

**REDACTED DECISION – DK# 20-300**

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON JUNE 8, 2022  
ISSUED ON DECEMBER 7, 2022**

**FINAL DECISION**

On September 24, 2020, the Compliance Division of the West Virginia State Tax Commissioner’s Office (“the Tax Department” or “the Respondent”) issued a Successor in Business Assessment against the Petitioner, Jane X (“Ms. X” or “Petitioner”). The Petitioner operates Atlas Security (“Atlas”) as a sole proprietor. 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 the Petitioner was a successor in business to Predecessor Security (“Predecessor Company”) and involved two (2) taxes; withholding, and sales 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 2009 through 2019. The sales and use portion involved tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_, additions and/or penalties of \$\_\_\_\_, for a total sales and use tax assessment of \$\_\_\_\_ and was for the time period from 2009 through 2019. The total assessment was in the amount of \$\_\_\_\_\_.

In her Petition for Reassessment, the Petitioner indicated that she received a copy of the assessment at issue on October 5, 2020. The Petitioner timely filed her Petition for Appeal with this Tribunal on November 23, 2020. 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 January 13, 2022. Thereafter, the parties submitted briefs containing proposed findings of fact and conclusions of law, with the evidence closed on June 8, 2022, and the matter became ripe for decision at that time.

## FINDINGS OF FACT

1. Jane X is the sole proprietor of Atlas, a security business, and is alleged to be a successor in business to Predecessor Company. Tr. 40.
2. John Y was the sole proprietor of Predecessor Company, a security business, which operated out of his residence at [REDACTED], [REDACTED], West Virginia 26847. Tr. 43.
3. John Y operated Predecessor Company for approximately 20-30 years and brought the existing business with him when he married the Petitioner's mother. Tr. 42-43.
4. The Petitioner began working as a part time security officer for Predecessor Company after graduating high school in 2012 and again after she returned from the military in 2013 until Predecessor Company closed. She was paid as a W-2 employee. Tr. 44-45.
5. The Petitioner did not have any role in the business aspect of Predecessor Company. She was told which security jobs to work. Tr. 20.
6. While working for Predecessor Company, the Petitioner worked security at [REDACTED], [REDACTED], [REDACTED], and various construction sites. Tr. 18-19.
7. The Petitioner would also conduct management duties when her stepfather was out of town. Those duties included providing paychecks to employees and maintaining adequate employee coverage for security customers, including filling in herself as needed. Tr. 21-22.
8. Prior to Predecessor Company's closure, the Tax Department issued third-party levies against its payments from various customers, including [REDACTED]. Tr. 67-68.
9. Predecessor Company closed at some point in the summer or fall of 2019. Tr. 45.
10. Predecessor Company had five to ten employees when it ceased operating in the summer or fall of 2019. Tr. 47.
11. The Petitioner and her stepfather did not have discussions about Predecessor Company closing, they were not on speaking terms during this time, and her mother informed her of Predecessor Company's closure. Tr. 45.

12. On February 4, 2019, the Petitioner's husband passed away. Tr. 24.
13. After her husband passed, the Petitioner lived with a friend in [REDACTED], West Virginia until her friend was evicted. Tr. 24.
14. After the eviction, the Petitioner had to move back in with her mother and stepfather sometime before October 2019 and lived with them until late 2021. Tr. 23-25.
15. Atlas became effective on October 23, 2019, with the address of [REDACTED], [REDACTED], West Virginia. Tr. 9, State's Ex. No. 3.
16. The State Tax Department issued a Business Registration Certificate to the Petitioner DBA Atlas and was effective November 7, 2019. Pet'r [']s Ex. No. 2.
17. The Petitioner had to bid for [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Tr. 46, 49.
18. These customers were already aware that Predecessor Company had closed and had already posted bids for security services prior to the Petitioner contacting them. Tr. 49.
19. In between the time of Predecessor Company closing and the Petitioner being the winning bid, [REDACTED] used bank tellers to carry money. Tr. 48, Pet'r [']s Ex. No. 4, Pet'r [']s Supp. Ex. A.
20. In between the time of Predecessor Company closing and the Petitioner being the winning bid, [REDACTED] and [REDACTED] used their own employees for security work. Tr. 49.
21. The Petitioner bid for [REDACTED] but lost to [REDACTED]. Tr. 52-53.
22. [REDACTED] put out a local bid but couldn't find anyone to match the prices they wanted. The Petitioner then provided them with a contract for her services. Tr. 52.
23. The Petitioner acquired [REDACTED] as a customer in 2020 to provide security and ticket sales for football, basketball, soccer, and softball games. Tr.15.

24. At the time of this hearing, the Petitioner had four customers, [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] was no longer a customer of Atlas at the time of the hearing. Tr. 32-33.

25. The Petitioner approached [REDACTED]'s CEO and was given the two-day job. There was no bid because they needed someone to start quickly. Tr. 51.

26. The Petitioner is the primary employee of Atlas but did pay a friend to assist her with [REDACTED] and would acquire others to help her, some of which did work for Predecessor Company. Tr. 30, 38.

27. The Petitioner did keep one prior employee of Predecessor Company to work with [REDACTED]. Tr. 53.

28. The Petitioner did not approach any other former customers of Predecessor Company due to some of them finding other security vendors, some of them leaving the area, or the Petitioner not wanting to work with them. Tr. 53-54.

29. The Petitioner did not purchase or acquire any vehicles, furniture, computers, cell phones, office equipment, or uniforms from Predecessor Company. Tr. 31, 38-39, 48.

30. The Petitioner did not purchase or acquire any accounts receivable or pay any accounts payable or other debt. Tr. 55.

31. The Petitioner used her own personal laptop and printer, her own personal cell phone, purchased an additional cell phone, a van, paper, office supplies, and had her own uniforms made. Tr. 31, 38-40.

## **DISCUSSION**

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

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 Section 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 and 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.

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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.** Typically, successor liability cases before this Tribunal have facts to easily ascertain whether liability should be imposed on a petitioner. We usually see a successor take over a former business that has ceased operations within a few days, move into an established business location, take over the existing employees, customer accounts, equipment, office supplies, contracts, delivery routes, assumption of leases or loans, acquisition of vehicles, acquisition of accounts receivable and accounts payable, business name, goodwill, etc. Facts such as these would normally impose successor liability, but they are not quite so clear in this case and are admittedly, a close call.

Here, the Petitioner acquired the following business assets on her own or used her own personal assets to operate Atlas, which is summarized as follows:

1. The Petitioner acquired her customers by bids or by being the most competitive;<sup>1</sup>

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<sup>1</sup> [REDACTED] put out a local bid but couldn't find anyone to match the prices they wanted, and the Petitioner later obtained them as a customer in 2020. Tr. 52.

2. No customers sought her out due to Predecessor Company's goodwill, and she lost a bid to [REDACTED] for [REDACTED];

3. The Petitioner used her own vehicle and purchased a van to provide security services to her customers and did not acquire any of the multiple vehicles of Predecessor Company;

4. The Petitioner used own her cell phone to conduct her business and did not acquire any of the cell phones from Predecessor Company;

5. The Petitioner used her own personal laptop to conduct her business and did not acquire any computers from Predecessor Company;

6. The Petitioner used her own supplies and equipment to run her business and did not acquire any supplies or equipment from Predecessor Company;

7. The Petitioner purchased her own uniforms for Atlas and did not acquire any uniforms from Predecessor Company;

8. The Petitioner is the primary person in her business who provides security to her customers and used a friend to assist with [REDACTED] and had [a] Predecessor Company employee who lived in Kaiser to assist with [REDACTED];

9. The Petitioner did not acquire the five (5) to ten (10) former employees of Predecessor Company;<sup>2</sup>

10. The Petitioner received her business registration certificate several months after the closure of Predecessor Company;<sup>3</sup>

11. The Petitioner conducts Atlas remotely and provides security for her customers on-site, and did not acquire any office space, lease, or mortgage of Predecessor Company to operate Atlas; and

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<sup>2</sup> Predecessor possibly had five (5) to ten (10) employees at its closure. Tr. 47.

<sup>3</sup> The Petitioner received the business registration certificate for Atlas on November 7, 2019. Predecessor closed sometime in the summer of 2019. Pet'r [ 's] Ex. No. 2, Tr. 45.

12. The Petitioner acquired no business loans, no accounts receivable, or accounts payable from Predecessor Company.

As mentioned above, this case also has facts, which on its face, could lend itself to imposing successor liability on the Petitioner, one being where Atlas was started. Atlas is a security business that operates remotely and provides onsite security services to its customers. When the Petitioner formed Atlas, she had moved back to her mother and stepfather's home after the recent death of her husband. Due to the nature of this business, which could be started and operated anywhere and the circumstances of her being a recent widow, she started it where she was living. The Petitioner has since moved out of this home and continues to operate Atlas remotely. As the location of where the Petitioner started and operated is not fundamental to running Atlas and ultimately, not outcome determinative to imposing successor liability.

The familial relationship between the Petitioner and her stepfather and any implied knowledge that she may have had about Predecessor Company was argued by the Respondent for potentially imposing successor liability. The Respondent finds it questionable that the Petitioner would live with her stepfather and not be aware of any tax issues for Predecessor Company. However, the evidence does not support that she was ever aware of any potential tax liability. She further testified that she was never involved in the business side of Predecessor Company and had worked part time as a security guard. She also had another job the entire time she worked there for Predecessor Company.

When her stepfather was out of town, she would give the employees their paychecks and ensure the security locations were covered with employees. It is unknown how often she handled these tasks. It is also notable that these tasks have nothing to do with filing or paying taxes. She testified that was unaware that Predecessor Company was closing, was not on good terms with her stepfather, and only became aware through her mom that Predecessor Company was closing. While one could argue that her lack of awareness was unlikely, she was credible at the hearing,

and her testimony was consistent throughout the hearing regarding any knowledge of tax issues. It is also important to note, there is an assumption that Petitioner and Mr. Y had a close relationship. A relationship that was close enough to where he would inform her about everything going in *his* 20-30 year old business that he had prior to knowing her. There was no testimony to support this assumption.

The Respondent attempts to question the Petitioner's credibility by citing to the following exchanges:

ATTORNEY [REDACTED]: Okay. So, when I asked earlier, how many employees did Predecessor Security have, you said you didn't know. Can you give us a guess?

[MS. X]: I really don't know.

ATTORNEY [REDACTED]: But you did have a list of employees that you were told to call and find a replacement or a substitute for when somebody was not able to make it to their job, right?

[MS. X]: Yes.

Evidentiary Hearing, Tr. 22-23.

The Respondent argues that when the Petitioner was later questioned by Chief Judge Pollack, she said that Predecessor Company had five (5) to ten (10) employees.

JUDGE POLLACK: And ballpark, how many people worked for Predecessor Security on the day, you know, in 20—in the summer or fall of 2019 when they closed up shop?

[MS. X]: About five to ten people maybe.

Evidentiary Hearing, Tr. 47.

While she testifies that she doesn't really know how many employees Predecessor Company had when asked to guess, she does later state that Predecessor Company had five to ten people maybe. While the Petitioner's testimony initially appears to be inconsistent, the Respondent's first question does not specifically ask when Predecessor Company had these employees, just how many they had. The Respondent's second question asks about a list of

substitute employees. However, Chief Judge Pollack specifically asked about how many employees Predecessor Company had in the summer or fall of 2019 when it “closed up shop.” The Petitioner responded with five to ten people maybe. The Petitioner answered differently because she was asked different questions. Thus, this Tribunal finds the Respondent’s credibility argument is unpersuasive.

Furthermore, the Petitioner testified that she only used one prior employee of Predecessor Company at the [REDACTED]. She also testified that she would sometimes procure help as needed or have a friend assist her with security at [REDACTED]. Otherwise, with the other customers, it was the Petitioner alone providing security services. Thus, the argument about the Petitioner acquiring all Predecessor Company’s employees is also unpersuasive.

The Respondent argues that there were questionable occurrences that point to potential cooperation between Predecessor Company and Atlas to avoid paying taxes. In July 2019, the Tax Department had a third-party levy issued on any payments from [REDACTED] to Predecessor Company. Tammy Castleman testified that the Tax Department received a phone call from “a lady at the accounts payable division of [REDACTED]” about Predecessor Company. Mr. Y had allegedly contacted [REDACTED]’ accounts payable division and informed them that Predecessor Company had changed its name to Atlas Security and that [REDACTED] should issue their checks to Atlas going forward. The identity of the Tax Department employee who spoke with the “lady in [REDACTED]’ accounts payable division” and placed the note in the Tax Department’s computer system is unknown. Although this Tribunal is not required to follow the West Virginia Rules of Evidence, it often allows in testimony that would be excluded under the Rules but will later give it the appropriate relevancy and weight.

On one hand, this call has multiple hearsay concerns, and this Tribunal could easily refuse to give it any weight. However, if weight is given to this call, then it seems highly unlikely that [REDACTED] would enter into a contract with Atlas. [REDACTED] was concerned about

running afoul of the Tax Department, enough so that it contacted them about Mr. Y's call. Predecessor Company was having considerable tax issues and its customers knew about them. Despite these issues, [REDACTED] would then, ignore any potential for tax fraud and contract with the Petitioner because she is Mr. Y's stepdaughter? It very doubtful that any business would willingly take the risk of being a party or a witness to this situation. This Tribunal finds that these concerns would more than likely erode any of Predecessor Company's goodwill and therefore, the Petitioner could not acquire it.

The Respondent argues that the Petitioner acquired all the intangibles that Predecessor Company had to offer, such as goodwill and customer lists. The Respondent avers that the Petitioner is a successor in business because all the Petitioner's customers were prior Predecessor Company customers and that she acquired them through Predecessor Company's customer lists. This Tribunal is cognizant of this issue, and we might even agree with the Respondent's position if no time went by between the Predecessor Company's closure and Atlas's opening. Predecessor Company's customers knew it was closing but just didn't hand over their security needs to Atlas. Several customers used their own employees to conduct security tasks before contracting with the Petitioner. These customers made other arrangements for security, put out bids, and didn't just "show up" for her. Furthermore, the Petitioner lives and works in a very rural part of West Virginia where the base of security customers is limited. It is unreasonable in a small, rural area for the Petitioner to be unable to submit bids to this small group of security customers.

In typical successor cases, the same location and goodwill are implicit. We often see a new restaurant that opens in the exact same place with the same stock of goods and equipment. In that scenario, the new business or successor just "opens its doors" and continues the status quo with no disruptions or changes. Here, the Petitioner went out and obtained customers through matching price requirements as she did with [REDACTED] or through a formal bid process. This Tribunal finds that the Petitioner's initiative in going out and contacting customers, meeting their

pricing requirements, and being the prevailing bid are outcome determinative. Conversely, had she not been required to “work to try to get their business” or place bids and been given customers on a silver platter because of her stepfather’s goodwill, then she would probably lose this case. However, the customers didn’t just contact her when Predecessor Company closed and automatically give her their business. This is different from a restaurant where former customers just “show up” because that is where the former restaurant was. The Petitioner even lost a bid to a prior customer of Predecessor Company. If the Petitioner were a successor in business who acquired all Predecessor Company’s goodwill, then she would not have lost any bids of Predecessor Company’s previous customers. Therefore, based upon all of the above, this Tribunal finds that the Petitioner is not a successor in business.<sup>4</sup>

### CONCLUSIONS OF LAW

Based upon all the above, this Tribunal **FINDS** and **CONCLUDES** 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 2010).
2. If Atlas was a successor in business to Predecessor Company, 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).
3. In order to be determined a successor in business to Predecessor Company, Atlas would have had to directly or indirectly purchased, acquired, or succeeded to the business or the stock of goods of Predecessor Company. *See* W.Va. Code R. § 110-15-4.9.1 (1993).

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<sup>4</sup> The Petitioner put the Statute of Limitations at issue in this case, however, as she prevailed, this Tribunal finds that it is not germane to this decision. However, the Court notes that when no return has been filed, then an assessment may be issued any time. W.Va. Code § 11-10-15.

4. In a hearing before the West Virginia Office of Tax Appeals on a petition for appeal, 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).

5. On its first day of operation, Atlas had no customers and had to bid competitively for her current customers and did not acquire any tangible or intangible business assets of Predecessor Company.

6. The Petitioner has carried her burden of proving that Atlas is not a successor in business for the consumer sales and use tax and withholding tax assessment issued against it on September 24, 2020.

#### **DISPOSITION**

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the September 24, 2020, Successor in Business Assessment, issued against the Petitioner for a total tax liability of \$\_\_\_\_\_ is hereby **DENIED**.

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

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

\_\_\_\_\_  
Date