

REDACTED DECISION – DK# 18-106 SIB

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 30, 2019
ISSUED ON SEPTEMBER 30, 2019**

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

FINAL DECISION

On February 7, 2018, the Compliance Division of the West Virginia State Tax Commissioner’s Office (hereinafter “the Tax Department or the Respondent”) issued two Successor in Business Assessments against the Petitioner. These assessments were 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 assessments stated that Petitioner was a successor to both Company A. and Company B. Both assessments were for motor fuel importer taxes, and the first involved Company A. for the period October 1, 2009 to January 31, 2014. However, at hearing the Tax Commissioner withdrew that assessment, and therefore, this decision only concerns the second assessment. The second assessment alleged that Petitioner was a successor in business to Company B and was for tax in the amount of \$ _____, interest of \$ _____ and additions of \$ _____, for a total assessed liability of \$ _____.

The Petitioner timely filed its Petition for Reassessment with this Tribunal on April 9, 2018. Subsequently, notice of a hearing on the petition was sent to the parties and in accordance with the provisions of West Virginia Code Section 11-10A-10 a hearing was held on April 9, 2019. Thereafter, the parties submitted legal briefs, the last brief being filed on September 3, 2019 and the matter became ripe for decision at that time.

FINDINGS OF FACT

1. The Petitioner is a West Virginia Corporation, formed in 1977, with its principal place of business in a West Virginia County. The Petitioner's business is the wholesale and retail sale of fuels and fuel products, such as gasoline, diesel fuel, propane, and lubricants such as oils and grease.

2. Sometime in 2000 or 2001, the Petitioner acquired a new customer, Company A. Tr. P64 at 1-5. The Petitioner sold Company A home heating fuel and on road and off road diesel fuel. Tr. P64 at 11-13.

3. Sometime in 2012, Company A approached the Petitioner to discuss its desire to enter into the home propane business. Tr. P14-15. The result of these discussions was an agreement for Company A to purchase propane from the Petitioner and for it to lease-to-own propane tanks owned by the Petitioner. Tr. P66.

4. In 2017, Company A approached the Petitioner and explained that the propane business was not profitable for it, and that it desired to cease that portion of its business. Tr. P52-53 at 20-2. The result of these conversations were a written agreement between Company A and Petitioner, signed in August of 2017, providing that the Petitioner would purchase some propane delivery trucks, some propane inventory and retake possession of the propane tanks it was leasing to Company A. *See* Petitioner's Ex. 3.

5. After this agreement was executed, the Petitioner continued to sell fuel and oil products to Company A. Tr. P82 at 5-8.

DISCUSSION

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

The law of this matter is found in West Virginia Code Section 11-10-11. 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 2019).

The Petitioner argues that it is not a successor to Company B, because Company B has not sold out its business or stock of goods, nor has it ceased doing business. For his part, the Tax Commissioner argues two points, first, that Mr. A, who testified on behalf of the Petitioner was not a credible witness. Next, the Tax Commissioner argues that the Petitioner bought Company B's entire propane business. This Tribunal is not prepared to say that it found Mr. A's testimony to be untruthful. However, as will be discussed in greater detail below, even if Mr. A's testimony is discounted in its entirety, we are still unable to rule for the Tax Commissioner. The Tax Commissioner is correct when he states that the Petitioner bought Company B's entire propane business, but that fact is not determinative of the legal question before us. The question to be

answered is, can Petitioner be a “successor in business” to Company B, as that term is used in Subsection (f), when Company B is still in business? On this point the Tax Commissioner’s post hearing brief is silent, despite much discussion between the parties and this Tribunal explaining how this is the salient point.

Again, even if Mr. A’s testimony is thrown out, the Petitioner’s President testified that after its purchase of the propane business, Company B continued in business. Due to the fact that Company B was a long time customer of the Petitioner, its President was clearly competent to testify on this point, and his testimony was unrebutted. Moreover, Petitioner’s Exhibit 7 showed that in 2016, and 2017, the Petitioner sold over a million dollars of fuels and oils to Company B each of those years. Finally, in the Tax Commissioner’s post hearing brief, he does not even attempt to argue that Company B is no longer in business.

By its unambiguous language, in order to have a successor, the prior business must have sold out his, her or its business or stock of goods, or ceased doing business. There is no evidence before this Tribunal that that has happened here, and the Tax Commissioner does not even argue as such. As a result, the Petitioner has proven that the assessment issued against it was clearly wrong, arbitrary and capricious, or an error of law.

Finally, we should note that prior to hearing the Tax Commissioner specifically argued that Subdivision (f) would allow for successor liability even when the original business still continues. The Tax Commissioner abandoned that argument in his post hearing briefs, presumably because it is not viable, based upon the clear and unambiguous language in Subdivision (f).¹ To read the Subdivision to allow for successor liability when the original business continues would not only

¹ The Tax Commissioner’s abandonment is somewhat oblique. In his argument that by buying all of Company B’s propane business, the Petitioner became a successor, he suggests such a conclusion, however, his brief never attempts to explicitly connect those dots.

do violence to the plain language of the statute, it would lead in a direction that this Tribunal cannot imagine the Legislature would ever have envisioned. Under that logic, every time a coal company sold a portion of its mineral holdings, the buyer would be on the hook for any outstanding tax bill of the seller. We believe such an interpretation would lead to an absurd result.

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. 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. W. Va. Code Ann. § 11-10-11(f)(2) (West 2019).

4. West Virginia Code Section 11-10-11(f)(2) is clear and unambiguous.

5. By its plain language, Subdivision (2) requires a selling out or cessation of one business, before a successor can be named.

6. Company B has not sold out its business or stock of goods, nor ceased doing business. Therefore, under West Virginia law, Petitioners cannot be a successor to Company B.

7. 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 or

penalty 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 (2003).

8. The Petitioner has met its burden of showing that the assessment issued against it was erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment, issued against the Petitioner on February 7, 2018, as a successor to Company B for a total tax due of \$_____, is hereby **VACATED**.

It is further **ORDERED** that, consistent with the Tax Commissioner's wishes, the other assessment, also issued on February 7, 2018, alleging that the Petitioner is a successor to Company A., is also **VACATED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered