

Cite as Det No. 07-0306, 27 WTD 211 (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. 07-0306
... )	
)	Registration No. . . .
)	Notice of Successorship
)	Docket No. . . .
As Successor to )	
... )	Registration No. . . .
)	Tax Warrant No. . . .
)	

[1] 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.

[2] RULE 216: SUCCESSORSHIP LIABILITY -- FAILURE TO MAIL PREDECESSOR'S ASSESSMENT TO SUCCESSOR. The Department was not barred from seeking successorship liability against Taxpayer, even though did not provide the successor with an actual copy of the predecessor's assessment in accordance with the provisions of RCW 82.32.140, because Taxpayer's Assessment of Successorship Liability clearly contained the amount owed by Taxpayer's predecessor by enclosing a copy of the warrant against it with all amounts due listed thereon and included the amount to be paid by Taxpayer (the amount of tax due on the warrant, excluding penalties and interest), and a payment due date.

- [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. – A corporation that purchased a tobacco store and resold it to another company the next day objects to the imposition of successorship liability. Held: The Department of Revenue was not adequately advised of the purchase, so the six month statute of limitations was not triggered; the predecessor's assessment was timely supplied, and the successorship assessment did not result in manifest injustice.<sup>1</sup>

#### ISSUES

1. 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 frame set forth in RCW 82.32.140?
2. Was the Department barred from seeking successorship liability against Taxpayer because it failed to provide the predecessor's assessment in accordance with the provisions of 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 (LCB) contacted [the 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 sale agreement to sell its tobacco shop . . . to [Taxpayer].<sup>2</sup> For this transaction, Taxpayer used an escrow company.

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

<sup>2</sup> [Taxpayer's] registration with the Department was closed 11/30/05. The [Taxpayer's] corporation is still an active corporation.

[The sales agreement] dated August 16, 2005 between [the tobacco store] (as Seller) and Taxpayer (as Buyer) provided that Taxpayer 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 agreement was signed by Taxpayer on August 16, 2005, and by [the tobacco store] on August 20, 2005. [There was a provision] that the transaction would be closed at the escrow company’s office on or before August 30, 2005.

On the afternoon of August 18, 2005, the escrow agent telefaxed a “Request for Tax Status” form for [dba of 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.<sup>3</sup> [the tobacco store] and Taxpayer 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 liabilities identified by TAA were paid off by the escrow company, and Taxpayer’s purchase of the business was closed on August 29, 2005.<sup>4</sup>

The next day -- August 30, 2005 -- Taxpayer resold the business assets for \$. . . and the inventory for approximately \$. . ., to [a third company]. Taxpayer did not have a business license for [the tobacco store] when it acquired or sold the business. On [the third company’s] license application, . . . the prior business name [was stated] as [dba of the tobacco store] and [individual’s name and the tobacco store’s name], as the prior owner’s name . . . .

[T]he purchase and sale agreement provided:

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<sup>3</sup> These amounts were further adjusted on August 29, 2005.

<sup>4</sup> [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.

LIABILITIES . . . . The SELLER shall be responsible for paying all liabilities existing at the time of closing.

Based on the escrow agent's explanation of the written purchase and sale agreement, Taxpayer states that it understood that this provision in the agreement would render [the tobacco store] liable for any and all taxes and tax liens held on the property. Taxpayer states that the escrow agent assured both parties that such agreement was inscribed in the purchase and sale contract. Taxpayer's owner . . . relied not only on the escrow agent's statement, but also on [the tobacco store's] representative that it would be responsible for the payment of taxes. [The tobacco store] did not disclose its pending audit to Taxpayer.

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>5</sup> When [the tobacco store] did not pay the assessment, the Department issued a Warrant for Unpaid Tax . . . on July 17, 2006, in the amount of \$. . . against [the tobacco store]. The warrant was filed in . . . County on August . . . , 2006. [The tobacco store's] CPA asked to set up a payment agreement in a letter to the Department dated August 30, 2006. No payment agreement was entered into . . . .

On August 18, 2006, [the third company] provided a Department employee with a copy of the closing statement of its purchase of [the tobacco store] from Taxpayer. This is the first point at which the Department was advised of Taxpayer's interim ownership of [the tobacco store]. On September 13, 2006, the Department employee telephoned Taxpayer's owner and requested that he provide the Department with a copy of the purchase and sale agreement. . . .

In a letter dated September 18, 2006, the Department notified Taxpayer of possible successorship liability.<sup>6</sup> The Department issued the Assessment of Successorship Liability against Taxpayer on October 2, 2006. On October 2, 2006, the Department assessed Taxpayer as a successor to [the tobacco store] for unpaid taxes accrued for the period November 1, 2002, through August 31, 2005. Taxpayer, objecting, filed a petition for correction of assessment with this Division . . . . Taxpayer requested and received a copy of [the tobacco store's] assessment on May 25, 2007.

## ANALYSIS

### **Issue #1: 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 frame set forth in RCW 82.32.140?**

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<sup>5</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.

<sup>6</sup> Because the Department did not immediately know that Taxpayer had purchased the business and resold it to [the third company], [the third company] was first identified in July 2006 as a successor to [the tobacco store]

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 argues the successorship assessment against Taxpayer on October 2, 2006 was beyond the six month statute of limitation because the Department had actual and constructive notice of the sale of [the tobacco store] not later than August 30, 2005, when [the third company] opened its business registration. . . . Taxpayer argues that its notice of the successorship was provided to the Department via the following:

- The escrow company asked for [the tobacco store's] tax status on August 18, 2005, and the Department responded on August 19, 2005 with information as to the tax liabilities existing as of that time.
- The escrow company sent payment of the identified outstanding tax amounts to the Department on August 30, 2005. The two checks – one for the outstanding warrant and the other for taxes due – provided an escrow number, indicating they were from an escrow account.
- [The tobacco store] closed its business tax account with the Department on August 31, 2005, orally advising the Department employee that the business had been sold and all liabilities paid.
- [The third company] applied for a business license from the Department of Licensing on August 30, 2005, indicating that the assets of the business had been purchased from [the tobacco store].<sup>7</sup>
- [The third company] submitted tax returns for the business beginning September 2005.

However, we note that it was not until a Department employee called [taxpayer's owner] on September 13, 2006, that [taxpayer's owner] admitted that Taxpayer had purchased [the tobacco store] business. [Taxpayer's owner] did not provide the Department with the Purchase and Sale Agreement until September 27, 2006.

[1] 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), which the successor must provide to the Department's Successorship Desk, is the information that the Department 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. At best, various parties provided diverse pieces of information to different Department employees that, pieced together, might have led to a conclusion that there had been a sale of assets.

However, 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

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<sup>7</sup> [The third company] did not reveal that it had purchased the business from Taxpayer.

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 #2: Was the Department barred from seeking successorship liability against Taxpayer because it failed to provide the predecessor's assessment in accordance with the provisions of 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.) Taxpayer asserts that the successorship assessment against Taxpayer fails because the Department did not include [the tobacco store's] assessment with the Department's assertion of Possible Successorship Liability dated September 18, 2006, or with the Assessment of Successorship Liability dated October 2, 2006, and did not provide this document to Taxpayer until May 23, 2007, over six months after the successorship assessment was made. Taxpayer cites to a Board of Tax Appeals decision, *Allied Medical & Associates, Inc., v. Dep't of Revenue*, Docket No. 92-70 (1992) (*Allied Medical*),<sup>8</sup> in which the Department notified a company that it was a successor without setting forth the amount owed. The Board reasoned:

The Department argues its Notice of Successorship letter effectively fulfills the purpose of sending a copy of the assessment to the successor. We disagree. In the case before us, the Notice of Successorship did not set forth the amount owed by [the claimed predecessor] M. G. Medical. The statutes contain no specific definition of a tax "assessment". However, since a tax "assessment" fixes a person's tax liability, at a minimum, the "assessment" should be a written document containing the name of the taxpayer, the type and amount of tax claimed to be due, and the date on which payment is due. See, e.g., RCW 82.32.100. The Notice of Successorship sent to Allied contained only the name of the taxpayer. We find it is not an assessment.

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<sup>8</sup> Decisions of the Board of Tax Appeals are not precedent for the Department. The Legislature intended that only the Department will decide what will be administrative precedent and what will not be administrative precedent. RCW 82.32.410. The Board has the authority to find the Department correctly or incorrectly applied a particular tax to a particular taxpayer's facts. The Legislature has not given the Board the authority to determine Department precedent. While BTA decisions are not binding on the Department as precedent with anyone except the named taxpayer, this case does in fact provide useful analysis with regard to the issue.

(Emphasis added.) The *Allied Medical* facts are distinguishable from the facts of this case. In this case, Taxpayer's Assessment of Successorship Liability clearly contained the amount owed by Taxpayer's predecessor, [the tobacco store], by enclosing a copy of the warrant against [the tobacco store] with all amounts due listed thereon. The Assessment of Successorship Liability itself included the amount to be paid by Taxpayer (the amount of tax due on the warrant, excluding penalties and interest), and a due date of November 1, 2006. Thus, the Notice of Successorship in Taxpayer's case more than satisfied *Allied Medical's* description of what constituted an "assessment" for purposes of the successorship statute.

[2] We hold that the Notice of Successorship Liability satisfied RCW 82.32.140's requirement that the predecessor's assessment be timely provided to the successor. Taxpayer's petition as to this issue is denied.

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

Taxpayer asserts that the Department should be estopped from asserting successorship liability because to do so results in manifest injustice. Taxpayer states that it justifiably relied on the escrow company, which in turn relied on the Department concerning [the tobacco store's] tax liability. Taxpayer asserts that the Department's later finding of tax evasion by [the tobacco store] should not cause Taxpayer to be held liable for a tax burden it had no notice of or control over.<sup>9</sup>

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 in this case claims that it relied upon the letters from the Department that verified [the tobacco store's] pay-off amounts totaled \$. . . . Taxpayer further notes that the Taxpayer Status Request form did not explicitly state that it could not be used for informing the Department of the pending sale of a business. . . . Taxpayer claims that if it had known that [the tobacco store] was further subject to audit or assessment, it would not have purchased the business. Taxpayer cites to *Harbor Air* as support for its contention that the Department is estopped.

This case, however, is distinguishable from *Harbor Air Service, Inc. v Board of Tax Appeals* 88 Wm. 2d 359, 560 p.2d 1145 (1977). In *Harbor Air*, the successor had already come forward and

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<sup>9</sup> We note that no evasion penalties were filed.

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 1972 -- 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 excise 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 \(1968\)](#).

[3] In this case, Taxpayer did not notify the Department that it had purchased [the tobacco store’s] business. Although Taxpayer has claimed that a succession 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.

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

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