Cite as Det. No. 93-297, 14 WTD 050 (1994).

BEFORE THE INTERPRETATION AND 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. 93-297
. . .	)	Registration No. . . .
	)	Successorship Liability

[1] RULE 216 AND RCW 82.04.180: SUCCESSORSHIP -- MAJOR PART OF THE MATERIALS, SUPPLIES, MERCHANDISE, ETC. RCW 82.04.180 requires, among other things, that a taxpayer acquire a "major part of the materials, supplies, merchandise, inventory, fixtures, or equipment" of its predecessor, if the taxpayer is to be a "successor" as defined in that statute.

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.

NATURE OF ACTION:

A California corporation protests the imposition of successorship liability because the property that it acquired was "intellectual property" and thus not in the scope of the definition of "successor" or of the scope of successorship liability.

FACTS:

Gray, A.L.J. -- The taxpayer is a California corporation engaged in the business of providing computer training. [Corporation X] was a Washington corporation also engaged in the business of providing computer training.

In April 1993, Corporation X decided to go out of business. According to the taxpayer, Corporation X's assets at that time included supplies, equipment (computers, desks, etc.), accounts receivable, a real property leasehold interest, and its trade name. The taxpayer did not acquire any of those assets. The

taxpayer entered into a License Agreement with Corporation X that said, in part:

> 1. License. The Company [Corporation X] hereby grants to [the taxpayer] a worldwide, perpetual, irrevocable, royalty-free, fully paid license to use, copy, revise, market, sell and distribute all the [software] listed on Exhibit A hereto (including the copyrights related thereto). Such license shall be exclusive for one year and shall thereafter be non-exclusive. [The taxpayer] shall have exclusive ownership of its revisions to the [software] (including copyrights). The Company [Corporation X] represents that it is the sole owner of the [software] and has the right to enter into this agreement.

In addition, it offered jobs to some of Corporation X's employees who were laid off.

The Department of Revenue (Department) concluded that the taxpayer was a successor as that term is defined in RCW 82.04.180 and was liable as a successor under RCW 82.32.140.

The taxpayer appealed to Interpretation & Appeals. The taxpayer argued that it should not have successorship liability for Corporation X's taxes because the taxpayer was not a successor under WAC 458-20-216 (Rule 216):

> The Washington Administrative Code does not provide that a business obtains successorship liability merely by obtaining any rights from an entity. Rather, under WAC 458-20-216, a person shall be a successor only if he should "purchase or succeed to the business, or portion thereof or the whole or any part of the stock in goods, wares, merchandise or fixtures or any interest therein." [The taxpayer] did not purchase or succeed to [Corporation X's] business, or any portion of its business.

The taxpayer argued that, in acquiring a license, it did not acquire any of Corporation X's "stock in goods, wares and merchandise." It argued that "goods, wares and merchandise" are defined as "such chattels and goods as are ordinarily the subject of traffic and sale," citing Black's Law Dictionary. It also cited United States v. Smith, 686 F.2d 234, 239 (5th Cir. 1982) for the proposition that "rights associated with copyright ownership are not within the usual or common sense meaning of the phrase 'goods, wares or merchandise'"; Smith v. Munizza, 170 Pa.Supr. 122, 84 A.2d 352 (1951) for the proposition that "customer lists are not included within the definition of 'goods, wares and merchandise'"; and Beacon Oil Co. v. Perelis, 263 Mass.

288, 160 N.E. 892 (1928), for the proposition that the "right to an invention is not 'goods, wares or merchandise.'"[1]

ISSUE:

Whether the taxpayer is a successor as defined in RCW 82.04.180.

DISCUSSION:

RCW 82.04.180 defines "successor" 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, a major part of the materials, supplies, merchandise, inventory, fixtures, or equipment of the taxpayer. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor. (Emphasis supplied.)

Before this statute was amended in 1985, it said:

> "Successor" means any person who, through direct or mesne conveyance, purchases or succeeds to the business, or portion thereof, or the whole or any part of the stock of goods, wares, merchandise, or fixtures or any interest therein of a taxpayer quitting, selling out, or exchanging, or otherwise disposing of his business.

Rule 216 is the Department's rule administering the successorship provisions of Title 82 RCW.[2] Rule 216 uses language from the pre-1985 statute, saying, in pertinent part:

> The word "successor" means any person who shall, through direct or mesne conveyance, purchase or succeed to the business, or portion thereof, or the whole or any part of the stock of goods, wares, merchandise or fixtures or any interest therein of a taxpayer quitting, selling out, exchanging or otherwise disposing of his business. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor.

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

[2]The liability of a successor is imposed in RCW 82.32.140.

Administrative rules cannot exceed the scope of the statutes they interpret. Duncan Crane v. Department of Rev., 44 Wn.App 684, 723 P.2d 480 (1986); Tacoma v. Smith, 50 Wn.App 717, 750 P.2d 647 (1988); review denied, 110 Wn.2d 1032 (1989). As a result, where a rule appears to exceed the provisions of a statute, the rule must be read so that it does not conflict with the statute.
In this case, the revenue officer states that the taxpayer was determined to be a successor based on the definition in Rule 216. That portion of the rule exceeds the definition in the statute as amended in 1985. While Rule 216 generally does not conflict with the amended statute, with regard to the definition of "successor," the rule employs language specifically repealed by the legislature in 1985. Use of the pre-1985 standards for determining successor liability was incorrect.

We do not believe it is necessary to decide whether the type of property acquired by the taxpayer is within the scope of the definition of "successor." The statute as amended requires a showing that the purchaser acquired a "major part" of the assets of the seller. No evidence has been provided showing that the assets acquired by the taxpayer were a major part of the assets of the seller. As a result, we are without authority to uphold the assessment against this taxpayer.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The successorship liability shall be cancelled.

DATED this 22nd day of November, 1993.