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BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

REDACTED DECISION – DK# 15-201 SIB-M

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON JANUARY 28, 2019  
ISSUED ON JULY 29, 2019

### FINAL DECISION

On February 20, 2015, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Tax Department or the Respondent) issued two Audit Notice of Assessments, against the Petitioner (hereinafter "the Petitioner" or "Company B"). 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 was for consumer sales tax for the period of May 2007-December 2007, 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 next amount was for withholding tax for the period of December 2006-June 2013, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed liability of \$\_\_\_\_\_. The combined sales and use tax amount for the period November 2018-June 2013, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_\_, for a total assessed liability of \$\_\_\_\_\_, and a total amount of \$\_\_\_\_\_.

The Petitioner timely filed its Petition for Reassessment with this Tribunal on June 15, 2015. Subsequently, notice of a hearing was sent to the Petitioner and in accordance with the provisions of West Virginia Code Section 11-10A-10 a hearing was held on September 13, 2018, at the conclusion of which parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

### FINDINGS OF FACT

1. Mr. and Mrs. A purchased all the issued and outstanding stock of Company A in May 1994 from Mr. B. Tr. 11-12.
2. Mr. and Mrs. A were the sole officers of Company A until it ceased operations in late October or early November 2012. Tr.11-12, 23.
3. Company A was engaged in the business of sales, distribution, and repair of specific types of equipment. Tr. 10.
4. Company A had maintenance contracts but the majority of Company A's repair work was customers calling for service and repair work. Tr. 21.
5. Company A was located in a West Virginia city, which is one and one-half miles from Company B. Tr. 13.
6. Company A did business under the name d/b/a \_\_\_\_\_. Tr. 10.
7. Company A sold most of its inventory prior to its cessation in 2012. Tr. 20
8. Company A ceased operations on or about late October or early November 2012. Tr. 23.
9. Company B or Petitioner., was incorporated on November 9, 2012 and is still in operation. Petitioner's Ex. No 1.

10. Mr. A described the transition from Company A to Company B as immediate. Tr. 23.

11. Mr. and Mrs. A are the sole officers of Company B. Tr. 7.

12. Company B engages in the repair of specific equipment, but does not sell any equipment. Tr. 7.

13. Company B started its business at a location in a West Virginia city. Tr. 9.

14. Several items of Company A, such as the register and other office equipment were transferred to Company B. Tr. 21.

15. 50% of the profitable customers of Company A were transferred to Company B, while approximately 50% of the unprofitable customers were not transferred. Tr. 21-22.

16. Company B kept the same phone number as Company A. Tr.22.

17. A vehicle that was owned by Company A became an asset of Company B. Tr. 25.

18. Specialized tools and inventory of Company A, such as varied items of equipment were transferred to Company B. Tr. 25.

19. Company B used the same cash register and other office items of Company A when it commenced business in November 2012. Tr. 21.

20. Any and all remaining assets of Company A that weren't previously sold became an asset of Company B. Tr. 26.

21. Mr. and Mrs. A filed personal bankruptcy on April 24, 2012, in the United States District Court for the Northern District of West Virginia and exempted their corporate stock in Company A from their personal bankruptcy. Tr. 14, 15, 18, and Petitioner's Ex. 3.

22. Mr. and Mrs. A's personal bankruptcy was discharged on July 31, 2012. Tr. 17, 23-24, Petitioner's Ex. 4.

23. Company A did not file for bankruptcy protection nor was it sold but ceased doing business on or about late October 2012 or early November 2012. Tr. 23.

### DISCUSSION

The issue in this case is whether Company B or Petitioner is a successor in business to Company A. West Virginia Code Section 11-10-11(f) and the Code of State Regulations Section Title 110 Series 15, §2.88 and are the controlling law in this case.

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.

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 Regulations 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 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. The business assets include tangible assets such as, fixtures, equipment, machinery, furniture and vehicles. Moreover, business assets also include intangible property, such as contracts, business name, business goodwill, customer lists, delivery routes, etc.

Here, Petitioner acquired substantial assets of Company A, including some of its office equipment, a vehicle, the same phone number, approximately 50 percent of its profitable customers, and the goodwill of the Company A. While Company A did sell some of its assets, anything that was remaining with Company A was acquired by the Petitioner.

The Petitioner argues that it has an entirely different business model than from Company A, including a different bank, different accountants, and a new business location. Petitioner further argues that Company A maintained an inventory of commercial items and equipment, while Petitioner does not. That Petitioner moved a mile and one-half away from Company A's location and purchased additional vehicles, in addition to retaining a vehicle from Company A. The Petitioner further avers that Company A offered **sales and service of equipment**, while Petitioner is strictly repair and service work, having no sales or inventory.

Petitioner entered the commercial repair business with little to no time lag from Company A's cessation of doing business. Mr. A testified that the transition between Company A and Company B or Petitioner was "immediate" which further lends it to the fact that Petitioner essentially took over what was remaining of Company A and entered the marketplace with little or no difficulty.

Mr. and Mrs. A are the sole owners of the corporate stock of Company A, which ceased doing business on or about late October/early November 2012.<sup>1</sup> Thereafter, on November 9, 2012, Mr. and Mrs. A incorporated Company B and are also the sole owners of the corporate stock. This transition, while not the next day, was within weeks and so close in time that it was characterized as immediate by one of the sole officers. The timeliness and ownership of these actions by the

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During the evidentiary hearing in the matter, Mr. A testified that he could not provide a specific date as to when Company A ceased operations but stated that it was a "probably a couple of weeks" between Company A ceasing operations and Company B or Petitioner beginning operations.

shareholders directly points to Petitioner or Company B being a successor in liability of Company A. Furthermore, Petitioner acquired substantial tangible and intangible assets of Company A further lending itself as a successor.

Petitioner acquired many items of tangible property from Company A such as the cash register, the computer, a vehicle, specialized tools and inventory including varied items and equipment used for specific repairs, and any remaining tangible assets from Company A were acquired by the Petitioner.

On the first day of operation, the Petitioner had a leg up on the industry with having 50% of Company A's profitable customers and the knowledge of the industry to be up and running with little, to no, hurdles. Petitioner essentially kept the tradename \_\_\_\_\_ as its new name. By keeping the tradename "\_\_\_\_\_" so broadly pronounced within the new name of Company B, the entity is ensuring that its customers would be able to easily identify them. Thus, the name ensures a seamless transition from one entity to the next entity and the goodwill associated with the previous entity.

A new business would certainly not have the advantage of a prior business name and the goodwill associated with that name. Moreover, a substantial amount of existing profitable customers did not require The Petitioner to build a business and generate customers from ground zero. This is a very valuable intangible business asset which had belonged to Company A and now belongs to Company B or the Petitioner which allowed them to seamlessly enter the marketplace with great ease shortly after the cessation of Company A.

Furthermore, the ability of an existing customer to contact the Petitioner was made with substantial ease due to Petitioner using Company A's existing phone number. Clearly, the Petitioner wanted Company A's customers to be able to reach them with little or no difficulty. As



the majority of the Petitioner's work is from their customers calling them for service and repair work, retaining the same phone number was crucial. To the outward eye, the business is the same, has the same exact owners, and the only difference is that the name has slightly changed. This allows The Petitioner to retain the customer goodwill by providing an easy transition for their services from one business to another. By using Company A's phone number, the Petitioner clearly seeks to retain all previous business from Company A, as it provides a direct conduit for their customer so that there is no disruption of repair and service calls.

The ability to have use of and access to everything one would need to run a business is clearly a property interest and a business asset. 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. On Petitioner's first day of existence, when it acquired substantial tangible and intangible property of Company A such as the customers, retaining the name Commercial Services, the same exact phone number, certain office equipment, a vehicle, special tools and inventory, and all remaining assets of Company A, it became a successor in business to Company A.

Under the Code of State Regulations section 4.9.2, just because money was not exchanged between Company A and Petitioner or Company B, it is still considered an acquisition for successor liability purposes. The same officers who controlled Company A's assets are the same exact officers who now control Company B's thus, the assets were essentially going from the left pocket to the right pocket of the officers. Considering all the above, the Petitioner clearly acquired substantially all the tangible and intangible assets of Company A, thus making it a successor in business.

## **CONCLUSIONS OF LAW**

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 2010).

2. “The Tax Commissioner shall collect the taxes, 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.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. It was the duty of Company A to collect and remit consumers sales and use tax to be collected by any vendor or retailer. Company A is liable for any taxes it failed to collect or remit. *See* W.Va. Code R. § 110-15-4.5 (1993).

4. If Company B or Petitioner were a successor in business to Company A, it too would be 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).

5. 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. Code R. § 110-15-4.9.1 (1993).

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

7. The Petitioner purchased all the business assets that remained of Company A when Company A ceased operations, and therefore meets the statutory and regulatory definition of a successor in business to Company A. Tr. 26.

8. The assessment issued against the Petitioner does not violate the provisions of 11 U.S.C. 101, et seq., as the Petitioner was never a debtor in bankruptcy. Additionally, the Petitioner is not entitled to any protections found in 11 USC 101 et seq., as Company B did not exist until after Mr. and Mrs. A's bankruptcy. Petitioner's Ex. 1, Petitioner's Ex. 4.

9.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that: the consumer sales tax, withholding tax, and combined sales and use tax assessment issued against Petitioner or Company B, on February 20, 2015, for a total liability of \$ \_\_\_\_\_, is hereby **AFFIRMED**.

Interest continues to accrue on these unpaid taxes until fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
Crystal S. Flanigan  
Administrative Law Judge

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Date Entered