Cite as Det. No. 95-132ER, 17 WTD 213 (1998)

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. 95-132ER
. . .	)	Registration No. . . .
	)	SUCCESSORSHIP LIABILITY
. . .	)	Registration No. . . .
	)	SUCCESSORSHIP LIABILITY

[1] RCW 82.04.180; RCW 82.32.140: SUCCESSORS -- STATUTORY REQUIREMENTS FOR. In order to be a successor, the Department must first find that the definition of successor applies to that person, and that person's actions give rise to successorship liability.

[2] RCW 82.32.050: SUCCESSORS -- STATUTE OF LIMITATION. RCW 82.32.050(3) does not bar assessments of successorship liability. Successorship liability is a general liability of a taxpayer which is acquired by a successor.

[3] RCW 82.32.140: SUCCESSORS -- SUCCESSORSHIP -- NATURE OF. The unpaid taxes of a taxpayer, who sells or otherwise conveys his business or a stock of goods to a successor, is a general liability of the taxpayer which the successor acquires as a matter of law.

[4] RCW 82.32.140; 82.32.160; 82.32.170; 82.32.180: SUCCESSORS -- CONTESTING THE PREDECESSOR'S TAX LIABILITY ON THE MERITS. A person who appeals a notice of successorship liability under RCW 82.32.160 cannot contest his predecessor's tax liability on the merits. That person must first pay the successorship tax and seek a refund under RCW 82.32.170 or 82.32.180.

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:

Two putative successors seek an executive level reconsideration of Det. No. 95-132, upholding the Department of Revenue's (Department) Compliance Division's assessment of successorship tax liability against them, and denying them the opportunity to contest their putative predecessor's tax liability on the merits without having first paid the tax. [1]

FACTS:

Gray, A.L.J. and Zagelow, Appeals Review Manager. -- The Department agreed to review Det. No. 95-132 as an executive level review, pursuant to WAC 458-20-100(5) and (6). The two petitioners will be referred to in this Final Determination as Petitioner 1 and Petitioner 2. Petitioner 1 refers to the first corporation identified in the caption, while Petitioner 2 refers to the second corporation.

Some of the facts in Det. No. 95-132 are undisputed and are repeated here for convenience:

> The Department of Revenue (Department) issued tax assessments and filed tax warrants against a corporation which shall be identified here as "taxpayer." The Department audited the taxpayer for the period January 1, 1989 through December 31, 1990, and issued tax assessment . . . against the taxpayer on December 10, 1993. This tax assessment was assumed in tax warrant no. . . . , which was issued on April 7, 1994. The amount of tax alone in both the tax assessment and in the warrant was $ . . . . The Department also audited the taxpayer for the period January 1, 1991 through July 14, 1993, and issued tax assessment . . . on December 10, 1993. This tax assessment was assumed in tax warrant no. . . . , which was issued on April 12, 1994. The amount of tax alone in both the tax assessment and in the warrant was $ . . . .
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> Two related out-of-state corporations (Petitioner 1 and Petitioner 2) were notified by the Department that they were liable for the taxpayer's unpaid taxes under the above-referenced tax warrants. Petitioner 1 was notified on March 10, 1994 and Petitioner 2 was notified on April 7, 1994. Both petitioners were granted an extension to June 10, 1994 to file their appeals with the Department's Interpretation & Appeals (I&A) Division. A joint petition was filed on behalf of the petitioners by "another party in interest."

It must also be noted that the Department's notice to Petitioner 2 on April 7, 1994, was an assessment of successorship liability, which stated, in part:

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

> Information obtained by the department has established that [Petitioner 2] is a successor to the business of [taxpayer] as defined in Revised Code of Washington (RCW) 82.04.180. [The taxpayer] has ceased operations, leaving unpaid taxes for the period of 01/01/1989 through 12/31/1990. This amount has been assessed and Tax Warrant No. . . . has been issued.
>
> This letter constitutes your assessment of successorship liability as required by RCW 82.32.140. We require payment of the tax from you as successor in the amount of $ . . . .

Additional facts are drawn from the Petition for Executive-Level Reconsideration:

> Pursuant to an Asset Purchase Agreement dated July 15, 1993, by and among [Petitioner 2], [taxpayer], and its corporate parent, [taxpayer parent], [Petitioner 2] purchased substantial assets used by [taxpayer] in its business of manufacturing and selling flexible packaging products in [city], Washington. [Petitioner 1] was not a party to the agreement, nor has it purchased any assets of [taxpayer] at any time.
>
> The Department audited [taxpayer] soon after the asset sale and issued two audit assessments. These assessments were for the periods of January 1, 1989 through December 30, 190, and January 1, 1991, through July 14, 1993, and were issued on December 10, 1993. The Department conducted the audits primarily by inspecting records of [taxpayer] then owned and possessed by [Petitioner 2] in [city]. Both [taxpayer] and [taxpayer parent] were out of business and were in the process of liquidation at the time. [Taxpayer] did not appeal the assessments.

Additionally, it must be noted that the Department simultaneously mailed a copy of the December 10, 1993 tax assessment to Petitioner 2. The form cover letter stated:

> We are enclosing a copy of an assessment based on an audit of your predecessor above and mailed on the date indicated on the notice. . . . This is not a request for payment as we assume that the tax will be timely paid by the predecessor. . . . .

In Det. No. 95-132, we held (1) that the Department's notices of successorship liability to the petitioners adequately informed them of the basis for their liabilities; (2) that the Department had erroneously assessed Petitioner 1 in an amount exceeding that permitted under the successorship statutes and remanded the matter to the Audit Division for recomputation of the correct amount due from Petitioner 1; (3) that RCW 82.32.050 did not bar the Department from seeking payment from the petitioners for the taxpayer's 1989 taxes; and (4) that the petitioners could not contest the substance of the tax assessments against the taxpayer with a petition for correction of assessment.
The petitioners claim error as follows:

1. The Department did not allow the petitioners to dispute the merits of the underlying liability of the predecessor;

2. The Department failed to honor the statutory right of any taxpayer to dispute the amount of an assessment;

3. The Department erroneously overruled Det. No. 87-5;

4. The Department erroneously applied Det. No. 86-268 and 87-39;

5. The Department failed to apply estoppel as a basis for permitting the petitioners to dispute their assessments on the merits;

6. The Department failed to observe the statute of limitations with regard to an assessment of successorship liability;

7. The Department arbitrarily failed to cancel the assessment against Petitioner 1 in view of the lack of any reasons to support the assessment against Petitioner 1.

On reconsideration, the taxpayer provided a copy of an Asset Purchase Agreement ("purchase agreement"), dated July 15, 1993. In the purchase agreement, the purchaser is identified as Petitioner 2. Petitioner 1 was not a party to the purchase agreement. The seller was the taxpayer (the "predecessor.") The subject of the sale was:

> all rights, property and assets of every kind, character and description, whether tangible or intangible, whether real, personal or mixed, whether accrued, contingent or otherwise of Seller which are owned, held or used by Seller in connection with the Business[2], wherever located and whether or not reflected in its books and records, other than the Excluded Assets[3][.]

ISSUES:

1. Is Petitioner 1 a successor to the taxpayer?

2. Did the Department fail to observe the statute of limitations (RCW 82.32.050) with regard to an assessment of successorship liability?

3. May a successor contest its predecessor's tax liability on the merits under RCW 82.32.160?

DISCUSSION:

Is Petitioner 1 a successor to the taxpayer?

[2] "Business" was defined in the purchase agreement as "the business of manufacturing and selling flexible packaging products."
[3] This term was defined later in the purchase agreement.

[1] The Asset Purchase Agreement definitively reveals the purchaser of the taxpayer's business to be Petitioner 2 only. Therefore, we now conclude that Petitioner 1 is not a successor to the taxpayer, but that Petitioner 2 is. We grant the petition for reconsideration as to Petitioner 1 and cancel the notice of successorship liability issued against it on April 7, 1994. Only Petitioner 2 shall be considered a successor, and the petitioners' remaining arguments must be considered as applying only to Petitioner 2.

Did the Department fail to observe the statute of limitations (RCW 82.32.050) with regard to an assessment of successorship liability?

[2,3] Petitioner 2 relies upon the following language from RCW 82.32.050(3):

> No assessment or correction of an assessment for additional taxes, penalties, or interest due may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter, (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (c) where a taxpayer has executed a written waiver of such limitation. The execution of a written waiver shall also extend the period for making a refund or credit as provided in RCW 82.32.060(2).

Petitioner 2 argues that it had registered as required by ch. 82.32 RCW, that the Department made no showing of fraud or misrepresentation of a material fact by Petitioner 2, and that Petitioner 2 did not execute a written waiver of the limitations period. The argument that the statute of limitations eliminates the assessment for the tax year 1989 fails, however, for the following reasons.

If the taxpayer or Petitioner 2 had complied with the requirements of RCW 82.32.140, this dispute would probably not have arisen.[4] But neither did so. The final paragraph of RCW 82.32.140 creates an "escape hatch" for a potential successor if it gives written notice to the Department of it's purchase of its predecessor's business or stock of goods. Upon receipt of the written notice, the Department then has six months in which to issue an assessment to the predecessor and to its successor. However, neither petitioner gave written notice to the Department under this provision of RCW 82.32.140. As a result, the Department was not required to issue an assessment to the taxpayer, with a copy to Petitioner 2 as successor, within six months of the date of notification by the successor of a bulk purchase of assets. Det. No. 92-306, 12 WTD 473 (1992).

The taxpayer's and Petitioner 2's tax liabilities were triggered by operation of RCW 82.32.140 once they signed the purchase agreement. The significant dates are as follows:

July 15, 1993	Signing of Asset Purchase Agreement;

[4] It appears that the petitioners agree with the effects of RCW 82.32.140 because these steps are essentially set forth in the Petition for Executive-Level Reconsideration.

	"Any tax payable hereunder" became "immediately due and payable" from the taxpayer
July 25, 1993	Last day for timely payment from taxpayer
July 26, 1993	First day of liability for successor

When the Department issued its notice of successorship liability[5] in 1994 to the petitioners, it had already assessed the taxpayer/predecessor in a timely manner to capture the tax year 1989, and had provided a copy of that tax assessment to Petitioner 2. The tax assessment established a definite amount of tax due from the taxpayer and, therefore, also from Petitioner 2. Petitioner 2's liability is measured from the date that it incurred liability as a successor. The taxpayer's error is in concluding that RCW 82.32.050(3) requires the Department to drop the tax year 1989 from the successor's liability. The first year in which taxes were due from Petitioner 2 as a successor was 1993. The entire amount of its predecessor's taxes, from 1989 through 1993, became due from Petitioner 2 for the first time in 1993. To summarize, the tax was assessed against the taxpayer. The taxpayer neither paid the tax nor appealed the assessment. Now it is simply a general liability of the taxpayer to which Petitioner 2 has succeeded. Thus, there is linkage between the tax year 1989 and Petitioner 2. The petition is denied on this argument.

May a successor contest its predecessor's tax liability on the merits under RCW 82.32.160?

[4] Det. No. 95-132 held that the petitioners were not permitted to attack their predecessor's underlying tax liability on the merits in a petition filed under RCW 82.32.160. Their arguments are:

1. The petitioners have a right to dispute the amount of assessments made against them;
2. Successorship liability is limited to the primary taxpayer's lawful tax obligations at the time of the transaction giving rise to the successorship;
3. No procedural barriers exist to prevent determination of the liability of a successor on the merits in the petition process -
    a) The finality of a primary taxpayer's assessment does not imply finality against a successor;
    b) No other statute or caselaw restricts a successor's petition rights;
4. The Department is estopped from denying review of the petitioners' dispute of the underlying liability of the predecessor taxpayer, and should not approve the repudiation of its executive's instructions.

With regard to the first argument, we reiterate what we said in Det. No. 95-132. The taxpayer did not appeal the tax assessment at all, let alone within 30 days of the due date in the tax assessment. RCW 82.32.160 expressly states that "[i]f no such petition is filed within the thirty-day period the assessment covered by the notice shall become final." We cannot disregard the plain language of a statute:

[5] For purposes of this determination, we assume that a notice of successorship liability is an "assessment" as that term is used in RCW 82.32.050.

> In interpreting a statute, it is the duty of the court to ascertain and give effect to the intent and purpose of the legislature, as expressed in the act. The act must be construed as a whole, and effect should be given to all language used. Also, all the provisions of the act must be considered in their relation to each other and, if possible, harmonized to insure proper construction of each provision.

Burlington Northern, Inc. v. Johnston, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). The taxpayer's liability is derivative, as acknowledged in its Petition for Executive-Level Reconsideration. Petitioner 2 succeeded to its predecessor's tax liability. Its predecessor let the tax assessment become final. The taxpayer succeeded to its predecessor's position; in this case, it succeeded to a tax liability upon which a tax assessment had been issued and had become final. Petitioner 2's remedy is to pay the tax and to seek a refund, either under RCW 82.32.170 or .180. Additionally, the taxpayer's tax obligation was a "lawful tax obligation" because it had become final.

With regard to prior conversations with a manager in this division that Petitioner 2 could address the taxpayer's position on the merits, a Department employee cannot commit the Department to undertake actions that are not permitted by statute or rule. When the division manager made her statements to Petitioner 2, there was no statutory or administrative authority to do so. The statement was ultra vires.

ETB 419.32.99 ("ETB 419") states the Department's policy regarding claims of estoppel based upon conversations with Department employees. ETB 419 is not directly on point because it addresses situations where a taxpayer seeks to reduce its tax liability based upon a Department employee's oral statements, whereas here the taxpayer argues that the scope of a hearing, held under the authority of RCW 82.32.160, to determine a petitioner's successorship tax liability includes addressing its predecessor's tax liability on the merits. Nonetheless, with that distinction in mind, the policy in ETB 419 is that the Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a department employee. Even though the identity of the Department's employee is not in question here, the underlying policy reasons that are stated in ETB 419 still apply:

(1) There is no record of the facts which might have been presented to the agent for his consideration.

(2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.

(3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

The case law also does not support the taxpayer's estoppel argument. In Kramarevcky v. DSHS, 122 Wn.2d 738, 863 P.2d 535 (Dec. 1993), the Court stated the elements of estoppel:

> The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Kramarevcky, at 743. In addition, the Court noted that there are additional elements to be proved when estoppel is asserted against the government:

> Equitable estoppel against the government is not favored. See Finch v. Matthews, 74 Wn.2d 161, 169, 443 P.2d 833 (1968). Consequently, when a party asserts the doctrine against the government, two additional requirements must be met: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel. Shafer v. State, 83 Wn.2d 618, 622, 521 P.2d 736 (1974); Finch, 74 Wn.2d at 175. Courts should be most reluctant to find the government equitably estopped when public revenues are involved. Harbor Air Serv., Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 367, 560 P.2d 1145 (1977).

Kramarevcky, at 744. This position is reiterated in Kitsap-Mason Dairymen v. Tax Comm'n, 77 Wn.2d 812, 467 P.2d 312 (1970), in which the Court said:

> The doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. The state cannot be estopped by unauthorized acts, admissions or conduct of its officers. Wasem's, Inc. v. State, 63 Wn.2d 67, 385 P.2d 530 (1963); Bennett v. Grays Harbor County, 15 Wn.2d 331, 130 P.2d 1041 (1942).

The argument that the taxpayer's changed their position by relying upon the division manager's statements by incurring additional legal fees in preparing their case does not estop the Department, nor has Petitioner 2 cited any authority to support such a claim. The taxpayer would incur those legal costs in any event when it seeks a refund after paying its successorship liability in its effort to reduce its tax bill. As stated in Det. No. 95-132, Petitioner 2's remedy is to pay the tax and then seek a tax refund under either RCW 82.32.170 or .180.

The Petition for Executive-Level Reconsideration is denied on the issue of the scope of reconsideration.

DECISION AND DISPOSITION:

The Petition for Executive-Level Reconsideration is granted in part and denied in part. Petitioner 1 is not a successor to the taxpayer and has none of the taxpayer's excise tax liabilities. Any assessments against Petitioner 1 for the taxpayer's excise tax liabilities shall be canceled and, further, the Compliance Division shall cause to be filed satisfactions of warrant as to Petitioner 1 with regard to any filed tax warrants naming Petitioner 1 with reference to the taxpayer's tax liabilities. The Petitioner for Executive Level Reconsideration is denied with regard to Petitioner 2, who has been found to be the successor to the taxpayer. The Compliance

Division shall cause to be issued to Petitioner 2 a new assessment for amounts due from Petitioner 2 as successor to the taxpayer, including additional interest, except that no additional interest shall be assessed from and after September 1, 1996. Petitioner 2's Petition for Executive-Level Reconsideration arrived in this division on September 1, 1995; the delay in issuing this Determination on Reconsideration from and after September 1, 1996 has been solely for the convenience of the Department; accordingly, no additional interest for those subsequent periods shall be assessed.

Dated this 31st day of October, 1997.