Cite as Det. No. 15-0262, 35 WTD 241 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 15-0262
. . .	)	Registration No. . . .

WAC 458-20-216; RCW 82.04.180; RCW 82.63.045: USE TAX AND/OR DEFERRED SALES TAX – HIGH TECHNOLOGY SALES/USE TAX DEFERRAL – TAX DEFERRAL SUCCESSOR TAX LIABILITY – QUALIFYING PURPOSE – INDEMNIFICATION – PRIVATE CONTRACT: A buyer who purchases the assets of an investment project and becomes the successor to a corresponding tax deferral, cannot avoid potential tax liability for deferred taxes by entering into a private contract with the seller, in which the seller agrees to be liable for any taxes due as a result of the buyer's failure to use the investment project for qualifying purposes.

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.

LaMarche, A.L.J. – A manufacturer objects to an assessment after it acquired the assets of a predecessor that had a high-technology sales and use tax deferral. The manufacturer argues that the contract between the parties indemnified the manufacturer from any potential tax liability for taxes deferred on the qualified buildings portion of the investment project . . . . We deny the petition.[1]

ISSUES

1. Under RCW 82.04.180, WAC 458-20-216, and RCW 82.63.045, can a purchaser of the assets of an investment project be relieved of potential tax liability for deferred taxes by entering into a private contract with the seller, in which the seller agrees to be liable for any taxes due as a result of the buyer's failure to use the investment project for qualifying purposes?

. . . .

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FINDINGS OF FACT

[Taxpayer] appeals two tax assessments. The Special Programs Division (Special Programs) of the Department of Revenue (Department) found that Petitioner failed to meet the use requirement of its Biotechnology & Medical Device Manufacturing Businesses Deferral (Biotech Deferral), Certificate No. . . . , for the periods of August 7, 2007 through January 20, 2008, and issued an assessment totaling $ . . . on July 29, 2014, Document No. . . . .[2] Taxpayer does not dispute this assessment . . . ..

Taxpayer disputes the assessment associated with High Technology Sales/Use Tax Deferral Certificate No. . . . (High-Tech Deferral). The High-Tech Deferral was originally issued to [Corporation], the parent company of Taxpayer, for an investment project, and required that both the investment project facility (Facility) and machinery and equipment (M&E) be used through annual 2011 for qualified research and development. [Corporation] was succeeded by [Seller] in June 2006.

In December 2006, Taxpayer purchased the assets of Seller, and became successor to the High-Tech Deferral. Taxpayer discloses in its petition that, prior to the sale, the parties entered into a contract (Asset Purchase Agreement) which states,

> [Taxpayer] agrees to file annual reports with the Department of Revenue and take any other reasonable actions necessary to maintain the sales and use taxes deferrals under Chapter 82.63 of the Revised Code of Washington in the amounts and for the term set forth on Schedule 10.9 to the Disclosure Memorandum (the "Tax Deferrals").
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> Notwithstanding the foregoing, Buyer shall not be required to occupy the Office Space throughout the term of the Tax Deferrals and Seller shall be responsible for deferred sales or use taxes that become due as the result of the Buyer's failure to occupy the Office Space throughout the term of the Tax Deferrals.

Id.[3]

At the time of sale, the High-Tech Deferral was in good standing; however, Taxpayer later took the M&E and moved out of the Facility. After discovering Taxpayer had left the Facility, Special Programs concluded that Taxpayer had failed to meet the qualifying use requirement for the Facility portion of the High-Tech Deferral. Special Programs issued a deferral assessment against Taxpayer on July 29, 2014, Document No. . . . , totaling $ . . . , which was later adjusted for interest, and reissued on August 19, 2014 in the amount of $ . . . .[4] This amount represented

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[2] Document No. . . . , totaling $ . . . , comprises use tax and/or deferred sales tax of $ . . . and $ . . . in interest, for the period of August 7, 2007 through January 20, 2008.

[3] We note that none of the parties in any of the transfers or acquisitions sent a Notice of Successorship to the Department.

[4] Document No. . . . , issued on July 29, 2014, is a successorship liability assessment totaling $ . . . , comprising use tax and/or deferred sales tax of $ . . . and $ . . . in interest, for the period of September 1, 2002 through December 31, 2004. Through an agreement with Special Programs, the assessment was reduced by $ . . . in interest, and reissued on August 19, 2014, totaling $ . . . , comprising use tax and/or deferred sales tax of $ . . . and $ . . . in interest.

deferred taxes and interest on the qualified buildings (Facility) portion of the investment project for the period of September 1, 2002 through December 31, 2004.

Taxpayer timely appealed, arguing that it was not responsible for the tax liability for deferred taxes under the High-Tech Deferral, because it entered into a private contract with Seller in which Seller agreed to be liable for any taxes due as a result of Taxpayer's failure to use the Facility for qualifying purposes . . . .

ANALYSIS

1. Successorship Liability for Deferred Taxes in the Event of Non-qualifying Use.

Chapter 82.63 RCW establishes a retail sales and use tax deferral/waiver program to promote high technology research and development and pilot scale manufacturing facilities in the state. RCW 82.63.020 authorizes applications for deferral under the chapter. RCW 82.63.030 directs the Department to issue a deferral certificate for sales and use taxes otherwise due on each "eligible investment project." However, RCW 82.63.045[5] provides for immediate repayment of the deferred taxes when an investment project is used for purposes other than qualified activities, and states as follows:

> (2)(a) If, on the basis of the survey under RCW [82.32.585] or other information, the department finds that an investment project is used for purposes other than qualified research and development or pilot scale manufacturing at any time during the calendar year in which the investment project is certified by the department as having been operationally completed, or at any time during any of the seven succeeding calendar years, a portion of deferred taxes is immediately due . . . .

RCW 82.63.045(2)(a) (emphasis added). The statute addresses the effect of a transfer of ownership on a tax deferral, and states,

> (4) The department must assess interest at the rate provided for delinquent taxes, but not penalties, retroactively to the date of deferral. The debt for deferred taxes will not be extinguished by insolvency or other failure of the recipient. Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of this chapter, for the remaining periods of the deferral.

RCW 82.63.045(4) (emphasis added).

Whenever any taxpayer quits business or sells out, exchanges, or otherwise disposes of more than fifty percent of the fair market value of either its tangible or intangible assets, any tax payable under RCW Ch. 82.32 shall become immediately due and payable. RCW 82.32.140(1).

[5] The version of RCW 82.63.045 relevant to our discussion was the version effective July 1, 2000, which covers the date when [Corporation] applied for the High-Tech Tax Deferral. RCW 82.63.045 was later amended in 2004, 2009, and 2010. *See* Laws of 2010, ch. 114, § 141; Laws of 2009, ch. 268, § 5; Laws of 2004, ch. 2 § 6; Laws of 2000 ch. 106, § 10. None of the subsequent changes have a bearing on our discussion here.

RCW 82.32.140(2) contains the trigger for liability of a successor, and states:

> Any person who becomes a successor shall withhold from the purchase price a sum sufficient to pay any tax due from the taxpayer until such time as the taxpayer shall produce a receipt from the department of revenue showing payment in full of any tax due or a certificate that no tax is due. If any tax is not paid by the taxpayer within ten days from the date of such sale, exchange, or disposal, the successor shall become liable for the payment of the full amount of tax . . . . [6]

RCW 82.32.140(2); *see also* Rule 216(4), (5)(a) and (c). A "successor" is defined in RCW 82.04.180 as:

> 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;

RCW 82.04.180(1)(a) (emphasis added); *see also* Rule 216(2)(a)(i)(A).

The effect of RCW 82.32.140 is to place on the successor of a business the burden of providing for any outstanding tax liability incurred by its predecessor, and thereby to make the successor secondarily liable for such tax. *Tri-Financial Corp. v. Dep't of Revenue*, 6 Wn. App. 637, 640 (1972). The successor provisions enacted by the legislature are intended to ensure the collection of excise taxes remaining unpaid by a taxpayer who quits, sells out, exchanges, or otherwise disposes of his business or stock of goods. *Id*. at 642. It is undisputed here that Taxpayer is a successor to Seller.

Seller's High-Tech Deferral was transferred to Taxpayer at the time of sale, RCW 82.63.045(2)(a), and Taxpayer was subject to the same terms and conditions as the original recipient of the deferral under Rule 216(8), which included qualifying use of the deferral Facility through 2011. Although the deferral was in good standing when Taxpayer acquired the assets of Seller, Taxpayer failed to meet the use requirements of the Facility portion of the High-Tech Deferral when it chose to move to another location in November, 2007. A portion of the deferred taxes became immediately due and payable pursuant to RCW 82.63.045(2)(a) when the Department discovered that Facility was no longer being used for a qualifying purpose. Here, Taxpayer does not dispute the basis for or amount of the assessment, but argues that it is not liable because Seller assumed all liability for Taxpayer's failure to meet the eligibility requirements for the Facility portion of the deferral.

However, the Department was not party to the Asset Purchase Agreement and, under the principles of privity of contract, cannot be bound by its terms. Det. No. 94-090, 14 WTD 244,

[6] On the other hand, 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 such acquisition, and no assessment is issued by the Department within six months of receipt of such notice against the former operator of the business, and a copy mailed to the successor, or provided electronically to the successor in accordance with RCW 82.32.135. RCW 82.32.140(4).

249-250 (1994). [The Agreement may allocate responsibilities between the parties, but it does not affect Taxpayer's responsibilities under the applicable statutes.] Moreover, nowhere in RCW 82.63.045 or the successorship statutes is there a provision that permits a successor to select certain portions of a tax deferral for which it will assume liability. Finally, allowing a successor to elude tax liability to the State through a private contract that imposes all liability on the Seller, as Taxpayer has attempted here, would defeat the purpose of RCW 82.32.140, which is to ensure the collection of excise taxes remaining unpaid by a taxpayer that quits, sells out, exchanges, or otherwise disposes of its business or stock of goods. *Tri-Financial Corp.*, 6 Wn. App. 637, *supra*. Accordingly, we conclude that Taxpayer is liable for the deferral assessment associated with High Technology Sales/Use Tax Deferral Certificate No. . . . .

. . . In conclusion, we deny the petition, and uphold both assessments.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 1st day of October, 2015.