

REDACTED DECISION – DK#’S 21-131

**BY: CRYSTAL S. FLANIGAN, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MAY 6, 2024
ISSUED ON OCTOBER 31, 2024**

**NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE
OFFICE OF TAX APPEALS**

FINAL DECISION

On June 11, 2021, the Compliance Division of the West Virginia State Tax Commissioner’s Office (hereinafter “Tax Department” or “Respondent”) issued a Successor in Business Assessment against the Petitioner, AAA, (hereinafter “AAA” or “Petitioner”). BBB operates AAA as a corporation. 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 CCC, (hereinafter “CCC”) and involved combined sales and use tax. The underlying tax was in the amount of \$XX, interest in the amount of \$XX, additions and/or penalties of in the amount \$XX, for a total assessment of \$XX for the period ending September 30, 2016.

The Petitioner timely filed its Petition for Appeal with this Tribunal on August 4, 2021. 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 December 14, 2023. Thereafter, the parties submitted briefs containing proposed findings of fact and conclusions of law, with the evidence closed on May 6, 2024, and the matter became ripe for decision at that time.

FINDINGS OF FACT

1. AAA is a corporation owned by BBB (hereinafter “BBB”) and was assessed as a successor in business to CCC. Resp’t’s Ex. 2.

2. DDD (hereinafter “DDD”) formed CCC, a corporation, in 1986. Tr. 13.
3. The West Virginia Secretary of State Business Entity Detail Screen designates CCC as being effective from December 31, 1986.¹
4. Annual reports were still being filed for CCC until June 3, 2020, according to the West Virginia Secretary of State.
5. According to DDD, EEE was formed in 2017 or 2018 and went out of business in December 2020. Tr. 12.
6. However, the West Virginia Secretary of State Business Entity Detail Screen designates EEE as being effective from January 1, 2019, and still being currently active.
7. The last annual report for EEE was filed on February 15, 2021.
8. BBB began working with DDD on a contract basis on or about August 2020 to prepare tax returns for his clients, including corporate work. Tr. 14, 17-19, 31-32.
9. In late fall of 2020, BBB became aware that DDD was leaving. Tr. 21.
10. DDD and CCC ceased doing business in December 2020, left West Virginia and the office space in December 2020 and moved to LLL. Tr. 4, 12.
11. In January 2021, BBB moved into the same office space and began operating his business. Tr. 29-30, 69.
12. Upon DDD departure from the KKK office, he left servers, computer equipment, software, desks, filing cabinets, chairs, a copier, a scanner, and phones. Tr. 8-10.
13. Upon DDD departure, he also left computers with software that contained client information for approximately 200 clients. Tr. 16-17.
14. BBB used the furniture, computers, and server left by DDD. Tr. 22, 25.

¹ This Tribunal notes that it can take judicial notice of the West Virginia Secretary of State Business Entity Details information for CCC and EEE.

15. DDD's clients that were on the computer became BBB's clients. Tr. 26, 28, 38.
16. A good number, if not all, of DDD's clients who walked into the building looking for DDD became BBB's clients. Tr. 27.
17. Approximately 400 tax returns were filed using BBB's EIN but had DDD's taxpayer preparer ID number. Tr. 48.
18. DDD and BBB communicated about the business, including clients after 2020 and into 2021. Tr. 15, 32, 38.
19. BBB did not change the phone number that DDD had previously used. Tr. 25, 61. Resp't's Ex. 4.
20. CCC had one employee, FFF, hereinafter ("FFF") when it ceased operating in December 2020. Tr. 24, 29.
21. BBB hired FFF, the former employee of DDD, in January 2021, and she remained with him the entire time BBB was in the KKK office. Tr. 24, 29-30.
22. FFF did not leave between DDD's departure and BBB's opening. Tr. 30.
23. FFF performed monthly bookkeeping and payroll duties for DDD, and her job description remained the same for BBB. *Id.*
24. DDD rented the space from GGG in the spring of 1992 until December 2020. Tr. 12.
25. BBB and GGG did not have a written lease agreement. Tr. 29.
26. Upon leaving the rental property, DDD left the key for BBB instead of providing it to the landlord, GGG. Tr. 10-12
27. BBB moved into the space that DDD had previously used and was there approximately one year and six months. Tr. 22.

28. BBB never had a conversation with GGG about the lease prior to BBB leasing the space. Tr. 29.

29. In January 2021, BBB informed GGG that he was taking over the space by mailing a letter and a check to them for the lease. *Id.*

30. BBB leased the space from January 2021 until November 2022. *Id.*

31. The Tax Department's witnesses, HHH and III, both made a site visit together on May 27, 2021, and spoke with BBB about the business. Tr. 37, 40-42, 44, 46, 50-51, 58, 63.

32. HHH and III both testified that BBB had informed him that DDD gave him the business and allowed him to take over. Tr. 42, 44, 47, 50-51, 53.

33. The CCC sign was still up during the site visit on May 27, 2021, but a sign for BBB business was not there. Tr. 40-41, Resp't's Ex. 3, Resp't's Ex. 4.

34. A CCC sign on aa directed people to the building where BBB was located. Tr. 45.

35. BBB had business cards with the CCC name and logo in his office during the site visit on May 27, 2021. Tr. 47-49, 51, Resp't's Ex. 6.

36. The Secretary of State Business Entity Details for AAA lists CCC as a tradename that was effective on January 19, 2021, and terminated on September 3, 2021. AAA's address is listed at bb. Tr. 57-58, 69-70, Resp't's Ex. 5.

DISCUSSION

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

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. (Emphasis added.)

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.** (Emphasis added.) In the history of this agency, we have ruled upon several successor in business cases. We typically 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. The same location and goodwill are usually implicit. For example, we will see a new restaurant open 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 the same customers with no disruptions or changes.

It is helpful to know the history of CCC and DDD to understand how this matter came before us. DDD testified during the hearing that he had started CCC in 1986 and that it had ceased doing business on or around 2017 or 2018. Around that time DDD allegedly formed EEE to have

a fresh start in a business that provided the same services that DDD provided with the addition of computer networking. By all accounts, CCC was a successful business, and it had been in existence for over thirty (30) years. DDD could not provide this Tribunal with a meaningful reason for allegedly closing CCC and opening EEE as set forth below in the exchange below:

JUDGE FLANIGAN: Okay. And then earlier, I think it was JJJ that asked you this, why you changed (sic) business models or why you changed the name?

DDD: And I think I explained that.

JUDGE FLANIGAN: Okay. I'm a little --- .

DDD: Do you have an additional question?

JUDGE FLANIGAN: I do have an additional question. Yes. Why did you do that? Your answer was a little vague, to be honest. You just said it seemed like a good thing to do at the time. Well, why? Why was that a good thing to do at the time, from your perspective?

DDD: Because we wanted a fresh approach. And CCC had been around for years and years, and it's time for a fresh facelift. And that's what we did. We changed it to EEE to incorporate networking and computers and so on and so forth, along with the services that we have provided for the last 25 years or so. There just seemed to be a good solution, and we did so.

JUDGE FLANIGAN: A good solution? I mean, you had what sounds like a successful business for a long time, and then you switch it up to something else. And I understand you wanted to include the computer networking, but couldn't you have did that without changing the name?

DDD: Yeah, probably.

JUDGE FLANIGAN: That takes some doing to change the name, to get started.

DDD: Right. We had to change bank accounts, we had to change logos, we had to change all kinds of things. And it takes quite a while to do that, but we felt comfortable in that decision, and it seemed to be the right thing to do at the time.

Tr. 13-14.

Despite DDD's testimony, it is clear that CCC was still operating, annual reports were still being filed, CCC still had signage at the KKK office and in the KKK area which will be discussed

infra, and BBB had business cards created with the CCC business name during the timeframe that he was contracting with DDD from August 2020 through December 2020. If CCC had ceased operations in 2017 or 2018 as DDD testified, then there would be no business card or signage with the CCC business name still being used in 2020. According to the West Virginia Secretary of State business entity detail screen, EEE is still in existence and contains DDD's LLL address. Once again, the facts do not support DDD's testimony about when EEE began and ended. This Tribunal finds that the dates of EEE allegedly beginning in 2017 or 2018 and ending in December 2020 is an attempt to break the sequence of business operation of CCC. This Tribunal further finds that CCC was still in operation at the time that BBB began working with DDD and that the business did not cease operating until December 2020. Accordingly, this Tribunal finds DDD's testimony inconsistent at best.

Although BBB had an existing business, AAA,² he opened a DBA for CCC on January 19, 2021, and kept it open until September 3, 2021. He did not provide a reason as to why he created a DBA for CCC other than attempting to follow the Board of Accountancy. However, BBB did not provide a specific rule or regulation requiring anything of this nature. It appears that he was attempting to expand his existing business. The only rationale this Tribunal can possibly attribute to this case is that he was easily taking over the goodwill and clientele of a successful, well-established business for little to no start-up cost.

In this case, BBB acquired one of the most important assets, if not the most important, in any business, its clients. BBB conceded that it acquired at least 150 (if not all) clients of CCC by filing returns for those already in the computer software system DDD left, through the contract work BBB did for CCC's clients from September 2020 through December 2020, and by "opening

² AAA became effective on October 19, 2018, and was still in effect at the time of this hearing. Resp't's Ex. 5. BBB testified that it had been in operation since 2011. Tr. 70.

its doors” at the exact location of CCC and retaining any client who walked into the office looking for DDD as set forth below:

ATTORNEY KKK: How many of those clients did you obtain because they walked in the building looking for Mr. DDD?

BBB: I would say all of them. Well, a good number of them just out of habit. But we also were fortunate with some other closures in the area during that timeframe as well.

Tr. 27.

BBB’s ease of acquiring all or substantially all of CCC’s clients coupled with having approximately 400 West Virginia tax returns processed with the CCC tax preparer’s number but with BBB’s EIN leans towards a successor in business determination as set out below:

MR. III: I had sent an inquiry through to our Tax Account Administration Division, and they had checked tax returns and noted for me that there were approximately 400 returns that were filed under BBB's EIN number. However, it used Mr. DDD's taxpayer preparer ID number.

ATTORNEY JJJ: Okay. So, based on that, you're saying it sounded like BBB was using Mr. DDD's tax preparer number?

MR. III: Correct. We did ask BBB about that when we were visiting.

ATTORNEY JJJ: Do you remember what his answer was?

MR. III: He said that Mr. DDD had left the computer behind, that they were using the computer.

ATTORNEY JJJ: So, did you take that to mean that the computer that was left there by Mr. DDD that BBB was now using, when BBB would now file a tax return for one of those people, it may automatically just throw the old tax preparer ID number in there?

MR. III: That was what was alluded to, yes.

Tr. 48.

CCC’s clients are clearly inexplicably intertwined with BBB. Those clients were essentially left by CCC and then taken over. BBB moved into the same exact space that CCC had been in since 1992 and retained the exact same phone number. BBB had been working for DDD

since August or September 2020 on a contract basis to assist with tax work for CCC's existing clients. Moreover, BBB had approximately 100 (perhaps less) business cards prepared with CCC as the business name although BBB had his own business and could have easily had his own business name on the cards. Contractors generally have their own business cards and do not use the cards of the business they are contracting with.

BBB moved into the space that CCC had occupied for approximately twenty-eight (28) years and did not remove the CCC sign until at least May 27, 2021. Additionally, there was a CCC sign that remained on aa that directed potential clients to BBB's location. To the casual observer or potential client, BBB's business was still CCC and BBB took no proactive measures to change that perception.

BBB kept the only existing employee of CCC, FFF. Ms. FFF performed monthly bookkeeping and payroll duties for CCC and her job description did not change for BBB. She never left CCC and remained with BBB from January 2021 through September of 2023, even after he moved from the CCC space. Essentially, BBB acquired the only employee of CCC and kept her to seamlessly utilize her knowledge and experience from CCC to his business.

BBB used the computer equipment and server which had all of CCC's client information (approximately 200 clients) and used that information for tax preparation as was discussed *supra*. He used the existing desks, chairs, printers, etc., to run the business that DDD had left. BBB began leasing the same office space as CCC. This office space is owned by GGG in KKK. There was never a written lease between CCC and GGG in the twenty-eight (28) years that DDD rented the office space. DDD (and not GGG) left BBB the key to the office and the locks were never changed, allowing for a seamless transition. BBB informed GGG in January 2021, after he was already in the office space, that he was taking it over from DDD. He mailed a note and a check to GGG

alerting it to this change in tenancy. There was no prior communication between BBB and BBB to him occupying the office space. He essentially took over where DDD left off.

On May 27, 2021, Mr. HHH and Mr. LLL made a site visit to BBB. During this visit, they noticed that the CCC sign remained up and did not see any signage of any other business denoting BBB. They also noticed that BBB had business cards with CCC's name and logo on them. There were no other business cards for BBB. There was a CCC sign on aa that gave directional information to the office. BBB informed Mr. HHH that DDD had given him the business and allowed him to take over. This "taking over" of a long-established business would provide BBB the opportunity to seize on the goodwill of CCC. BBB argues that he opened the trade name to allegedly follow the Board of Accountancy. BBB did not provide any type of specific Rule or Regulation of Accountancy that would support this argument as to why he kept CCC as opposed to just using AAA. Tr. 60-70. BBB appeared to be uncertain in relying on the Rules of Accountancy as his rationale for opening CCC as a DBA. He never appears to truly know what specific rules of compliance would control nor were any specific rules argued during the pendency of this case. This Tribunal is unclear as to why he would open a DBA with the same name as CCC (if not to seize upon all the benefits of CCC) when he already had a business.

BBB knew in the fall of 2020 that DDD was planning to move to LLL at the end of the year. He saw this as an opportunity to expand his own business for little or no startup cost and enter a market that was losing another accounting firm, MMM in Nitro. He appears to have just "opened his doors" and been given customers and a long-established business which had goodwill, the same location, the same phone number, the business cards, the signage, and he even took the proactive step to open a DBA for CCC with the Secretary of State by January 19, 2021. There is little, if anything, that BBB did not succeed to CCC. As discussed in the beginning, this case is

very similar to a restaurant where former customers just “show up” because that is where the former restaurant was and has existing goodwill.

BBB argues that he is not a successor in business because he did not have an agreement with DDD to purchase or take over the business and that they are still competitors. This Tribunal finds that such an agreement between the BBB and DDD is not required under law for successor liability to attach. Furthermore, the argument that they are still competitors is without merit as BBB literally took over every client that DDD had.

Upon reviewing the testimony from the evidentiary hearing, the exhibits, and the post hearing briefs, this Tribunal cannot recall a more clear-cut case of successor liability than this one. Therefore, based upon all the above, this Tribunal finds that BBB is a successor in business to CCC.

CONCLUSIONS OF LAW

Based upon all the above, it **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 BBB was a successor in business to CCC, 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 CCC, BBB would have had to directly or indirectly purchased, acquired, or succeeded to the business or the stock of goods of CCC. *See* W.Va. Code R. § 110-15-4.9.1 (1993).

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, BBB had CCC's goodwill, customers, employee, office equipment, customer tax information, furniture, business cards, signage, and essentially took over all or substantially all of CCC's tangible and intangible business assets.

6. The Petitioner has not carried the burden of proving that it is not a successor in business for the consumer sales and use tax assessment issued against it on June 11, 2021.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the June 11, 2021, Successor in Business Assessment, issued against the Petitioner for a total tax liability of \$xx is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

Crystal S. Flanigan
Deputy Chief Administrative Law Judge

Date