

**REDACTED DECISION – 09-332 C & 09-341 CU – BY A. M. “FENWAY” POLLACK,
CHIEF ALJ—SUBMITTED FOR DECISION on MARCH 2, 2010—ISSUED on MARCH
30, 2011**

SYNOPSIS

**CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A
“SUCCESSOR IN BUSINESS”**— It was the duty of Company A to collect and remit
consumers sales and service tax and use tax required to be collected by any vendor or retailer.
Company A is personally liable for any such taxes it failed to collect or remit. *See* W.Va.
C.S.R. § 110-15-4.5.

**CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A
“SUCCESSOR IN BUSINESS”**-- If the Petitioner was a successor in business to Company A,
it too would 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. *See*
W.Va. C.S.R. § 110-15-4.9.

**CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A
“SUCCESSOR IN BUSINESS”**-- In order to be determined a successor in business to
Company A, the Petitioner would have had to directly or indirectly purchased, acquired, or
succeeded to the business or the stock of goods of Company A. *See* W.Va. C.S.R. § 110-15-
4.9.1.

**CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A
“SUCCESSOR IN BUSINESS”**— 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); W. Va. Code. St. R. §§ 121-1-63.1 and 69.2.

**CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A
“SUCCESSOR IN BUSINESS”**— The Petitioner did not acquire any real property, tangible
personal property, or intangible property of Company A’s.

**CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A
“SUCCESSOR IN BUSINESS”**— The Petitioner did not acquire any stock of goods of
Company A’s.

CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A “SUCCESSOR IN BUSINESS”—The creation of the Petitioner’s business did not represent a change in the form of Company A’s business, as that term is used in Title 110, Series 15, Section 4.9.5 of the West Virginia Code of State Rules.

CONSUMER SALES AND SERVICE TAX & SALES AND USE TAX-LIABILITY AS A “SUCCESSOR IN BUSINESS”— The Petitioner has carried its burden of proof of showing that the Successor in Business Assessment, for consumer sales and service tax and sales and use tax issued against it on August 4, 2009 was erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On or about August 4, 2009, the Compliance Division of the West Virginia State Tax Commissioner’s Office (“the Tax Department or the Respondent”) issued a Successor in Business Assessment, for consumer sales and service tax and sales and use 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, and of the West Virginia Code. The consumer sales and service tax portion of the assessment was for the period of December 31, 2005, through March 31, 2008, 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 sales and use tax portion of the assessment was for the period of March 31, 2009, through May 31, 2009, 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 August 5, 2009.

Thereafter, on September 28, 2009, 2008 the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, two petitions for reassessment.

Subsequently, notice of a hearing on the petition was sent to Petitioner and in accordance with the provisions of West Virginia Code Section 11-10A-10 [2010] a hearing was held.¹

FINDINGS OF FACT

1. The assessments that are the subject of these petitions allege that petitioner is a successor in business to Company A.
2. Company A is a limited liability company formed under the laws of Ohio and organized on August 20, 2003. Petitioner's Ex. 7.
3. In January, 2005, Company A obtained a Certificate of Authority from the West Virginia Secretary of State. At that time, Company A identified itself as a manager managed company, with two managers, Mr. A and Mr. B, both residents of Ohio. Petitioner's Ex 7.
4. In February of 2005, Company A registered two trade names in West Virginia, Name X and Name Z.² Petitioner's Ex's 8 & 9.
5. In November, 2008, Petitioner was formed as a West Virginia limited liability company. At that time it identified itself as a member manage company, with two members, Mr. C and Mr. A.
6. Petitioner's company was formed for the purpose of opening a restaurant in West Virginia, which it did in April of 2009.
7. At the time Petitioner's company was formed, Company A was operating the three aforementioned restaurants.
8. In 2009, Petitioner filed with the West Virginia Secretary of State's office, an application to remove Mr. A as a member. Petitioner's Ex. 2.

¹ The evidentiary hearing in this matter was heard by Chief Administrative Law Judge Michele Duncan Bishop. Judge Bishop resigned her post on December 31, 2010. This Decision is authored by her successor, Chief Administrative Law Judge A.M. "Fenway" Pollack..

² The record in this matter established that Company A operated three restaurants, two (2) in West Virginia, and one (1) in Ohio. Aside from a closing date of July 20, 2009, for one West Virginia location, there was no evidence introduced regarding the opening or closing dates of these restaurants.

9. In July, 2009, Mr. C, on behalf of Petitioner, executed a lease with Company D to lease the soon to be vacant Company B restaurant in West Virginia.³
10. In July, 2009, the Company A restaurant in West Virginia ceased operation.
11. On or about July 28, 2009, Petitioner opened a restaurant, in the space formerly occupied by Company A in West Virginia.
12. Petitioner did not use any of the stock of goods used by Company A. Virtually all of the kitchen equipment and furnishings were owned by Company D, Petitioner's lessor. Petitioner did not use any of the dishware, food or decorations that had been used by Company A. Petitioner changed all of the signage from Company A to Petitioner's Company. Petitioner obtained a new phone number. Petitioner did use the same cash registers as had been used by Company A, but they needed to be re-programmed to coincide with Petitioner's bank accounts, which were separate from Company A. Petitioner did use many of the same employees as had Company A.
13. After he was no longer a member of Petitioner's company, Mr. A received no remuneration of any kind from Petitioner.
14. Petitioner did not purchase any business assets or inventory of Company A's.
15. In August, 2009 the West Virginia State Tax Department ("Tax Department") issued the two assessments against Petitioner that are the subject of this appeal.⁴

DISCUSSION

³ Company D was partially owned by Mr. A. The Office of Tax Appeals does not find this fact to be relevant to any issue before it.

⁴ It should be noted that the assessments at issue in this matter are presumed to arise from a tax liability that accrued due to Company A's operation of its restaurant in West Virginia. This is presumed because the Petitioner's one witness testified that he believed as such and because the Tax Department suggested as such in its proffers and pleadings. No one from the Tax Department testified in this matter. The actual assessments that were introduced into evidence merely state that they arise by virtue of Petitioner being a successor to Company A. This omission is not determinative because of the Office's ruling that Petitioner is not a successor to Company A.

The law of this matter is found in West Virginia Code Section 11-10-11 and Title 110, Series 15, Section 4.9 of the West Virginia Code of State Rules.

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. Section 2 of Title 110, Series 15 of the

West Virginia Code of State Rules 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. C.S.R. § 11-15-2.88

Section 4.9 of Title 110, Series 15 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.*

W.Va. C.S.R. § 11-15-4.9

There are essentially two ways a person can become a “successor” as the term is defined in Section 2.88 of Title 110, Series 15 of the West Virginia Code of State Rules. First, a person can acquire the business assets or stock of goods of a business that is ceasing operation. Acquisition can occur through the payment of a variety of considerations, including money, property, assumption of liabilities or cancellation of indebtedness. 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.

It is undisputed that Petitioner did not purchase any business assets of Company A either when it formed and operated a restaurant in one West Virginia location or when it signed the lease for another West Virginia location. In fact, the evidence in this matter revealed that, at the time of lease signing, Company A had either filed for bankruptcy or was rapidly headed in that direction. As such, it had no business assets to offer Petitioner. Additionally, Petitioner was unable to avail itself of the goodwill which may or may not be associated with a restaurant chain, because all signage and markings associated with Company A were removed prior to Petitioner's opening. The evidence in this matter also showed that Petitioner did not purchase any of the stock of goods which Company A used to operate the restaurant. The Tax Department offered no rebuttal to any of the aforementioned evidence.

The Tax Department, while not arguing it directly, seems to be relying on Section 4.9.5 of Title 110, Series 15 of the West Virginia Code of State Rules, which states:

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.

W.Va. C.S.R. § 110-15-4.9.5

The Tax Department suggests that Company A and Petitioner are too "intertwined". By this, it presumably means that the formation of Petitioner's Company was really a change in the formation of Company A for the purpose of allowing Mr. A to continue to operate a restaurant in West Virginia. However, the facts in this matter show that the two entities operated concurrently

for a time; when Petitioner was organized, in November of 2008, Company A was operating three restaurants, at the same time Petitioner began operating a separate restaurant in West Virginia. Clearly, Petitioner was not formed for the purpose of operating any of Company A's restaurants.

Nonetheless, an argument could be made that once the decision was made to close one restaurant, another decision was made to "slide" Petitioner (and Mr. A) into an operation position at that location. This theory is disproved by the facts. On July 13, 2009, when Petitioner entered into a lease for the former Company A location in West Virginia, Mr. A had been removed as a member. Petitioner's Ex. 2. The Tax Department suggests that Mr. A's removal was improper, in that he did not sign the application that was filed with the Secretary of State's office. That fact is irrelevant. The issue before the West Virginia Office of Tax Appeals is: was Petitioner a successor to Company A, for the purposes of establishing tax liability? By its filing with the Secretary of State, in July, 2009, Petitioner clearly intended to inform the business community that Mr. A was no longer a member of the company. This office finds Petitioner's intent to be more determinative than whether the company properly filled out all the necessary paperwork. This conclusion is bolstered by the testimony of Mr. C, who testified that after July 9, 2009, Mr. A had no involvement in Petitioner's company, either operationally or financially. Mr. C's testimony in this regard was un-rebutted. Absent some showing that after 2009, Mr. A was still involved in the operation of Petitioner's company, or that he profited from its operations, a finding of successor liability cannot be made.

CONCLUSIONS OF LAW

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

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W.Va. Code Ann. § 11-1-2 (West 2101).
2. Prepared food is taxed at the general rate of tax as contained in West Virginia Code Section 11-15-3.
3. It was the duty of Company A to collect and remit consumers sales and service tax and use tax required to be collected by any vendor or retailer regarding the sale of prepared food. Company A is personally liable for any such taxes it failed to collect or remit. *See* W.Va. C.S.R. § 110-15-4.5.
4. If Petitioner was a successor in business to Company A, it too would 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. *See* W.Va. C.S.R. § 110-15-4.9.
5. In order to be determined a successor in business to Company A, Petitioner would have had to directly or indirectly purchased, acquired, or succeeded to the business or the stock of goods of Company A. *See* W.Va. C.S.R. § 110-15-4.9.1.
6. 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); W. Va. Code. St. R. §§ 121-1-63.1 and 69.2.
7. Petitioner did not acquire any real property, tangible personal property, or intangible property of Company A's.
8. Petitioner did not acquire any stock of goods of Company A's.

9. Petitioner's creation did not represent a change in the form of Company A's business, as that term is used in Title 110, Series 15, Section 4.9.5 of the West Virginia Code of State Rules.

10. Petitioner has carried its burden of proof of showing that the Successor in Business Assessment, for consumer sales and service tax and sales and use tax issued against it on August 4, 2009 was erroneous, unlawful, void or otherwise invalid.

11. Based upon the above it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Successor in Business Assessment, issued against the Petitioner on August 4, 2009, is hereby **VACATED**.