

**REDACTED DECISION -- 08-066 C -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for
DECISION on AUGUST 20, 2008 -- ISSUED on SEPTEMBER 9, 2008**

SYNOPSIS

1. CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- ON TAXPAYER -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a taxpayer to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- PREPONDERANCE OF EVIDENCE -- To satisfy its burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of the evidence.

3. CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- PETITIONER IS NOT A SUCCESSOR IN BUSINESS -- Where Petitioner has shown by a preponderance of the evidence that she did not purchase all or substantially all of the predecessor's business or its stock of goods or that any kind of consideration passed between them in conjunction with the ceasing of the predecessor's business, Petitioner cannot, by law, be deemed a successor in business pursuant to W. Va. Code § 11-10-11 (f)(2), as amended, and the implementing legislative regulations, specifically, W. Va. Code St. Rules §§ 110-15-4.9.1 to - 4.9.2 (July 15, 1993); the alleged successor merely leased from a third party the same business premises formerly used by the alleged predecessor for the same type of business.

FINAL DECISION

On April 7, 2008, the Director of the Compliance "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a consumers' sales and service tax assessment against the Petitioner, as (an alleged) successor in business to a certain other corporation, "B." This assessment was issued pursuant to the

authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the period May 31, 2001 through December 31, 2006, for tax of \$_____, interest, through April 7, 2008, of \$_____, and additions to tax of \$_____, for a total assessed liability of \$_____. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked April 25, 2008, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2007] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. The consumers' sales and service tax assessment issued against the Petitioner, as (an alleged) successor in business in this matter, resulted from a consumers' sales and service tax assessment which had become final against the other corporation, "B."

2. After "B" -- which had operated a bar in a certain county in West Virginia -- was involuntarily put out of business by the Respondent in March, 2008, the Petitioner entered into a lease agreement with "L," the owner of the same premises in which "B" had conducted business as a bar.

3. Under the terms of the written lease agreement, the Petitioner was to pay "L" one thousand dollars (\$1,000.00) a month for a period of one (1) year, beginning on March 17, 2008, with a thirty (30)-day notice provision before termination of said lease agreement. Proof of payments was submitted to this tribunal.

4. At the administrative hearing the Petitioner's manager testified that she called the new bar, Company "A"; that the entire premises and its contents were owned by "L" as the lessor, including the tables and chairs, the beer coolers, beer taps, etc., and that the slot machines and the pool tables continued to be owned by a video company.

5. It was the Petitioner's manager's testimony that all she owned was the beer and the snacks which were delivered to the bar each day or as needed, which she paid for in cash.

6. The Petitioner's manager also testified that she absolutely had no financial relationship of any kind with anyone with Company "B," the owner of the prior bar business; that she did not even know anyone with "B"; and that no money ever changed hands between anyone with the Petitioner and anyone with "B."

7. Based upon the evidence presented in a prior proceeding involving the alleged predecessor, "B," it is clear that that the Petitioner did not own the premises, its contents, or any of the property associated with the operation of the bar and that "B"'s business relationship with "L," the lessor of the business premises, was also that solely of lessee and lessor.

DISCUSSION

The only issue presented for determination in this case is whether Petitioner has shown that the assessment 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). Specifically, the issue is whether Petitioner has shown that she is not a successor in business to the predecessor bar known as the Corporation.

W. Va. Code § 11-10-11(f)(2) [1986, 2003, 2006, 2007] states as follows:

The successor in business of any person who sells out his or its 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-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 shall not be 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 such taxes. The amount of tax, additions to tax, penalties and interest for which the successor is liable shall be a lien on the property of the successor, which shall be enforced by the tax commissioner as provided in this article.

In addition, W. Va. Code St. R. § 110-15-4.9.1 (July 15, 1993), *see also* § 2.88 of those same consumers' sales and service tax and use tax legislative regulations, define the term "successor" as, "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." Subsection 4.9.1 then makes it clear that 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." [emphasis added]

W. Va. Code St. R. § 110-15-4.9.2 (July 15, 1993) then provides that a person purchasing or acquiring a portion of a business or stock of goods, "may become liable as a successor when that person purchases or acquires substantially all of the business assets or stock of goods of such business."

When these two (2) legislative regulations are read together, along with the related statute, W. Va. Code § 11-10-11(f)(2), as amended, it is obvious that to find successor liability there must first be some form of consideration passing from the alleged successor to the alleged predecessor, and there must be a succession to all or substantially all of the business assets or stock of goods of the business. Stated another way, merely operating the same or a very similar type of business in the same (or essentially the same) business location as the alleged predecessor business does not, by itself, automatically create successor liability.

The facts in this case clearly show that the Petitioner never purchased any portion of the business or the stock of goods of the alleged predecessor business and that absolutely no other form of consideration passed from the Petitioner to the alleged predecessor business known as “B.”

Accordingly, the Petitioner is not a successor in business to “B” and is not, therefore, liable for the consumers’ sales and service tax debt of that alleged predecessor business.

CONCLUSIONS OF LAW

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter carried the burden of proof by a preponderance of the evidence with respect to the issue of whether the Petitioner was legally responsible, as an alleged successor in business, for the consumers’ sales and service tax debt of “B,” the alleged predecessor in business. *See* W. Va. Code § 11-10-11(f)(2), as amended; W. Va. Code St. R. §§ 110-15-4.9.1 to -4.9.2 (July 15, 1993); and W. Va. Code St. R § 121-1-69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers’ sales and service tax assessment issued against the Petitioner for the period of May 31, 2001 through December 31, 2006, for tax of \$_____, interest of \$_____, and additions to tax of \$_____, totaling \$_____, should be and is hereby

VACATED, and the Petitioner owes no further consumers' sales and service tax liability for the period in question.