

Cite as Det No. 07-0305, 27 WTD 201 (2008)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of )	<u>D E T E R M I N A T I O N</u>
Assessment of )	
)	No. 07-0305
)	
... )	
)	Registration No. . . .
)	Notice of Successorship
)	Docket No. . . .
As successor to )	
)	Registration No. . . .
... )	Tax Warrant No. . . .

- [1]. Rule 216; RCW 82.32.140, RCW 82.04.180: SUCCESSORSHIP LIABILITY -- INDIRECT CONVEYANCE -- INTERMEDIATE SELLER. Successorship liability can be imposed when a company purchases business assets from an intermediate seller that did not incur the original tax liability because RCW 82.04.180 defines a “successor” as one to whom a person quitting a business conveys -- either directly or indirectly -- more than 50% of its assets.
- [2]. Rule 216; RCW 82.32.140: SUCCESSORSHIP LIABILITY -- ASSESSMENT PERIOD -- ADEQUATE NOTICE. To provide the Department adequate notice of the purchase of another company’s business assets in order to trigger the six month assessment period set forth in RCW 82.32.140, the purchaser of a business should provide the Department's Successorship Desk with the information required by Rule 216(6)(b). Providing various diverse pieces of information to various Department employees that, only if pieced together, might lead to a conclusion that there has been a sale of assets, does not constitute adequate notice.
- [3]. Rule 216: EQUITABLE ESTOPPEL -- DEPARTMENT ADVICE. The Department's Tax Status Desk did not create an equitable estoppel resulting in manifest injustice when it did not advise an escrow agent who had requested a current tax status that a business might be subject to an audit and additional tax liability.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Bauer, A.L.J. – The purchaser of the assets of a business objects to a successorship assessment. Held: Successorship liability can be imposed when a company purchases business assets from an intermediate seller that did not incur the original tax liability, RCW 82.32.140’s six month limitation did not bar the assessment, and the assessment did not result in manifest injustice. We affirm the assessment.<sup>1</sup>

### ISSUES

1. Can successorship liability be imposed under RCW 82.32.140 when a company purchases business assets from an intermediate seller that did not incur the original tax liability?
2. Did the Department receive adequate notice of Taxpayer’s purchase of another company’s business assets, and then fail to issue a successorship assessment within the six month time period set forth in RCW 82.32.140?
3. Was the Department estopped from imposing successorship liability because the assessment allegedly resulted in manifest injustice?

### FINDINGS OF FACT

The Washington State Liquor Control Board (LBC) contacted [a tobacco store], on July 19, 2005 concerning unpaid tobacco products tax on out-of-state purchases. On August 12, 2005, the LCB forwarded a copy of its findings to the Department. On August 23, 2005, Audit notified [the tobacco store] that it would be audited.

On August 29, 2005, [the tobacco store] entered into a purchase and sales agreement to sell its tobacco shop . . . to Company A. For this transaction, Taxpayer used an escrow company. . . .

[The sales agreement] dated August 16, 2005 between [the tobacco store] (as Seller) and Company A (as Buyer) provided that Company A would purchase the “above-described business, fixtures, . . . equipment, goodwill, and other tangible assets of the business for the sum of \$. . .,” and the inventory, “based upon the SELLER’S cost of purchase . . . estimated to be approximately \$. . . .” [The sales agreement provided that in] addition to the above purchase price, the BUYER shall pay the SELLER for the entire store inventory, based upon the SELLER’S cost of purchase. The Seller Estimated Closing Statement estimated this amount to be \$. . . . The agreement was signed by Company A on August 16, 2005, and by [the tobacco store] on August 20, 2005. Paragraph 11 provided that the transaction would be closed at the escrow company’s office on or before August 30, 2005.

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

On the afternoon of August 18, 2005, the escrow agent telefaxed a "Request for Tax Status" form for [dba of the tobacco store] to the Tax Status Desk of the Department's Taxpayer Account Administration Division (TAA). The cover sheet stated:

This is urgent so please provide us w/ tax status as soon as possible! Thank you.

p.s., email, fax or any kind of ways to make the process faster would be greatly appreciated.

On August 19, 2005, the Tax Status Desk replied to the escrow agent as follows:

We have received your request for the tax status of [the tobacco store]. Our records show this company has filed all excise tax returns through July 2005. All payments have been received with the exception of the following:

Warrant . . . March 2005 \$ . . .

Excise tax return for July 2005 \$ . . .

On August 23, 2005, TAA again contacted the escrow agent with more particular payoff information as to Tax Warrant . . . and the July 2005 tax amount . . . . The liabilities identified by TAA were paid off by the escrow company and Company A's purchase of the business was closed on August 29, 2005. [The tobacco store] and Company A entered into an agreement on August 27, 2005 to hold the escrow company harmless for any tax liability that might be later imposed on [the tobacco store].

[The tobacco store's] business tax account with the Department was closed on August 31, 2005, [The tobacco store's] accountant having orally advised the Department employee that the business assets had all been sold to another corporation, and that all tax liabilities had been paid. [The tobacco store's] corporate license with the Washington Secretary of State expired on November . . ., 2005, and is now inactive.

On August 30, 2005, using the same escrow company, and relying on the same Tax Status Desk statement, [Taxpayer] purchased the business assets of [the tobacco store] from Company A for \$ . . . and the inventory for approximately \$ . . . . Company A did not have a business license for [the tobacco store] when it acquired or sold the business.

On August 30, 2005, Company A also signed a written Affidavit as to creditors, stating:

We are the Seller(s) herein of the business known as [the tobacco store]. We certify that there are no outstanding creditors of the business and/or any and all remaining creditors shall be paid in full on/or before closing.<sup>2</sup>

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<sup>2</sup> Paragraph 6 of the purchase and sale agreement provided:

LIABILITIES . . . [Company A] shall be responsible for paying all liabilities existing at the time of closing.

On September 1, 2005, Taxpayer applied for and received its business license. On the license application, Taxpayer stated the prior business name as [dba of tobacco store], and [individual's name and the tobacco store's name] as its prior owner.

As a result of the LCB investigation concerning untaxed tobacco products begun in the July-August 2005 timeframe, the Department issued an audit assessment against [the tobacco store] on May 26, 2006 with a payment due date of June 26, 2006.<sup>3</sup>

On June 21, 2006, a Department employee telephoned [the tobacco store]. . . . Taxpayer's owner answered the phone and advised that she was the new owner of [the tobacco store]. The Department employee asked if she had purchased the business in its entirety, and she replied in the affirmative . . . .

On July 16, 2006, the Department mailed Taxpayer a Possible Successor Notice.

When [the tobacco store] did not pay the assessment, the Department issued a Warrant for Unpaid Tax . . . on July 17, 2006 against [the tobacco store].

On July 18, 2005, the Department orally requested a copy of the full purchase and sale agreement from Taxpayer's owner.

On August 18, 2006, Taxpayer's owner advised the Department by letter that Taxpayer had purchased the business assets from [the tobacco store] on August 28, 2005, and owed none of [the tobacco store's] taxes. Attached to the letter, however, was the closing statement from [the tobacco store's] sale of the business to Company A, and not to Taxpayer.

On August 30, 2006, the Department issued an Assessment of Successorship Liability, holding Taxpayer to be a successor to [the tobacco store]. A copy of [the tobacco store's] warrant was attached to the letter.

On September 5, 2006, Taxpayer's owner . . . telephoned the Department and advised that she had purchased the business from [Company A]. On September 13, she faxed a copy of the closing statement of the sale of the business from Company A to Taxpayer. In response, Taxpayer was telephonically requested to provide the full purchase and sale agreement, which was provided on September 27, 2006.

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<sup>3</sup> Audit fieldwork did not begin until February 8, 2006 because [the tobacco store's] owner could not be reached to commit to dates when the audit could be performed. Because there were only limited records, a great deal of time was spent sharing schedules back and forth so that the projected numbers on the assessment would be as accurate as possible.

## ANALYSIS

**1. Can successorship liability be imposed under RCW 82.32.140 when a company purchases business assets from an intermediate seller that did not incur the original tax liability?**

RCW 82.04.180 provides:

(1) "Successor" means:

(a) Any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, more than fifty percent of the fair market value of either the (i) tangible assets or (ii) intangible assets of the taxpayer; . . .

(Emphasis added.) Taxpayer argues that Company A purchased [the tobacco store from original owner], and that Company A should therefore be liable as a successor. Taxpayer argues that it cannot be liable as a successor because it purchased the assets from Company A, and not from [the original owner of the tobacco store]. RCW 82.04.180 defines a "successor" as one to whom a person quitting a business conveys more than 50% of its assets. This conveyance can be either direct or indirect.

[1] If Taxpayer had purchased [the tobacco store from the original owner], this would have been a direct conveyance of the business from [original owner]. In this case, [the tobacco store] was first sold to an intermediate buyer (Company A), which then, in turn, sold the business to Taxpayer in an indirect conveyance. This interim purchase and sale did not "cleanse" the assets of successorship liability. *See* Det. No. 01-019, 22 WTD 22 (2003). In that determination, newly-acquired equipment was knowingly and intentionally placed in an existing corporation in order to take advantage of its limited liability and corporate insurance coverage pending the formation of a new corporation. Passing only briefly through the names of the shareholders, the equipment was held to have been indirectly acquired by the newly-formed corporation, whose designation as a successor was justified.

Similarly, in this case, we find that that [the original owner] conveyed [the tobacco store's] assets to Taxpayer through Company A. Both sales were handled similarly by the same escrow company within a 24-hour period, and both transactions were obviously conceived and executed as a whole. Taxpayer by its own admissions considered itself to have purchased [the tobacco store] from [the original owner]. We thus find that the sale of [the tobacco store from the original owner] to Taxpayer was indirect, and that Taxpayer is thus a "successor" through an indirect conveyance under RCW 82.04.180.

Taxpayer's petition as to this issue is denied.

**Issue #2: Did the Department receive adequate notice of Taxpayer's purchase of another company's business assets, and then fail to issue a successorship assessment within the six month time period set forth in RCW 82.32.140?**

RCW 82.32.140 provides:

No successor shall be liable for any tax due from the person from whom the successor has acquired a business or stock of goods if the successor gives written notice to the department of revenue of such acquisition and no assessment is issued by the department of revenue within six months of receipt of such notice against the former operator of the business and a copy thereof mailed to the successor.

(Emphasis added.) WAC 458-20-216(6) (Rule 216(6)) provides:

**Can a successor avoid responsibility for taxpayer's outstanding tax liability?**

(a) What must a successor do to avoid responsibility for tax due by a taxpayer? A successor is not liable for any tax due from the taxpayer if the successor provides written notice of the acquisition to the department and within six months of receiving the written notice, the department has not issued a tax assessment against the taxpayer and mailed a copy of a notice of tax due to the successor. RCW 82.32.140. The six-month period begins upon the department's receipt of the written notice, or the date the person becomes a successor, whichever is later. . .

(b) How does a successor notify to [sic] the department of the acquisition of a taxpayer? Written notice of the acquisition must be made on a form prescribed by the department, or it must contain substantially the same information. The written notice must be provided by mailing to the Department of Revenue, Attn: Successorship Notices, P.O. Box 47476, Olympia, Washington 98504-7476. The written notice is available on the department's internet web site at [www.dor.wa.gov](http://www.dor.wa.gov) under forms. The written notice must contain the following information:

- (i) The (predecessor) taxpayer's name, business name, address, and UBI number;
- (ii) The successor's name, business name, address, and UBI number;
- (iii) The date of the acquisition;
- (iv) Whether or not the successor acquired more than fifty percent of the tangible or intangible assets of the (predecessor) taxpayer;
- (v) A description of the assets acquired and their estimated fair market value;
- (vi) The total costs of acquisition; and
- (vii) How the person became a successor (i.e., asset purchase, merger, guarantor of a defaulting contractor, etc.).

(Emphasis added.) Taxpayer asserts that the Department was on notice that it had purchased [the tobacco store's] assets when the Department received a Tax Status request from the escrow company "on or about August 15, 2005." The Department responded to the Tax Status request

as to [the tobacco store's] outstanding tax liabilities on August 19, 2005. Further, the escrow company sent two checks to the Department fulfilling [the tobacco store's] existing tax obligations on August 30, 2005 and September 9, 2005. Taxpayer asserts that these payment checks provided an escrow number that indicated that [original owner] was the seller, and Company A was the buyer of [the tobacco store's] assets.

Contrary to Taxpayer's assertions, evidence indicates that the Tax Status request was not provided to the Department "on or about August 15, 2005." The request, which was itself undated, bears a telefax date indicating its receipt by the Department on August 18, 2005. The request asked only about the tax status of [tobacco store's dba], and did not advise of the purpose of the request or that that [the tobacco store] was being sold. The checks mailed by the escrow company were for the escrow of the sale from [the tobacco store] to Company A; the checks were not related to, and made no mention of, Taxpayer's purchase of [the tobacco store's] assets from Company A.

Taxpayer did not advise the Department that it had purchased [the tobacco store]. Taxpayer, when applying for its business license on September 1, 2005, did assert that it had acquired the assets from [the original owner of the tobacco store]. On June 21, 2006, Taxpayer's owner orally advised a Department employee that she had purchased the business from [the original owner of the tobacco store]. Even then, it was not until September 27, 2006 that the Department was provided all of the information concerning Taxpayer's purchase of [the tobacco store] from Company A.

The Department issued and mailed to Taxpayer an Assessment of Successorship Liability on August 30, 2006.

[2] We agree that a successor does not have to use the Department's official form set forth in Rule 216 to notify the Department of the purchase of a business or business assets. However, the information set forth in Rule 216(6)(b), that the successor must provide to the Department's Successorship Desk, is the information that the Department needs requires in order to properly evaluate and make an informed decision as to whether a transfer of ownership of a business or its assets has created a successor in fact and/or by operation of law.

In this case, Taxpayer, as successor, provided none of the information – i.e., the predecessor's name, business name, address, and UBI number; the successor's name, business name, address, and UBI number; the date of the acquisition; whether or not the successor acquired more than fifty percent of the tangible or intangible assets of the (predecessor) taxpayer; a description of the assets acquired and their estimated fair market value; the total costs of acquisition; and how the person became a successor (i.e., asset purchase, merger, guarantor of a defaulting contractor, etc.) -- required by Rule 216(6)(b) to the Department's Successorship Desk, or to anyone else in the Department before September 27, 2006, at which time the Department finally acquired the purchase and sale documents. At best, various diverse pieces of information were provided for review by various Department employees that, pieced together, might have led to a conclusion that there had been a sale of assets, but none of this was clearly set forth in accordance with Rule 216.

It is not the Department's burden to ferret out information concerning transactions that might result in successorship liability. It is the successor's statutorily-imposed obligation to notify the Department in writing of the transfer or sale – providing the data enumerated in Rule 216 -- in order to begin the six month time frame in which a successorship assessment may be issued. It is the taxpayer's burden to successfully fulfill this obligation by complying with the Department's regulatory requirements in Rule 216: to wit, contact the Department's Successorship Desk in order to submit the required information.

We hold that Taxpayer did not notify the Department of its acquisition of the predecessor's business in the manner required more than six months before the successorship assessment was issued. Taxpayer's petition as to this issue is therefore denied.

**Issue #3: Was the Department estopped from imposing successorship liability because the assessment allegedly resulted in manifest injustice?**

Taxpayer asserts that it relied on the letters from the Department of Revenue's Tax Status Desk that verified the pay off amounts for [the tobacco store's] tax liabilities. Taxpayer in this case claims that it relied upon the letters from the Department that verified [the tobacco store's] pay-off amounts totaled \$. . . . Taxpayer asserts that both the escrow company and Taxpayer relied upon the representation from the Department that \$. . . was the amount of taxes that were owed by [the tobacco store], and that if it had known of the upcoming tax liability, it would not have disbursed the funds and ensured that the payment of the taxes was made prior to closing. Taxpayer asserts that the Department should have advised that there would be more taxes owed, and to hold Taxpayer responsible for their payment under such circumstances is manifest injustice and should be estopped.

[3] In Washington, the burden is on the taxpayer to establish the following three elements to create an equitable estoppel: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Shafer v. State*, 83 Wn.2d 618, 521 P.2d 736 (1984). In addition, when a party seeks to assert equitable estoppel against the Department, that party must also show (1) that equitable estoppel is necessary to prevent a manifest injustice; and (2) that the exercise of governmental powers will not thereby be impaired. *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968). The Department has adopted these guidelines for applying estoppel. See, Det. No. 93-300, 13 WTD 396 (1994); Det. No. 02-0130, 23 WTD 13 (2004).

Taxpayer cites to *Harbor Air* as support for its contention that the Department is estopped from assessing these taxes.

This case, however, is distinguishable from *Harbor Air*. In *Harbor Air*, the successor had already come forward and notified the Department that it was purchasing a business, and that the purchaser would be a successor. The Department advised the successor that an audit – inquiring into the year 1971 -- was pending. The Department, however, contrary to the information it had

given the successor, went back to the year 1968 after the successor had dispersed the amounts it had withheld. In that case, the court said:

The [Department's] letter informed the successor to comply with Rule 216 only if the seller could not produce sufficient evidence that it had paid the items listed. Rule 216 is substantially identical to [RCW 82.32.140](#). See [WAC 458-20-216](#). We believe respondent reasonably relied on the department's statement that compliance with rule 216 was necessary only if Executive could not produce sufficient evidence that its exercise taxes for January 1, 1972 to the close of business were paid. Although the general rule is that courts should be most reluctant to find the State equitably estopped when public revenues are involved, See [Wasem's, Inc. v. State, 63 Wash.2d 67, 70, 385 P.2d 530 \(1963\)](#), we believe the facts in this case warrant the finding. The department could have easily clarified the scope of its audits and prevented respondent's misunderstanding. The Superior Court found that respondent would not have disbursed the purchase funds if it had known the scope of the audit. Permitting the department to collect Executive's taxes from respondent would result in manifest injustice to respondent and should not be allowed. \*See [Finch v. Matthews, 74 Wash.2d 161, 175, 443 P.2d 833 \(1968\)](#).

In this case, Taxpayer did not notify the Department that it had purchased [the tobacco store]. Although Taxpayer has claimed that a number of “notifications” were made to various Departmental employees, none of them specifically divulged any of the information required by Rule 216 or identified Taxpayer as the purchaser of the business. Further, none of the claimed “notifications” reached the desk of the Department that specifically dealt with successorships. The Tax Status Notification, by its very nature, addresses only the current tax status of taxpayers; it is not meant to, and in this case did not, advise that an audit might or might not be pending. There is no evidence that the Department advised Taxpayer that [the tobacco store] would not be potentially liable for more tax or that an audit would not be pending.

Company A's and [the tobacco store's] “Hold Harmless” agreement dated August 27, 2005 demonstrates that the escrow company, [the tobacco store], and Company A recognized that a further audit of [the tobacco store] was a possibility. That agreement provided:

THIS AGREEMENT made between [COMPANY A], “Purchaser,” and [the tobacco store] “Seller,” regarding the Purchase and Sales of that certain business asset commonly known as [dba of the tobacco store] located at . . . .

Purchaser and Seller hereby agree to hold the escrow officer or its representatives harmless from any and all liabilities and / or lawsuits, including but not limited to any matter of excise tax after July 31, 2005. Although Escrow agent were able to check excise tax and any other tax lien with the Department of Revenue up to July 31, 2005, due to information that has not been updated since, escrow officer is not liable for any responsibility of matter after that day as well as having no liability of excise tax for August. Both parties agree to settle this matter outside of Escrow.

The Department never represented to Taxpayer that an audit was not pending. Therefore, the first requirement of estoppel – an admission, statement, or act inconsistent with the claim afterwards asserted – was never made. Estoppel does not apply. Taxpayer’s petition as to this issue is denied.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 31st day of October 2007.