

**REDACTED DECISION—09-328 C—BY MICHELE DUNCAN BISHOP, CHIEF ALJ—  
SUBMITTED FOR DECISION on DECEMBER 17, 2009 —ISSUED on JUNE 17, 2010.**

**FINAL DECISION**

**SYNOPSIS**

1. The decision of the State Tax Commissioner to deny a party's request for extension of time to file a petition for appeal and post security relative to a notice of jeopardy assessment is reviewable by the West Virginia Tax Appeals, as is the assessment itself.
2. Where a petitioner has purchased several tangible assets of another business, but has not purchased, acquired or otherwise succeeded to "substantially all" of the stock of goods or any intangible business assets of the other business, no successor relationship is established.

**OVERVIEW**

On August 12, 2009, the State Tax Department issued a Notice of Jeopardy Successor Assessment in the amount of \$\_\_\_\_\_ to Ms. B\_\_\_\_\_, owner of a bar and grill establishment, pursuant to West Virginia Code § 11-10-7. The notice was hand-delivered to her on August 26, 2009, but was not received by her prior to that date. The assessment was issued jointly to Ms. B\_\_\_\_\_ and the corporation, and stemmed from unpaid consumers sales tax by a business previously housed in the same location as the establishment. Ms. B\_\_\_\_\_, by counsel, promptly requested of the State Tax Commissioner an extension of time to file a petition for reassessment, simultaneously informing the commissioner that Ms. B\_\_\_\_\_ was financially unable to remit the amount assessed or obtain a line of credit. Then-State Tax Commissioner Christopher Morris denied the request by letter dated September 11, 2009. No surety bond or other security was posted by Ms. B\_\_\_\_\_ at any time throughout the process.

Upon receiving the denial from Commissioner Morris, the petitioner's counsel promptly filed on his client's behalf a petition for reassessment with the West Virginia Office of Tax Appeals, which petition was received on September 16, 2009. A hearing on that petition was conducted by a presiding administrative law judge on December 17, 2009. Both parties were represented by counsel. At the conclusion of the hearing, the parties agreed to submit the matter for decision on the existing record without the need for the exchange of proposed findings of fact and conclusions of law. The parties also declined to offer closing arguments at the conclusion of the hearing.

#### **STATE TAX COMMISSIONER'S MOTION TO DISMISS**

The respondent State Tax Commissioner moved, prior to the beginning of the evidentiary hearing, to dismiss the petition on the basis that no security was posted, thereby rendering the jeopardy assessment final pursuant to W.Va. Code § 11-10-7(b). That portion of the statute reads, in part:

. . . Unless the taxpayer against whom a jeopardy assessment is made posts the required security and petitions for reassessment within twenty days after service of notice of the jeopardy assessment, such assessment shall become final: Provided, That upon written request of the taxpayer made within such twenty-day period, showing reasonable cause therefor, the tax commissioner may grant an extension of time not to exceed thirty additional days within which such petition may be filed. If a taxpayer against whom a jeopardy assessment has been made petitions for reassessment, the petition or request shall be accompanied by remittance of the amount assessed or such security as the tax commissioner may deem necessary to insure compliance with the applicable provisions of this chapter. If a petition for reassessment is timely filed, and the amount assessed has been remitted, or such other security posted, the provisions for hearing, determination and appeal set forth in sections nine and ten shall then be applicable.

As noted above, the State Tax Commissioner declined to grant the requested extension, and the petitioner never made a payment to the State Tax Department or posted security. The petitioner's assertion that she was unable to post security is uncontroverted.

The presiding administrative law judge is unable to agree that the petitioner's failure, or inability as the case may be, to post security for the assessment, precludes any possibility of relief. W.Va. Code § 11-10A-8 grants this office jurisdiction over "all . . . [a]ppeals from tax assessments issued by the Tax Commissioner pursuant to article ten of this chapter . . ." as well as "[q]uestions presented when a hearing is requested pursuant to the provisions of any article of this chapter which is administered by the provisions or article ten of this chapter . . ." The conclusion that an assessment was final and unreviewable, even in a situation where an individual was without the means to provide the security required by the State Tax Commissioner, would deny this tribunal jurisdiction over the very basic question of whether the State Tax Commissioner appropriately issued the jeopardy assessment in the first place. Such a conclusion is inconsistent with the broader jurisdiction statutorily granted to this office.

The broad jurisdictional grant is supported by the West Virginia Supreme Court's holding in Frantz v. Palmer, 211 W. Va. 188, 193, 564 S.E.2, 398, 403 (2001):

[T]he statutory language . . . which permits an administrative body to have ultimate discretionary authority on the bond or a substitute therefor, required to perfect an appeal of that administrative body's decision to a circuit court, violates the open courts provision set forth in article III, section 17 of the West Virginia Constitution. That ultimate discretionary authority must be vested in the courts. Determining the sufficiency of an appeal bond or its alternative is a judicial function and not an executive function.

Though the Frantz court did not address the particular subsection at issue here, it seems to provide an important lesson with regard to due process. The assumption should favor a complaining party's right to full and fair appeal, and that right is endangered where the administrative office is permitted to wholly define the requirements of a perfected appeal.

The presiding administrative law judge determines that the Legislature intended for all decisions of the State Tax Commissioner, save those specifically excepted in W.Va. Code § 11-10A-8, to be reviewable. For this reason, and because the evidence presented at the hearing of this matter, as described below, demonstrates that the petitioner was improvidently assessed for the tax liability of a separate business without the benefit of meaningful inquiry or investigation, the respondent's motion is DENIED.

### **FINDINGS OF FACT**

#### *The Demise of The Former Business and Establishment of Bar and Grill<sup>1</sup>*

1. Ms. B\_\_\_\_\_ operates Bar and Grill, a "bar and grill" establishment located in West Virginia.
2. Bar and Grill was formed as a limited liability company on August 10, 2009. The State Tax Department issued a business registration certificate on August 12, 2009 and a certificate of good standing on August 18, 2009. A permit was issued by the West Virginia Department of Health and Human Resources on September 1, 2009. A license was issued by the West Virginia Alcohol Beverage Control Commission on September 4, 2009. Ms. B\_\_\_\_\_ is the sole owner, and she and her husband, Mr. F\_\_\_\_\_, are listed

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<sup>1</sup> The names of all establishments are changed herein for privacy purposes.

with the Office of the Secretary of State as the organizers. Ms. B\_\_\_\_\_ is the designee for service of process.

3. The establishment opened its doors to the public on September 5, 2009. Though State Tax Department employees testified that they observed individuals in the location prior to that date, which individuals appeared to be patrons, there were not sufficient details provided – for example, whether an exchange of money was observed – to establish that a business was in operation before the date on which Ms. B\_\_\_\_\_ testified operations began.
4. The building housing Bar and Grill is owned by Family Rentals.
5. Prior to Bar and Grill, the building housed The Former Business, an establishment owned by C. and J. C\_\_\_\_\_<sup>2</sup>. Ms. B\_\_\_\_\_ had no ownership interest in that business.
6. Prior to The Former Business, the building housed a variety of establishments including those known as Mom’s, and prior to that, Pop’s. Ms. B\_\_\_\_\_ had no ownership interest in either of those businesses.
7. Ms. B\_\_\_\_\_ was a patron of The Former Business. At some point in or around December 2007, she began working at the establishment. Her duties appear to have been cooking and waitressing, and she presented State Tax Department officials with documentation for The Former Business on more than one occasion, though the evidence does not show that she was involved in the preparation of those documents. While there was some remuneration for her services, the exchange of which appears to be surreptitious in nature, Ms. B\_\_\_\_\_ does not describe herself as a regularly-paid employee of the bar. This was the extent of her involvement with The Former Business.

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<sup>2</sup> Any reference to “Mr. C\_\_\_\_\_” throughout the remainder of this order is to C. C\_\_\_\_\_.

8. Ms. B\_\_\_\_\_ testified that Mr. C\_\_\_\_\_ was unable to renew a West Virginia Alcohol Beverage Control Administration (“ABCA”) license for The Former Business and closed the establishment around the end of July or the beginning of August 2009.<sup>3</sup> She further testified that the locks to the doors were changed by Family Rentals around that time.
9. Around the first week of August 2009, Mr. C\_\_\_\_\_ approached Ms. B\_\_\_\_\_ and offered to sell to her the business, in which Ms. B\_\_\_\_\_ said she was not interested, or some property that had been contained within the building.
10. Ms. B\_\_\_\_\_ agreed to purchase the property offered. That property included: a residential gas stove, a stainless steel grill, three freezers, a refrigerator, a fryer, tables, chairs, two televisions, and some plates and glassware.
11. Mr. C\_\_\_\_\_ removed two televisions from the premises. He also removed some bar décor, such as mirrors and signage.
12. The purchase by Ms. B\_\_\_\_\_ did not include: real estate, food, alcohol, inventory, accounts receivable, contracts, the name of the establishment, or any merchandise for resale.
13. A pool table, a jukebox, and some video games were leased by Ms. B\_\_\_\_\_ from a local company. These were new leases, and not associated in any way with any leases to which Mr. C\_\_\_\_\_ or The Former Business may have been a party.
14. Ms. B\_\_\_\_\_ agreed to pay \$\_\_\_\_\_ for the goods obtained from Mr. C\_\_\_\_\_. Their basic agreement, and Mr. C\_\_\_\_\_’s acknowledgement of the receipt of \$\_\_\_\_\_, is memorialized by a handwritten document dated August 14, 2009, though Ms. B\_\_\_\_\_ testified that the document was not actually signed by the parties until she secured a lease from Family

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<sup>3</sup> Ms. B\_\_\_\_\_, however, did see Mr. C\_\_\_\_\_ selling alcohol from the trunk of his car after she became aware that the ABCA license had not been renewed.

Rentals, approximately four days later. It is noted that the date of the 14<sup>th</sup> is subsequent to all site visits reported by State Tax Department officials, described below in further detail. Additional installments on the agreement between Ms. B\_\_\_\_\_ and Mr. C\_\_\_\_\_ have been made, but as of the date of the hearing, there was an outstanding balance of \$\_\_\_\_\_ on the agreement.

15. Ms. B\_\_\_\_\_ negotiated a lease of the building with Family Rentals, which lease was entered into on August 17 or 18, 2009. Mr. C\_\_\_\_\_ was not a signee to that lease and was not involved in the negotiation of the lease.

16. Mr. H\_\_\_\_\_ of Family Rentals testified that Mr. C\_\_\_\_\_ had owed back-rent on the premises, and Mr. H\_\_\_\_\_ changed locks on the premises to deny Mr. C\_\_\_\_\_ access. Prior to effectively evicting that tenant, Mr. H\_\_\_\_\_ asked Ms. B\_\_\_\_\_, around early August 2009, if she would be interested in leasing the building, and the two reached a verbal agreement.

17. Unfortunately, the date on which the locks were changed was not established in the record and it is unclear who may have been in possession of keys to the location on dates that State Tax Department officials made visits described below.

18. Mr. H\_\_\_\_\_ determined, prior to entering the lease agreement, that Mr. C\_\_\_\_\_ was not associated with Bar and Grill. Mr. H\_\_\_\_\_ also testified that he has not personally observed Mr. C\_\_\_\_\_ on the premises since at least September 5, 2009.

19. Ms. B\_\_\_\_\_ established new accounts with utility companies, including such for the electricity, the gas, the telephone, and the water companies. She did not pay any money toward accounts that had been in the names of Mr. C\_\_\_\_\_ or The Former Business.

20. Ms. B\_\_\_\_\_ engaged a bookkeeper that had not been associated with The Former Business to establish records for Bar and Grill.
21. Two employees of Bar and Grill - or people who “helped out” there - had at one time been employees of The Former Business, but they were not been employees at the time that The Former Business ceased operation.
22. Mr. C\_\_\_\_\_ assisted with cleaning the establishment prior to its opening, but was not an employee or otherwise associated with Bar and Grill.
23. Chuck Slater, an investigator with the Criminal Investigation Division of the State Tax Department, contacted Ms. B\_\_\_\_\_ and met with her on August 26, 2009 at Bar and Grill, on which date he hand-delivered the Bar and Grill business registration certificate, as well as a certificate of service on corporations showing the delivery of the notice of jeopardy assessment. Ms. B\_\_\_\_\_ did not receive the notice of jeopardy assessment prior to that date.
24. Upon receiving the notice of jeopardy assessment, Ms. B\_\_\_\_\_ attempted to secure a surety bond to satisfy the requirements set forth by the State Tax Commissioner, but she was unable to do so.

*State Tax Department Involvement  
With Mr. C\_\_\_\_\_ and The Former Business*

25. Ms. B\_\_\_\_\_ was aware that Mr. Slater visited Mr. C\_\_\_\_\_ at Bar and Grill sometime in mid-June, during the week in which a local festival was occurring, but was not privy to the discussion between the two men.
26. Mr. Slater testified that he advised Mr. C\_\_\_\_\_ during that visit, which he said occurred on June 22, 2009, to contact a field agent Sherry King-Bess of the West Virginia State Tax Department, to discuss a plan for the payment of taxes owed.

27. Field agent Sherry King-Bess oversaw the account for The Former Business for approximately the five years preceding the date of the evidentiary hearing. She testified that she had encountered Ms. B\_\_\_\_\_ on some occasions during her visits to The Former Business, which occurred approximately once per month.
28. On July 31, 2009, Mr. C\_\_\_\_\_ presented himself at the State Tax Department and asked Sherry King-Bess to give him a letter of good standing so that he could renew the ABCA license for The Former Business. Sherry King-Bess testified that after she denied his request on that date based on delinquency of returns<sup>4</sup> and plan payments, Mr. C\_\_\_\_\_ said “that was okay. He had someone else who was going to go and take over the business and get a new license so that they could get a liquor license to keep the business running.”
29. Ms. B\_\_\_\_\_ signed, on behalf of The Former Business, a retail trade survey report completed by Chuck Slater on August 6, 2009. Mr. C\_\_\_\_\_ was not available to meet with Mr. Slater on that date. Mr. Slater testified that he asked Ms. B\_\_\_\_\_ to have Mr. C\_\_\_\_\_ contact Sherry King-Bess regarding taxes.
30. Mr. Slater testified that the establishment was “open and operational” on that date, though he entered through the back kitchen door, did not check the front door to see if it was unlocked, and could not say that he observed anything being cooked in the kitchen.

*State Tax Department Involvement  
With Bar and Grill*

31. Ms. B\_\_\_\_\_ signed a second retail trade survey report, but on behalf of Bar and Grill, completed by Mr. Slater on August 26, 2009. Mr. Slater testified that the establishment was not open on that date, but he was able to deliver the business registration certificate

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<sup>4</sup> Mr. Slater testified that returns of The Former Business were current.

for the Bar and Grill, as well as the notice of jeopardy assessment. He further testified that he would normally have advised Ms. B\_\_\_\_\_ to contact Sherry King-Bess, though he did not have specific recollection of having done so.

32. Mr. Slater conducted no investigation with regard to the potential successorship of Bar and Grill to The Former Business, inasmuch as that duty was not assigned to him, and his involvement in this matter was limited to the delivery of documents on the dates described above.

33. The State Tax Department taxpayer services division received the August 10, 2009, application for a business registration for Bar and Grill completed by Ms. B\_\_\_\_\_, and that division subsequently forwarded the document to Sherry King-Bess because there was prior liability associated with the address on the application. A certificate of business registration was nonetheless issued pursuant to that application.

34. Sherry King-Bess attempted to deliver both the certificate of business registration and the notice of jeopardy assessment to Bar and Grill on August 12, 2009. Sherry King-Bess observed individuals on the premises, and encountered Mr. C\_\_\_\_\_, who advised that he was the cook and he would not accept any papers for the new owner. Sherry King-Bess believed the establishment to be in operation at that time.

*State Tax Department Decision to Issue  
The Notice of Jeopardy Assessment*

35. Sherry King-Bess testified that any investigation conducted into the possible successorship of Bar and Grill to The Former Business would have been conducted by Mr. Slater during his prior site visits. As noted above, Mr. Slater conducted no investigation.

36. According to Sherry King-Bess, the determination to issue the notice of jeopardy assessment was made by Jeff Oakes, director of the compliance division of the State Tax Department, and was based on the fact that Bar and Grill had opened in the same location as, and close in time to the closure of, The Former Business, as well as the statement made on July 31, 2009, to Sherry King-Bess by Mr. C\_\_\_\_\_ that he intended to find an individual to “take over” his business.
37. Sherry King-Bess testified that her observation that “nothing had changed” in the location also was a factor in the consideration of successor liability and the decision to issue a notice of jeopardy assessment.
38. Sherry King-Bess also testified that Mr. C\_\_\_\_\_ had a history of changing the name of his business to obtain letters of good standing or to otherwise avoid tax liability. She was not aware of any occasion, however, when Mr. C\_\_\_\_\_ had involved another party in such a scheme.
39. Sherry King-Bess’s last site visit to the location prior to the August 12, 2009, issuance of the notice of jeopardy assessment was around August 6, 2009. She did not return after her August 12, 2009 attempt. She is not aware of any representative of the State Tax Department returning to the site since that date.

### **DISCUSSION**

The assessment issued to Bar and Grill together with Ms. B\_\_\_\_\_ was issued pursuant to W.Va. Code § 11-10-7, as set forth above, and references unpaid consumers sales and use tax spanning a six-year period. It indicates that the petitioner received the notice on the basis that

Bar and Grill is a successor in business to The Former Business. Together with interest and additions, the amount assessed totals \$\_\_\_\_\_.

The circumstances giving rise to successor liability are set forth with little explanation in W.Va. Code § 11-10-11:

*(f) Payment when person sells out or quits business; liability of successor; lien. --*

(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.

In the instant matter, it is undisputed that the predecessor business, The Former Business, had a state tax liability that remained unsatisfied after its cessation or the selling of its business or assets. The question before the presiding administrative law judge, then, is whether Bar and Grill is indeed a successor as described in the code section above. Because the state code does

not define “successor,” consideration of the legislative rules addressing the term is necessary.

*See Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995). The term is defined:

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. § 110-15-2.

The West Virginia Code of State Rules sets forth further considerations for determining whether a successor-in-business situation exists:

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.

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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, [or] the formation of a partnership from one or more sole proprietorships or corporations.

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W.Va. Code St. R. § 110-15-4.9.

Successor liability arises, then, when the successor is determined to have somehow acquired the predecessor business or the stock of goods of the predecessor.

First, the undersigned examines the question of the stock of goods. The "stock of goods," as explained in the rule above, "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." The Former Business was a "bar and grill" that was in the business of selling food and beverages. Ms. B\_\_\_\_\_’s undisputed testimony was that she did not purchase any food or alcohol as part of the agreement she entered into with Mr. C\_\_\_\_\_.

Though Sherry King-Bess testified that she observed individuals that appeared to be patrons in the establishment prior to the opening date of Bar and Grill, the evidence is not sufficient to establish that Bar and Grill was at that time selling goods acquired from the predecessor business or, for that matter, selling goods at all. Furthermore, because testimony has established that Mr. C\_\_\_\_\_ sold alcoholic beverages “out of the trunk of his car” after the termination of The Former Business’s ABCA license, it is presumed that any stock of alcoholic beverages had been removed from the premises prior to the opening date – September 5, 2009 – of Bar and Grill. The petitioner has put forth sufficient evidence to establish that she did not purchase “substantially all” of the stock of goods of The Former Business.

The second inquiry is whether Bar and Grill acquired “substantially all” of the business assets of The Former Business. Again, the rule above explains what is meant by business assets: “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.” Ms. B\_\_\_\_\_ testified to purchasing the following: a residential gas stove, a stainless steel grill, three freezers, a refrigerator, a fryer, tables, chairs, two televisions, some plates, and glassware. The testimony also reflects that some items, such as beer coolers that had been left by the business occupying the building prior to The Former Business, remained at the location, though it is not clear whether the landlord, Mr. H\_\_\_\_\_, laid claim to those items. It is undisputed that Mr. C\_\_\_\_\_ removed his personal items, two television sets, and certain signage from the property.

At first blush, it would seem that Ms. B\_\_\_\_\_ did acquire substantial assets from the prior business, particularly where, as here, it appears the predecessor had few assets to offer. But the consideration of assets is not limited to tangible property. At the evidentiary hearing, the petitioner's counsel inquired as to all the intangibles listed in the applicable rule, and the petitioner affirmed that Bar and Grill received no accounts receivable, contracts, business name, business goodwill, or other specified intangibles from The Former Business. In fact, it appears that it may have been to the petitioner's detriment to have obtained certain intangibles, such as "goodwill" – if any was to be had – inasmuch as Mr. H\_\_\_\_\_ testified that he would not have entered into a lease agreement with Ms. B\_\_\_\_\_ if he believed her to be affiliated with Mr. C\_\_\_\_\_. The petitioner's testimony, as well as Mr. H\_\_\_\_\_ 's, reflects that the location – in close proximity to a nearby courthouse – had housed similar establishments for many years, so it certainly seems that the leasehold of the property was likely the most desirable asset Bar and Grill could have acquired. The change of the name of the business also is persuasive. Bar and Grill would have had to establish its own reputation and could not necessarily rely on long-term patrons or referrals from customers of The Former Business. It is determined that the petitioner has put forth sufficient evidence to establish that she did not purchase "substantially all" of the business assets of The Former Business.

For many of the same reasons underlying the finding with respect to the business assets, it is also determined that Bar and Grill was a business established by Ms. B\_\_\_\_\_, and was not simply a change in the form of The Former Business. The change-in-form scenario appears to be the basis for the respondent's position, stated at the hearing, that the engagement of a "front man" may give rise to successor liability. Mr. C\_\_\_\_\_ 's comment to Sherry King-Bess that he "had someone else" to stand in as the operator of his business, taken alone, is not damning to the

petitioner's position. Mr. H\_\_\_\_\_ testified that he is not aware of Mr. C\_\_\_\_\_ having any presence at the location or, for that matter, any income.<sup>5</sup> Neither is Sherry King-Bess's observation of Mr. C\_\_\_\_\_ on the premises prior to the opening of Bar and Grill problematic for the petitioner, inasmuch as Ms. B\_\_\_\_\_ acknowledged that he had been at the location prior to the opening date. Nor is it lost on the presiding administrative law judge that all site visits by State Tax Department officials occurred prior to the date Ms. B\_\_\_\_\_ formally agreed to purchase the equipment, prior to the date she signed the lease with Family Rentals, prior to or on the same date that the State Tax Department issued a certificate of business registration, and more than twenty days prior to the date Ms. B\_\_\_\_\_ testified Bar and Grill was opened to the public. Furthermore, the notice of jeopardy assessment was actually prepared prior to Sherry King-Bess's last site visit of August 12, 2009.<sup>6</sup> Given the entirety of the testimony showing a somewhat relaxed and possibly naïve approach to the establishment of the petitioner's business, it is not inconceivable that the transition was a slow one. There is little evidentiary connection between The Former Business and Bar and Grill other than the business location, which can hardly be described as a positive connection when taking into account the testimony of Mr. H\_\_\_\_\_, and the few pieces of tangible equipment that were purchased by Ms. B\_\_\_\_\_.

## CONCLUSION

It is accordingly HELD:

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<sup>5</sup> Mr. H\_\_\_\_\_ also is Mr. C\_\_\_\_\_ 's personal landlord, and Mr. H\_\_\_\_\_ testified that Mr. C\_\_\_\_\_ has not paid for his residential rental.

<sup>6</sup> On the date of August 6, 2009, Ms. B\_\_\_\_\_ signed the retail trade survey report presented to her on behalf of The Former Business. Because the testimony reflects that The Former Business may have operated as late as early August, any observation by State Tax Department officials on that date may have been irrelevant.

1. The petitioner has carried the burden of proof in this matter.
2. The petitioner did not purchase, acquire, or otherwise succeed to substantially all of the stock of goods of the predecessor business.
3. The petitioner did not purchase, acquire, or otherwise succeed to substantially all of the business assets of the predecessor business.
4. The petitioner individual did not establish the resulting business through a change of form of the predecessor business.
5. Based on the above, it is the FINAL DECISION of the West Virginia Office of Tax Appeals that the notice of jeopardy assessment dated August 12, 2009, be, and it hereby is VACATED.