

**REDACTED DECISION—09-378 CU, 09-379 W, 09-380 C—BY GEORGE V. PIPER,
ALJ—SUBMITTED FOR DECISION on JULY 14, 2010 —ISSUED on DECEMBER 29,
2010**

SYNOPSIS

CONSUMERS SALES AND SERVICE TAX, COMBINED SALES AND USE 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, COMBINED SALES AND USE 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, COMBINED SALES AND USE 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, COMBINED SALES AND USE 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 combined sales and use tax and 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, COMBINED SALES AND USE 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 Iron Gate, Inc., 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, COMBINED SALES AND USE TAX & PERSONAL INCOME TAX WITHHOLDING – LIABILITY AS A “SUCCESSOR IN BUSINESS” -- The evidence in this matter shows that Petitioner never changed the form of the business of Corporation A, and therefore operated the business in the same manner in virtually every respect and, as such, 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, COMBINED SALES AND USE 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 September 2, 2009, the Compliance Division of the West Virginia State Tax Commissioner’s Office (“the respondent”) issued a successor in business assessment, for consumers sales and service tax, combined sales and use 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, 15A and 21 of the West Virginia Code. The consumers sales and service tax portion of the assessment was for the period of March 1, 2002, through June 30, 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 combined sales and use tax portion of the assessment was for the period of July 1, 2008 through February 28, 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 \$____. The personal income tax withholding portion of the assessment was for the period of January 1, 2002, through November 30, 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 \$____. According to the petition for reassessment, written notice of this assessment was received by the petitioner on September 2, 2009.

Thereafter, on November 2, 2009 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].

At the conclusion of the hearing Petitioner's representative was directed to submit a copy of the lease agreement between Corporation A, and Petitioner; copies of any invoices showing renovations to the property; and invoices for purchases of tangible personal property for use in the restaurant. The requested exhibits were never submitted.

FINDINGS OF FACT

1. Petitioner's business registration certificate lists its business name and actual physical location as Petitioner's address in a city in West Virginia and its mailing address as Corporation A's address in a city in West Virginia.

2. The business activity listed is "restaurant."

3. According to the certificate, the previous name of the business and location is Corporation A, in a city in West Virginia.

4. The business registration certificate lists the officers of the corporation as Mr. A, Mr. B and Mr. C.

5. The beginning date of the business, according to the form, was to be July 1, 2009.

6. The assessment was issued against Petitioner on the grounds that it is a successor in interest to Corporation A, which was the subject of tax assessments from Respondent that had become final.

7. Mr. C testified that his parents operated the restaurant until June 30, 2009 and that he often worked on the premises as the cook. He testified that they had expressed to him on occasion that they wanted out of the business, and that he wanted to carry on the business.

8. He testified that he entered into a written lease with his parents, effective July 1, 2009, to take over the business and that he thereafter operated it essentially the same as they had, utilizing virtually the same employees, tangible personal property, fixtures and equipment.

9. He testified that the business continued at that same location, used the same sign and telephone number and that customers who went to the restaurant still believed that the business name was Corporation A, and not the Petitioner.

10. He further testified that Petitioner did not file any tax returns or remit any taxes while he operated the business.

DISCUSSION

The sole issue presented is whether the Petitioner is liable for taxes assessed against Corporation A. The basis for said liability, according to the respondent, 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).

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, combined sales and use tax, the personal income tax withholding and a number of the other taxes administered by the State Tax Commissioner. W. Va. Code § 11-10-3(a).

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). It clearly does. Corporation A voluntarily ceased doing business as of June 30, 2009 while at the same time owing significant amounts of consumers sales and service tax, combined sales and use tax, personal income tax withholding to the respondent. This voluntary cessation coupled with its tax delinquencies qualifies it as a predecessor in business under 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. In order for this tribunal to find that the petitioner is a "successor in business" 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.

In determining whether a person has acquired the business of a predecessor, consideration must be given to whether or not the person acquiring the 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.

Mr. C's testimony is that he acquired, by lease, all of the assets of Corporation A, which had been previously used in the operation of the restaurant. He testified that once the premises were turned over to him for a stated fee the restaurant operated the same on the day Petitioner took over as it had the day before.

Mr. C testified that the business continued at the same location, with the same sign and telephone number and that customers who went to the restaurant believed that Corporation A, was still in business.

The personal property owned by Corporation A, and the goodwill in the name, phone number and location were substantially all of the assets owned by predecessor. The petitioner did in fact acquire assets under the lease, 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 Corporation A, and is liable for taxes accrued by it.

CONCLUSIONS OF LAW

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

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 combined sales and use tax and 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 clearly shows that Petitioner did purchase, acquire or otherwise succeed to all or substantially all of the business assets of 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).

6. The evidence in this matter shows that the Petitioner never changed the form of the business of Corporation A, and 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).

7. 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 portion of the assessment issued against the petitioner for the period of March 1, 2002 through June 30, 2008, 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.

It is also the final decision of the West Virginia Office of Tax Appeals that the combined sales and use tax successor liability portion of the assessment issued against the petitioner for the period of July 1, 2008 through February 28, 2009 for tax in the amount of \$____, interest in the amount of \$____, and additions to tax of \$____, totaling \$____, 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 portion of the assessment issued against the Petitioner

for the period of January 1, 2002, through November 30, 2008, 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.
