009 – ISSUED on JANUARY 8, 2010.

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING -- 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 § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- W. Va. Code § 11-10-11(f) does not answer the precise legal questions of what constitutes a “successor” or “successor in business,” or what is the sale of a “business” for purpose of establishing the liability of a “successor” or “successor in business.” Consequently, the State Tax Commissioner addressed the silence of the statute by promulgating legislative rules defining what is a “successor” or “successor in business.” *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- The legislative rules promulgated by the State Tax Commissioner with respect to the consumers sales and service tax, defining who or what is a “successor” or “successor in business,” W. Va. Code St. R. §§ 110-15-2.88 & 4.9.1, and “business” for purpose of the sale of a business, W. Va. Code St. R. § 110-15-4.9.2, present reasonable constructions of the statute. Consequently, they are entitled to the same deference as statutes. *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- Although W. Va. Code St. R. §§ 110-15-2.88 & 4.9 are part of the Chapter of the West Virginia Code of State Rules respecting the consumers sales and service tax, those rules were promulgated for the purpose of interpreting W. Va. Code § 11-10-11(f), a provision of the Tax Procedures Act which is applicable to all taxes identified in W. Va. Code § 11-10-3, including personal income tax withholding. It is logical that the standards established by said rules should apply consistently to all taxes covered by the Tax Procedures Act.

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- The evidence presented in this matter shows that the Petitioner did not purchase, acquire or otherwise succeed to the stock of goods of the Corporation A and, therefore, is not liable as its “successor” or “successor in business” by reason of that provision contained in W. Va. Code § 11-10-11(f).

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- The evidence presented in this matter clearly shows that the Petitioner did purchase, acquire or otherwise succeed to all or substantially all of the business assets of the Corporation A and, therefore, is liable as its “successor” or “successor in business” by reason of that provision contained in W. Va. Code § 11-10-11(f).

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- The evidence in this matter shows that Ms. A changed the form of the business of Corporation A, a corporation, to the Petitioner, a limited liability company, but otherwise operated the business in the same manner in virtually every respect and, therefore, the Petitioner is liable as Corporation A’s “successor” or “successor in business” by reason of that provision contained in W. Va. Code § 11-10-11(f).

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- Based on the language of W. Va. Code § 11-10-11(f)(2), interest and additions to tax continue to accrue on the liability that attached to the Petitioner as a successor in business to the Corporation A, consistent with the statutes imposing interest and additions to tax.

CONSUMERS SALES AND SERVICE TAX & PERSONAL INCOME TAX WITHHOLDING – BURDEN OF PROOF -- The Petitioner in this matter has failed to carry its burden of proving that any assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On or about October 24, 2008, the Compliance Division of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a Successor in Business Assessment, for consumers sales and service tax and personal income tax withholding against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10, 15 and 21 of the West Virginia Code. The consumers sales and service tax portion of the assessment was for the period of December 31, 1997, through January 31, 2006, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. The personal income tax withholding portion of the assessment was for the period of January 31, 1997, through December 31, 1997, for tax in the amount of \$____, interest in the

amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. According to the petition for reassessment, written notice of this assessment was served on the Petitioner on October 26, 2008.

Thereafter, on December 22, 2008 the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005].

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

FINDINGS OF FACT

1. The Petitioner, is a limited liability corporation, with an address in West Virginia.
2. The Petitioner's sole organizer and managing member is Ms. A.
3. The Petitioner has a business registration certificate issued by the State Tax Department; a business license issued by a city in West Virginia; is registered with an entity for unemployment compensation insurance; and is registered with another entity for workers' compensation coverage.
4. The assessment in this action was issued against the Petitioner on the grounds that the Petitioner is a successor in interest to Corporation A, which was the subject of two assessments which have become final.
5. A successor in business assessment was issued against the Corporation A, as more fully set forth above.
6. In dealing with the Petitioner, a revenue agent for the Compliance Division of the State Tax Department, dealt with Ms. A, its managing member.
7. Corporation A was incorporated in 1964 by Ms. A's parents. At that time Corporation A was involved in other endeavors.

8. Some time after its incorporation, the corporation began operating sandwich shop in a city in West Virginia.

9. In 1987, after her father suffered a stroke, Ms. A became the president of the Corporation A. She continued to operate the company after her father left the business.

10. After a number of years of operation, sandwich shop closed.

11. After the sandwich shop closed, Corporation A opened sandwich shop in a city in West Virginia. Some time passed between the closing of the sandwich shop location and the opening of the sandwich shop location. Ms. A recalls that the shop reopened in 1996.

12. At the new location, Corporation A continued to operate under the name sandwich shop so that customers would know that they were the same sandwiches.

13. The revenue agent attempted to collect delinquent taxes from the Corporation A. He dealt with Ms. A in his attempts to collect said taxes.

14. In April, 2008, the State Tax Commissioner issued a notice to the Corporation A revoking its business license due to the accrual and nonpayment of withholding and consumers sales and service taxes.

15. The revocation of Corporation A's business license was upheld by an administrative decision issued by this Office on or about May 21, 2008.

16. After the Tax Department revoked Corporation A's business license, Corporation A continued doing business while Ms. A contemplated filing an appeal on behalf of the corporation.

17. Ms. A determined that Corporation A could not post an appeal bond, so it was decided that the shop would be closed.

18. Corporation A continued to operate the sandwich shop until June 20, 2008, consuming but not restocking its inventory, at which time the shop was closed.

19. At the time that the Corporation A ceased operating the sandwich shop, it gave away its remaining inventory and closed the shop.

20. Corporation A had five employees at the time that it was operating the sandwich shop.

21. When the Corporation A closed the sandwich shop, Ms. A left the equipment in the building, believing that she could store it there until it could be removed to another location because she figured there would not be a new tenant at that location for some time.

22. Corporation A had a sign hanging over the sidewalk at the location advertising its location to the public.

23. After Corporation A ceased doing business, Ms. A removed the sign from the front of the building and stored it in the basement of the leased premises.

24. Ms. A testified that at the time that Corporation A ceased operating the sandwich shop that she did not intend to reopen in the same location, but that she intended to look for a new location from which to operate a sandwich shop.

25. At that time, the owner of the building in which the shop was located was negotiating to sell the building to a new owner.

26. Ms. A was contacted about remaining in the building as a tenant, because that was a factor in the financing of the purchase by the new owner.

27. Effective July 1, 2008, Ms. A entered into a new lease with the new owner of the building.

28. The new lease is a verbal, month-to-month lease, with an increased rent.

29. The Corporation A closed sandwich shop on or about June 20, 2008, and Petitioner reopened sandwich shop on or about July 7, 2008.

30. Petitioner is operating sandwich shop at the same location at which Corporation A operated its sandwich shop.

31. The sandwich shop operated by Petitioner is called the sandwich shop, the same name as the sandwich shop operated by Corporation A, because of the name recognition.

32. When the sandwich shop reopened, Ms. A retrieved the sign from the basement and hung it on the side of the building.

33. Ms. A testified that if she had reopened the sandwich shop at a different location, she might have changed the name.

34. The Petitioner did not pay any consideration to Corporation A for the use of the name sandwich shop.

35. Upon reopening the sandwich shop, the Petitioner retained one full-time employee of Corporation A, made a part-time Corporation A employee a full-time employee of the Petitioner, and hired another employee.

36. Ms. A testified that she did not maintain contact with the employees during the period between the time Corporation A closed the sandwich shop and the time that the Petitioner reopened it.

37. Ms. A hired the two former Corporation A employees after it was clear that she was going to reopen sandwich shop under the Petitioner.

38. In order to reopen the sandwich shop, it was necessary to restock the supplies used to make product to sell. The Petitioner purchased the necessary supplies to reopen the sandwich shop. See Petitioner's Exhibit No. 2.

39. None of the supplies used by the Petitioner were transferred from the Corporation A.

40. Ms. A began ordering supplies on or about June 30, 2008. She indicated that she possibly picked up some supplies on that date.

41. The phone number used by the Corporation A for the sandwich shop was _____.

42. The phone number used by the Petitioner for the sandwich shop is different.

43. If customers call the number used by the Corporation A for the sandwich shop, it will roll over to the current number.

44. Ms. A testified that the counters used in the sandwich shop were purchased by the Corporation A and installed in the sandwich shop when it opened. She recalls that they were purchased in 1995 or 1996.

45. The counters remained in the sandwich shop when Corporation A closed and are currently being used by the Petitioner.

46. The tables and chairs located in the sandwich shop were salvaged by Ms. A from the a former restaurant in West Virginia.

47. The former restaurant was operated by the Corporation A.

48. The restaurant was closed for several years before the property was purchased by an oil company for use as a service station.

49. She is unsure if the property was owned by Corporation A or her father at the time it was sold to the oil company.

50. Ms. A salvaged the tables and chairs before the building was demolished by or on behalf of the oil company.

51. The tables and chairs were used in the sandwich shop at the time it was operated by the Corporation A.

52. The tables and chairs remained in the sandwich shop at the time Corporation A closed the sandwich shop and are currently being used by the Petitioner.

53. A substantial portion of the equipment used by the Petitioner in its business is the personal property of Ms. A that she accumulated over a number of years. Some of the property was acquired by her when she operated a sandwich shop in a city in West Virginia.

54. Ms. A “put” the equipment in the sandwich shop at the time that it was operated by Corporation A.

55. There is a walk-in cooler at the sandwich shop that belongs to Ms. A.

56. The walk-in cooler was originally used by her in a deli she operated.. When the deli closed, she dismantled the cooler, transported it to a city in northern West Virginia and stored it in a warehouse there.

57. When the Corporation A reopened the sandwich shop in 1996, she brought the walk-in cooler from the northern city and installed it at another West Virginia location.

58. The walk-in cooler was used in the sandwich shop at the time it was operated by the Corporation A.

59. The walk-in cooler remained in the sandwich shop at the time Corporation A closed the sandwich shop and is currently being used by the Petitioner.

60. The cooler used by the Corporation A at the sandwich shop was personally owned by Ms. A. Corporation A did not pay any money to lease the cooler from Ms. A.

61. The equipment used by the Petitioner was not property that had been used by the sandwich shop until it was in another location.

62. Ms. A was given a refrigerator in approximately 2006, which she testified that she put in storage before putting it to use in the sandwich shop.

63. It is unclear as to whether the refrigerator was used in the sandwich shop at the time it was operated by Corporation A.

64. Corporation A purchased a chest freezer that was used in the sandwich shop at the time it was operated by Corporation A.

65. The chest freezer was never sold by Corporation A to Ms. A to the Petitioner.

66. The chest freezer remained in the sandwich shop at the time Corporation A closed the sandwich shop and is currently being used by the Petitioner.

67. The cash register was used by Ms. A in operating her deli.

68. The cash register was subsequently used in the sandwich shop at the time it was operated by Corporation A and is currently being used in the sandwich shop.

69. Deliveries on behalf of the sandwich shop were made in a vehicle titled in the name of Ms. A. This was the case when sandwich shop was operated by Corporation A and by the Petitioner.

70. Neither Corporation A nor the Petitioner paid any rent for the use of Ms. A's personal vehicle.

71. Ms. A testified that the Petitioner did not purchase or otherwise acquire any equipment from the Corporation A.

72. Ms. A testified that she "just went through the paper work and reset things up and reopened."

73. At some time before the hearing regarding the revocation of Corporation A's business registration certificate, Ms. A filed personal income tax withholding returns which show that the amount withheld from its employees for the period covered by the assessment is less than the amount assessed.

74. The Revenue Agent received the returns, but did not process them.

DISCUSSION

The issue presented by this action is whether the Petitioner is liable for taxes assessed against Corporation A. The basis for said liability, if any, is that the Petitioner is a successor in interest to Corporation A.

West Virginia Code § 11-10-11(f) provides, in relevant part:

(1) If any person subject to any tax administered under this article sells out his, her or its business or stock of goods, or ceases doing business, 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 become due and payable immediately and that person shall, within thirty days after selling out his, her or its business or stock of goods or ceasing to do business, make a final return or returns and pay any tax or taxes which are due. The unpaid amount of any tax is a lien upon the property of that person.

(2) The successor in business of any person who sells out his, her or its business or stock of goods, or ceases doing business, is personally liable for the payments of tax, additions to tax, penalties and interest unpaid after expiration of the thirty-day period allowed for payment: Provided, That if the business is purchased in an arms-length transaction, and if the purchaser withholds so much of the consideration for the purchase as will satisfy any tax, additions to tax, penalties and interest which may be due until the seller produces a receipt from the Tax Commissioner evidencing the payment thereof, the purchaser is not personally liable for any taxes attributable to the former owner of the business unless the contract of sale provides for the purchaser to be liable for some or all of the taxes. The amount of tax, additions to tax, penalties and interest for which the successor is liable is a lien on the property of the successor, which shall be enforced by the Tax Commissioner as provided in this article.

This provision imposes liability on a “successor in business” where the predecessor either sells out its business, sells out its stock of goods or ceases doing business. It further provides that there is no liability imposed on the successor where the successor purchases the business in an arms-length transaction and where the successor withholds so much of the purchase price as to ensure payment of any taxes, interest and additions to tax owed by the predecessor.

The State Tax Commissioner promulgated a legislative rule to clarify or interpret the statute. The applicable rule was authorized by the Legislature. The legislative rule provides for liability of a successor in business in limited instances. W. Va. Code St. R. § 110-15-2 (July 15, 1993) defines who is a “successor” or “successor in business.” It provides, in relevant part:

As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular or in the plural.

* * * *

2.88. "Successor" or "successor in business" means any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling or otherwise disposing of a business or stock of goods.

W. Va. Code St. R. § 110-15-4.9 (July 15, 1993) establishes certain criteria respecting the liability of a "successor" or "successor in business" for the tax liability of a predecessor. It provides, in relevant part:

4.9. Liability of Successor. - *If any person sells out his or its business or stock of goods, or ceases doing business, any tax, additions to tax, penalties and interest shall become due and payable immediately and such person shall, within thirty days after selling out his or its business or stock of goods or ceasing to do business, make a final return or returns and pay any tax or taxes which may be due; and, the unpaid amount of any such tax shall be a lien upon the property of such person. The successor in business of any person who sells out a business or stock of goods, or ceases doing business, shall be personally liable for the payment of tax, additions to tax, penalties and interest unpaid after expiration of the thirty (30) day period allowed for payment by the predecessor.*

4.9.1. *The term "successor" is defined in Section 2 of these regulations to mean any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness.*

4.9.2. *The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods of such business. If two or more persons purchase or acquire a business or stock of goods, their liability as successor is in proportion to the value of the business assets or stock of goods acquired by each person.*

4.9.3. *The business assets include all assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights. Any asset owned by a corporation is a business asset. "Stock of goods" means the inventory or merchandise that the*

taxpayer is in the business of selling, but does not include fixtures, equipment, machinery or vehicles used in connection with such business.

* * * *

4.9.5. The change in the form of a business will generally give rise to successor liability. A change in the form of a business would include changes such as the incorporation of a sole proprietorship or partnership, the voluntary or involuntary dissolution of a corporation, the merger or consolidation of two or more corporations, the formation of a partnership from one or more sole proprietorships or corporations.

* * * *

4.9.8. The liability of a successor extends to taxes incurred in the course of operation of the business by the former owner and any successor liability of the former owner. The liability may include any liability of the former owner for tax, interest, additions to tax, and penalties that is due and payable, and any such liability that is not due and payable because the former owner has not filed tax returns at the time required by law. The liability includes all taxes, penalties, interest, and additions to tax, whether assessed or unassessed against the former owner, without regard to whether a tax lien has been issued or perfected against the former owner. If any former owner is given a certificate from the Tax Department stating that no taxes are due from his former owner, then the successor shall only be liable for the tax liability of the successors' former owner not covered by the said certificate.

4.9.8.1. The liability of a successor includes taxes that are required by law to be paid prior to the sale or transfer of the business or stock of goods, even if the liability of the former owner is not determined at the time of the sale or transfer. If an audit conducted after the sale or transfer shows a deficiency for periods prior to the sale or transfer, the deficiency is a liability of the former owner and a liability of the successor.

4.9.9. The liability of a successor in business is not limited to the amount of purchase money, or consideration received by the former owner, unless the successor avoids liability or limits liability by one or more of the following methods. If the purchase of a business or stock of goods is an arms-length transaction, the purchaser may avoid any successor liability by requiring the seller to produce a receipt from the Tax Commissioner showing all taxes of the seller have been paid. If the purchase of a business is an arms-length transaction, the purchaser may limit successor liability by withholding enough of the purchase money to satisfy the tax liability of the seller. If the purchase or transfer of a business or stock of goods is not an arms-length transaction, the purchaser or transferee may avoid any successor liability by requiring the seller or transferor to produce a receipt from the Tax Commissioner showing all taxes of the seller or transferor have been paid.

4.9.10. The liability of a successor is determined by law and cannot be avoided or altered by contracts or agreements between the former owner and successor. Thus, a contract or other agreement, providing that the purchaser, transferee, seller, or transferor is or is not responsible for the tax liability of the former owner, or that the former owner has no tax liability, does not alter the liability of the successor.

4.9.11. The liability of a successor may be determined or estimated and an assessment made against such successor. An assessment against a successor is considered to be a proceeding for the collection of the tax liability of the former owner. If the liability of the former owner is determined to be due by an assessment which has become final, an assessment against a successor must be made within five years after the date on which the former owner 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. (Emphasis added.)

In determining whether or not force and effect is to be given to a legislative rule, the initial determination that must be made is whether or not the Legislature has directly spoken to the precise legal question at issue. Syl. pt. 3, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995). If the statute is silent or ambiguous with respect to the precise legal question at issue, then the determination to be made is whether the administrative agency's answer to the precise legal question is based on a permissible construction of the statute. Syl. pt. 4, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

In determining whether or not the Legislature has answered the precise legal questions presented in this matter, it is apparent that it has not. The statute does not precisely answer several questions necessary to the resolution of this matter. What is a "successor in business?" What constitutes the "stock of goods" of a business? Where there is no stock of goods, what is the "business?" What if the purchaser or person acquiring a business purchases or acquires less than all of the assets or stock of goods of the business? May a purchaser or acquirer avoid liability where it is merely a nominally different business entity which is owned and operated by the same principals in exactly the same manner as the original business? How may a purchaser

protect itself by ensuring that the predecessor paid taxes or by ensuring that they are paid out of the purchase price and a certificate is obtained from the State Tax Commissioner? In promulgating the legislative rule, the State Tax Commissioner addressed these issues. As will be more fully discussed below, with respect to the legal issues presented, the legislative rule provides permissible constructions of the statute.

Another issue that needs to be addressed is the fact that the legislative rule construing the liability of successors in business is contained in W. Va. Code St. R. § 110-15-1, *et seq.*, which applies to the consumers sales and service tax. A portion of the assessed liability in this matter is for personal income tax withholding. The issue is whether the legislative rule should apply to personal income tax withholding in spite of the fact that it is contained in that Chapter of the Code of State Rules pertaining to consumers sales and service tax.

While the legislative rule is contained in the Chapter of the Code of State Rules pertaining to consumers sales and service tax, it construes a section of the West Virginia Code contained in the Tax Procedures Act, W. Va. Code § 11-10-1, *et seq.* The Tax Procedures Act pertains to the consumers sales and service tax, the personal income tax and a number of the other taxes administered by the State Tax Commissioner. W. Va. Code § 11-10-3(a). Thus, the legislative rule construes a statute that pertains to the personal income tax. Additionally, it makes no sense to have two different constructions of the same statute, depending on the tax. Consequently, the legislative rule must apply to the withholding tax portion of the assessment.

The first determination to be made in this matter is whether Corporation A constitutes a predecessor in accordance with the provisions of W. Va. Code § 11-10-11(f). Clearly it does. Corporation A ceased doing business as a result of the revocation of its business registration certificate by the State Tax Commissioner. Although it involuntarily ceased doing business, nothing in the statute requires its cessation of business to be voluntary. This involuntary

cessation of business qualifies Corporation A as a predecessor in business for purposes of this statute.

Having determined that Corporation A qualifies as a predecessor, the next determination to be made is whether the Petitioner constitutes a “successor in business.” Insofar as the statute does not define or otherwise elaborate on what qualifies the Petitioner as a “successor in business,” it does not answer that precise legal question. The legislative rule proposed by the State Tax Commissioner and authorized by the Legislature contains a definition of “successor in business” and other factors to be considered in determining what constitutes a “successor” or “successor in business.” The definition in the legislative rule and the other factors set forth therein constitute a permissible construction of the statute.

W. Va. Code St. R. § 110-15-2.88 (July 15, 1993) provides that a “successor” or “successor in business” is “any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling or otherwise disposing of a business or stock of goods.” This definition is reiterated in W. Va. Code St. R. § 110-15-4.9.1. Thus, in order for this Office to find that the Petitioner is a “successor in business” to Corporation A, there must be evidence in the record sufficient to show that it purchased, acquired or succeeded to either the business or the stock of goods of Corporation A, or both.

The Petitioner argues that it cannot be considered a successor in business because it did not purchase or acquire all or substantially all of the stock of goods of Corporation A. “Stock of goods” is not defined by the statute, but is defined by the legislative rule. It means the inventory or merchandise that the taxpayer is in the business of selling, but does not include fixtures, equipment, machinery or vehicles used in connection with such business. W. Va. Code St. R. § 110-15-4.9.3. Clearly, the evidence shows that the Petitioner did not purchase or acquire any of

Corporation A's stock of goods. Thus, insofar as the Petitioner did not purchase or acquire Corporation A's stock of goods, it is not a "successor in business."

Although the Petitioner cannot be considered a "successor in business" because it did not purchase or acquire Corporation A's stock of goods, it may be a "successor in business" if it purchased, acquired or succeeded to Corporation A's business.¹ The statute does not address the precise legal issue of what constitutes the business of a predecessor in business. However, the legislative rule addresses the question. In determining whether a person has acquired the business of a predecessor, consideration must be given to whether or not the person acquiring assets of the predecessor has acquired substantially all of the assets of the predecessor business. W. Va. Code St. R. § 110-15-4.9.2. Conversely, a person who acquires some small portion of the predecessor's business or stock of goods is not a "successor in business."

The evidence in this matter clearly shows that the Petitioner acquired all or substantially all of the assets of the Corporation A. Based on the evidence in the record and giving consideration to the manner in which Corporation A operated and the Petitioner operates its business, it appears that the Petitioner acquired all or substantially all of the personal property used by Corporation A in the operation of its business.

It is apparent that the Petitioner acquired all of the property owned by the Corporation A. While this was not a substantial amount of property, it was all of the property owned by the Corporation A.

¹ Limiting the definition of a "successor" or "successor in business" only to one who purchases the stock of goods of a predecessor is contrary to the clear, express language of W. Va. Code § 11-10-11(f), which provides for successor liability to one who purchases or otherwise succeeds to a business. This provision prevents one who purchases or succeeds to a business from avoiding successor liability simply by acquiring all of the assets of the predecessor, except its stock of goods. If purchase or acquisition of the stock of goods were the only basis for successor liability, the purchaser/acquirer/successor might forego purchasing or acquiring the predecessor's stock of goods solely for the purpose of avoiding successor liability. The Legislature has clearly sought to prevent this from happening.

The Petitioner also acquired the use of all of the personal property owned by Ms. A that had been used by Corporation A in the operation of the sandwich shop. This included the walk-in cooler, refrigerator and miscellaneous kitchen equipment. It also acquired use of Ms. A's vehicle, which had been used by Corporation A to deliver sandwiches and is presently being used by the Petitioner for the same purpose. Although the Petitioner did not own or lease Ms. A's property, its use thereof was an asset. While neither Corporation A nor the Petitioner paid any direct consideration to Ms. A for the use of her property, its use constituted assets of Corporation A acquired by the Petitioner.²

The Petitioner also acquired the name "sandwich shop" from the Corporation A and the phone number used by the Corporation A. After Corporation A ceased operations, the phone number could still be used to call the Petitioner. It also retained the same business location as Corporation A, albeit pursuant to a new month-to-month lease, at increased rent. These were unique and valuable assets of the Corporation A and became assets of the Petitioner. As testified to by Ms. A, when she determined that the Petitioner would operate the sandwich shop out of the same location, it would retain the same name. She also testified that it retained the name because it signified to the public that the business was serving high quality sandwiches. Although she did not expressly use the term, this indicates her belief that there is substantial goodwill attached to the name, location and phone number associated with the sandwich shop. This goodwill was an asset acquired by the Petitioner from the Corporation A.

The personal property owned by Corporation A, Ms. A's personal property used by the Corporation A and the goodwill in the name, phone number and location were substantially all of

² Arguably, the lack of any consideration paid for the use of equipment owned by Ms. A rendered use of the assets more valuable to Corporation A and the Petitioner than if it had leased the assets.

It could also be argued that Ms. A derived consideration from the use of her personal property in the form of the benefits that flowed to her in her capacity as the principal of both Corporation A and the Petitioner.

the assets owned by the Corporation A. The Petitioner acquired these assets. Thus, in accordance with W. Va. Code § 11-10-11(f) and the legislative rule construing that statute, the Petitioner is a “successor in business” of the Corporation A and is liable for taxes accrued by it.

Successor liability may also attach where there is a mere change in the form of the business, such as involuntary dissolution of a corporation or a change in the form of the business entity. W. Va. Code St. R. § 110-15-4.9.5. The facts in this matter demonstrate that the business merely underwent a change in the form and that it is the same business operating under a different name and form.

Corporation A’s business registration certificate was revoked effective May 27, 2008. It continued operating until June 20, 2008, beyond the effective date of the revocation. In the meantime, within a week of the effective date of the revocation and in apparent reaction thereto, and no later than June 3, 2008, Ms. A filed the paperwork necessary to create the Petitioner. This was nearly three weeks before Corporation A ceased operating the sandwich shop. During this period, Ms. A negotiated a new lease on behalf of the Petitioner for the same premises in which she operated the sandwich shop. Ms. A began ordering supplies to operate the sandwich shop on June 30, 2008. The sandwich shop was effectively closed for a period of two (2) weeks.

The Petitioner began operating under the same business name as was used by the Corporation A. It operates in the same location as did the Corporation A and its customers can phone the business at the same number as was used by the Corporation A. It is selling the same product as did the Corporation A. It is using all or substantially all of the same equipment as the Corporation A, including personal property owned by Ms. A that is “loaned” to the Petitioner without consideration, in the same manner as it was “loaned” to the Corporation A without consideration. Deliveries are made in the same vehicle. The same individual, Ms. A, is

managing the Petitioner as managed the Corporation A. It appears that Ms. A is the sole owner of the Petitioner, and that she was the sole owner of the Corporation A.³ Several employees are the same.

Considering all of this evidence together, it appears that Ms. A intended to transition from Corporation A to the Petitioner in response to the business registration certificate revocation, with as little disruption as possible. This conclusion is supported by Ms. A's testimony that she went through the paperwork, reorganized the shop and reopened. She appears to have viewed this as a mere change in the form of operating the sandwich shop. This is demonstrative of a mere change in the form of the business.

The Petitioner also contends that if it is found liable for the taxes of Corporation A, then it cannot be liable for any amount that accrued more than thirty (30) days after Corporation ceased business. It relies on the language of W. Va. Code § 11-10-11(f)(2), which provides, in relevant part:

The successor in business . . . is personally liable for the payments of tax, additions to tax, penalties and interest unpaid after expiration of the thirty-day period allowed for payment: . . . The amount of tax, additions to tax, penalties and interest for which the successor is liable is a lien on the property of the successor, which shall be enforced by the Tax Commissioner as provided in this article.

The Petitioner contends that this language limits its potential liability to the amount Corporation A owed thirty (30) days after the revocation of its business registration certificate. The Petitioner is correct that the amount owed by Corporation A is the limit of the amount of the lien that attaches to the property of the Petitioner,⁴ at least until such time as any liability of the Petitioner

³ Although not well fleshed out by the evidence, it appears that Corporation A may have operated and the Petitioner may be operating as alter egos of Ms. A, without regard for the formal requirements necessary to the operation of said business entities.

⁴ The language of the statute appears to make the lien applicable to all property of the successor, not merely the property acquired from the predecessor.

is established and a lien filed against it based on its independent liability, including its liability as a successor in business.

The statutory language is unclear enough that either party's construction of the statute could be considered a permissible construction. The State Tax Commissioner could have promulgated a legislative rule that would give the statute the construction that he argues. However, he has not done so. Thus, this Office must give the statute a reasonable construction based on the language of the statute.

The successor in business is liable for the payments of tax, additions to tax, penalties and interest unpaid after expiration of the thirty-day period allowed for payment. While the language may be susceptible to a construction that would stop the accrual of interest and additions to tax after the expiration of the thirty-day period, this Office is of the opinion that the better construction of the statute is that interest and additions to tax continue to accrue.⁵ To hold otherwise would be to encourage a taxpayer to cease doing business as one business entity and commence doing business as a second business entity, while limiting its liability to a fixed amount, without the accrual of additional interest or additions to tax. This would allow the taxpayer to relieve itself of the payment of any additional interest or additions to tax, in effect in contravention of the statutes requiring accrual and payment of interest and additions to tax. The taxpayer's argument in this regard does comport with the overall statutory scheme. Accordingly, interest and additions to tax continue to accrue, as provided by statute.

CONCLUSIONS OF LAW

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

⁵ No additional tax accrues in the name of the predecessor, since it has either sold the business or stock of goods, or has ceased doing business.

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. W. Va. Code § 11-10-11(f) does not answer the precise legal questions of what constitutes a “successor” or “successor in business,” or what is the sale of a “business” for purpose of establishing the liability of a “successor” or “successor in business.” Consequently, the State Tax Commissioner addressed the silence of the statute by promulgating legislative rules defining what is a “successor” or “successor in business.” *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

3. The legislative rules promulgated by the State Tax Commissioner with respect to the consumers sales and service tax, defining who or what is a “successor” or “successor in business,” W. Va. Code St. R. §§ 110-15-2.88 & 4.9.1, and “business” for purpose of the sale of a business, W. Va. Code St. R. § 110-15-4.9.2, present reasonable constructions of the statute. Consequently, they are entitled to the same deference as statutes. *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

4. Although W. Va. Code St. R. §§ 110-15-2.88 & 4.9 are part of the Chapter of the West Virginia Code of State Rules respecting the consumers sales and service tax, those rules were promulgated for the purpose of interpreting W. Va. Code § 11-10-11(f), a provision of the Tax Procedures Act which is applicable to all taxes identified in W. Va. Code § 11-10-3, including personal income tax withholding. It is logical that the standards established by said rules should apply consistently to all taxes covered by the Tax Procedures Act.

5. The evidence presented in this matter shows that the Petitioner did not purchase, acquire or otherwise succeed to the stock of goods of the Corporation A and, therefore, is not

liable as its “successor” or “successor in business” by reason of that provision contained in W. Va. Code § 11-10-11(f).

6. The evidence presented in this matter clearly shows that the Petitioner did purchase, acquire or otherwise succeed to all or substantially all of the business assets of the Corporation A and, therefore, is liable as its “successor” or “successor in business” by reason of that provision contained in W. Va. Code § 11-10-11(f).

7. The evidence in this matter shows that Ms. A changed the form of the business of Corporation A, a corporation, to the Petitioner, a limited liability company, but otherwise operated the business in the same manner in virtually every respect and, therefore, the Petitioner is liable as Corporation A’s “successor” or “successor in business” by reason of that provision contained in W. Va. Code § 11-10-11(f).

8. Based on the language of W. Va. Code § 11-10-11(f)(2), interest and additions to tax continue to accrue on the liability that attached to the Petitioner as a successor in business to the Corporation A, consistent with the statutes imposing interest and additions to tax.

9. The Petitioner in this matter has failed to carry its burden of proving that the assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers sales and service tax successor liability assessment issued against the Petitioner for the period of December 31, 1997, through January 31, 2006, for tax in the amount of \$43,926.66, interest in the amount of \$29,974.92, and additions to tax in the amount of \$21,643.19, totaling \$95,544.77, should be and is hereby **AFFIRMED**.

Interest continues to accrue on this unpaid tax until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that personal income tax withholding successor liability assessment issued against the Petitioner for the period of January 31, 1997, through December 31, 1997, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, totaling \$____, should be and is hereby **AFFIRMED**.

Interest continues to accrue on this unpaid tax until this liability is fully paid.