

REDACTED DECISION – DK#S 10-242 W, 10-243 C, 10-244 CU – BY – A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION on JULY 29, 2011 – ISSUED ON JANUARY 30, 2012

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- 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 2110).

CONSUMERS SALES AND SERVICE TAX AND 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. Code R. § 110-15-4.5 (1993)

CONSUMERS SALES AND SERVICE TAX AND SALES AND USE TAX -- LIABILITY AS A “SUCCESSOR IN BUSINESS” -- If Petitioner were 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-day period allowed for payment by the predecessor. *See* W.Va. Code R. § 110-15-4.9 (1993).

CONSUMERS SALES AND SERVICE TAX AND SALES AND USE TAX -- LIABILITY AS A “SUCCESSOR IN BUSINESS” -- 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. Code R. § 110-15-4.9.1 (1993).

WEST VIRGINIA OFFICE OF TAX APPEALS -- HEARING PROCEDURES -- 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 Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

CONSUMERS SALES AND SERVICE TAX AND SALES AND USE TAX -- LIABILITY AS A “SUCCESSOR IN BUSINESS” -- On its first day of operation, Petitioner acquired all of the business assets and stock of goods of Company A.

CONSUMERS SALES AND SERVICE TAX AND SALES AND USE TAX -- LIABILITY AS A “SUCCESSOR IN BUSINESS” -- Petitioner has not carried its burden of proof of showing that the Successor in Business Assessment, for consumer sales and service and use tax, withholding tax, and sales and service tax, issued against it on April 16, 2010, was erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On April 16, 2010, the Compliance Division of the West Virginia State Tax Commissioner's Office (hereinafter "the Tax Department or the Respondent") issued a Successor in Business Assessment against the Petitioner. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment stated that Petitioner was a successor in business to Company A and involved three (3) taxes; withholding, consumer sales and service and combined sales and service and use tax. The withholding portion involved tax in the amount of \$____, interest in the amount of \$____, additions and/or penalties in the amount of \$____ for a total withholding tax assessment of \$____ and was for the period from December 31, 2006, through June 30, 2009. The consumer sales and service portion involved tax in the amount of \$____, interest in the amount of \$____ additions and/or penalties of \$____ for a total consumer sales and service tax assessment of \$____ and was for the time period from September 30, 2007, through June 30, 2008. The combined sales and use tax was for interest in the amount of \$____, additions to tax in the amount of \$____ for a total assessment of \$____ and was for the time period from July 31, 2008, through May 31, 2009. The total assessment was in the amount of \$____.

In its Petition for Reassessment, the Petitioner indicated that it received a copy of the assessment at issue on April 19, 2010. The Petitioner timely filed its Petition for Reassessment with this Tribunal on June 15, 2010. 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 a hearing was held on April 29, 2011. Thereafter, the parties submitted briefs containing proposed

findings of fact and conclusions of law, the last brief being filed on July 29, 2011 and the matter became ripe for decision at that time.

FINDINGS OF FACT

1. Mr. B is the sole member of Petitioner's business that is alleged to be a successor in business to Company A.

2. Sometime prior to 2004, Mr. B was the sole proprietor of a trucking business in West Virginia.

3. Pursuant to the operation of his trucking business, Mr. B purchased a variety of trucks, and financed them through third parties.

4. Later, Mr. B leased land in West Virginia, from a Mr. C. Mr. B used this land for his trucking business.

5. Mr. B placed a trailer on the leased land, for use in his trucking business.

6. Thereafter, Mr. B added a concrete ready mix business, also on the land leased from Mr. C. Adding a concrete ready mix business involved hiring a company to install a variety of structures on the land.

7. As part of his trucking and concrete business, Mr. B kept a variety of sand, rocks and gravel on the land leased from Mr. C.

8. Mr. B employed other people during his sole proprietorship, including his wife Mrs. B. Mrs. B kept Mr. B's books, helped with his fuel mileage and generally performed any functions required to assist him in his business.

9. On March 5, 2004, in order to compete for a contract with a West Virginia company, Mrs. B formed a limited liability company called Company A.

10. On its first day of operation, (the exact date of which is unclear) Company A operated in exactly the same manner as had Mr. B's sole proprietorship. It used the same land leased from Mr. C; used the same equipment and trucks as Mr. B; it used the same trailer as an office; it used the same office equipment and supplies; it used the same employees; it used the same concrete ready mix plant and, it used the same inventory of sand and gravel.

11. During its existence, Mr. B was an employee of Company A as a manager.

12. In January of 2008, upon advice from their accountant, Mr. B prepared a written lease for the vehicles owned by him that were being used by Company A. The terms of the lease memorialized the oral agreement that the two businesses had been operating under, namely that Company A could use all of the vehicles owned by the sole proprietorship as long as Company A made all monthly payments, insured the vehicles and paid for both preventative and necessary maintenance.

13. Company A made the monthly payments to Mr. C, without a written lease.¹

14. Company A used the concrete ready mix plant, the trailer on the land, the office equipment contained therein and the employees without any written agreement or remuneration to Mr. B.

15. Company A operated in the fashion discussed in paragraph ten (10), for approximately five (5) years. The only changes were an increase in the number of employees, due to the contract with a West Virginia company, and the painting of the name "Company A" on the side of the concrete plant.

16. At some point in time, Company A was issued an assessment or assessments for unpaid state income taxes.

¹ At some point, the record is unclear as to when, Mr. C passed away and the payments on the oral land lease were then made to his wife.

17. Sometime in 2009, the contract between Company A and the West Virginia company was terminated.

18. This turn of events caused Mrs. B to decide to cease operating Company A. While Mrs. B did not file articles of termination with the Secretary of State's office until September of 2010, Company A's last day of operation was December 31, 2009.

19. Petitioner began operations on January 4, 2010.²

20. Mr. B testified that he went to work on January 4, 2010 at the same location, with the same employees, inventory, equipment, office supplies, customers and phone number as Company A had operated with.

21. Mr. B further testified that on that date "Company A" was still painted on the side of the concrete ready mix plant. Additionally, it was possible that a customer could have come in sometime after January 4, 2010 and paid a bill owed to Company A.

DISCUSSION

The parties agree that the sole issue to be decided in this matter is whether Petitioner is a successor in business 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

² In 2010, New Year's Day was a Friday. The next regular workday was Monday January 4. Mr. B testified that he reopened the office on the first day after the weekend.

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.

W. Va. Code Ann. § 11-10-11(f) (West 2010)

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. Code R. § 110 -15-2 (1993).

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. Code R. § 110-15-4.9 (1993) (emphasis added).

The successor liability of Petitioner is quite clear. The rules cited above make clear that an entity will be deemed a successor when it purchases or acquires substantially all of the business assets or stock of goods of the business that has ceased operations. Moreover, business assets include intangible property, such as contracts, business name, business goodwill, customer lists, delivery routes etc.

Here, Petitioner acquired **everything** that Company A had, its entire stock of goods³, and all of its business assets. It is worth noting that Company A did not have much tangible personal property, but what little it did have was acquired *in toto* by Petitioner.

More important is the intangible property of Company A that was acquired by Petitioner, which is summarized below:

1. Assumption of the lease of the land, via oral contract with Mr. B.

³ Mrs. B testified somewhat inconsistently, first stating that all of her inventory had been sold in anticipation of ceasing operations. Later she testified that her inventory was "minimal to nothing". Additionally, Mr. B testified that he was sure that he hauled some sand and gravel during his first days of operating as Petitioner. Mr. B also conceded that it was possible, although unlikely, that it delivered some concrete during the first days of operation as Petitioner. This testimony leads the presiding administrative law judge to conclude that Mrs. B's latter statements are probably the more accurate and that there was a small amount of inventory on hand when Petitioner began operations.

2. Assumption of the leases to approximately 40 vehicles, via oral contract with Mr. B.
3. The gift, from Mr. B, of use of a trailer and other buildings located on the leased land.
4. The gift, from Mr. B, of use of the contents of the aforementioned trailer, including all office equipment contained therein.
5. The gift, from Mr. B, of use of a concrete/ready mix plant.
6. The goodwill and customers of Company A.

The assumption of the leases for the vehicles and land, and the gifts of everything else listed above, were given to Company A, on its first day of operation, by Mr. B. On that day, they became the intangible property of Company A. One might argue that everything listed above was the tangible property of Mr. B, and that is correct. However, that does not negate the intangible nature of the property interest Company A had in the list above. The ability to have use of and access to everything one would need to run a concrete/aggregate business is clearly an intangible property interest and a business asset. They are intangible property and business assets to Company A because of the ease by which they allowed Company A to enter the market place in March of 2004. Company A did not have to negotiate at arms length with various parties in order to enter the marketplace or to fulfill its contract with a West Virginia company. When, on its first day of existence, that same **intangible property** was **indirectly acquired** by Petitioner, as those terms are used in Section 4.9 *supra*, Petitioner became a successor in business to Company A. Petitioner like Company A, was able to enter the concrete/aggregate marketplace in the area without the need to negotiate with any third parties. It strains credibility to suggest that Company A can shut off the lights on Thursday, December 31, and Petitioner

could turn on the lights on Monday, January 4, without a single change in circumstance, and Petitioner would not be considered a successor. Additionally, Section 4.9 does not require that the successor's acquisition of the business assets and stock of goods be in exchange for any certain consideration. Therefore, the gift of everything, save for the assumption of the land lease and equipment payments, is still considered an acquisition, for successor liability purposes.

Even if one were to successfully argue that the items in the list above were not intangible property, the Petitioner still could not prevail. Clearly, the Petitioner has acquired all of the assets of Company A, even if those assets only consisted of its small stock of goods of stone sand and gravel, goodwill, and customer lists. Sections 4.9.1 and 4.9.2 of Title 110, Series 15 of the West Virginia Code of State Rules, *supra* make no distinction about the value of the business assets acquired. Rather, Section 4.9.2 merely refers to a person who acquires substantially all of the business assets of an entity that is ceasing operations. If the only business assets Company A had on December 31 was a small stock of goods of stone sand and gravel, goodwill, and customer lists, then Petitioner acquired all of it on January 4.

This Tribunal is mindful of the reasons why, on January 4, 2010, Mr. B resumed what was essentially Company A's operations. He testified that he needed to continue working, and while it was not stated, presumably he did not want to put all of Company A's employees on the unemployment line. The wisdom of that decision is outside the purview of this Tribunal. However, that decision put Petitioner clearly and unequivocally in a position to acquire substantially all of the business assets and stock of goods of Company A, thus making it a successor in business to Company A.

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 2110).

2. 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. Code R. § 110-15-4.5 (1993)

3. If Petitioner were 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-day period allowed for payment by the predecessor. *See* W.Va. Code R. § 110-15-4.9(1993).

4. 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. Code R. § 110-15-4.9.1 (1993).

5. 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 Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. §§ 121-1-63.1 and 69.2 (1993).

6. On its first day of operation, Petitioner acquired all of the business assets and stock of goods of Company A.

7. Petitioner has not carried its burden of proof of showing that the Successor in Business Assessment, for consumer sales and service and use tax, withholding tax, and sales and service tax, issued against it on April 16, 2010, was erroneous, unlawful, void or otherwise invalid.

8. Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the April 16, 2010, Successor in Business Assessment, issued against the Petitioner for a total tax liability of \$_____ is hereby **AFFIRMED**.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. *See* W. Va. Code Ann. § 11-10-17(a) (West 2010).