

Cite as Det. No. 14-0043, 33 WTD 394 (2014)

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. 14-0043
...	)	
	)	Registration No. . . .
	)	
As successor to	)	
	)	
...	)	Registration No. . . .
	)	

[1] RULE 216: SUCCESSORSHIP – “OTHERWISE CONVEYED.” A predecessor “otherwise conveyed” assets to a successor when it permitted the successor to use its assets as a bailee or in exchange for the successor’s payments of predecessor’s underlying purchase contracts.

[2] RULE 216: SUCCESSORSHIP – “REGULAR LEGAL PROCEEDINGS TO ENFORCE A LIEN.” A successor did not obtain assets from the IRS through “regular legal proceedings to enforce a lien” when the IRS never released its lien on the predecessor’s assets with a Certificate of Discharge. Distinguishing Det. No. 90-377, 10 WTD 173 (1990).

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 contracting company argues that it was not a successor because it purchased its predecessor’s assets from the Internal Revenue Service (IRS). We uphold the Notice of Successorship.<sup>1</sup>

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

## ISSUE

Does a taxpayer qualify for the WAC 458-20-216(2)(a)(ii) exception from the definition of “successor” in accordance with [RCW 82.04.180(1)] because it acquired assets through “regular legal proceedings to enforce a lien”?

## FINDINGS OF FACT

On November 29, 2005 [Predecessor] opened its business with four corporate officers. Two of these officers were [Mr. A and Ms. B]. When Predecessor was inactivated on August 1, 2012, [Mr. A and Ms. B] were the only officers (President and Vice President/Secretary, respectively) listed on Predecessor’s last Annual Report.

On June 3, 2011, [Ms. B] filed a Certificate of Formation of [Taxpayer] with the Washington Secretary of State’s Corporations Division.

Predecessor and Taxpayer were both engaged in construction. They did not use subcontractors, but maintained their own employees. Predecessor’s website on February 25, 2011<sup>2</sup> stated:

[Taxpayer] came into existence in 2003 to fill a demand for a Reliable Full Service Contractor who actually understands that repairs/remodels are an organic experience.

**PRICE**

[Taxpayer] is primarily a Word of Mouth company; This means that almost all of our customers comes [sic] by referral from someone who knows you or that have seen our trucks in their neighborhood or community. This allows us to be better priced and more responsive than the companies who blast the airwaves with ads.

(Emphasis added.) Taxpayer’s website on June 28, 2012 stated:

With years of experience in WA and beyond, you may have already seen one of our past projects without even realizing it. . . .<sup>3</sup>

With many years of experience in residential and commercial projects, we have earned the enviable reputation of being a dependable, no-nonsense contractor who consistently delivers rock-solid results - on time and within the budget.<sup>4</sup>

(Emphasis added.) On July 12, 2011, [Ms. B] opened an account for Taxpayer with the Department of Revenue (Department), listing herself as the only member. On August 1, 2011, [Ms. B] filed an Amended Report with the Corporations Division adding [Mr. A] as a member.

<sup>2</sup> See [Taxpayer’s website] . . . (last visited Dec. 17, 2013).

<sup>3</sup> See . . . (last visited Dec. 17, 2013).

<sup>4</sup> See . . . (last visited Dec. 17, 2013).

On September 23, 2011, Taxpayer filed its first tax excise tax return for August 2011.

On November 15, 2011, pursuant to a deadline by the IRS, [Mr. A] states he paid \$. . . of his own funds, representing the fair market value of Predecessor's tangible personal property, to the IRS in partial payment of Predecessor's federal "trust" obligation. Taxpayer asserts that this payment was for "purchasing from the IRS the assets of Predecessor. Taxpayer, however, has not presented a Certificate of Discharge from Federal Tax Lien to the Department indicating that the IRS has removed the lien from Predecessor's tangible personal property; in fact, the UCC filings by the IRS still are in effect and have not been released.

On November 30, 2011, Predecessor ceased business operations.

From June 12, 2012 through September 4, 2012, the Department's Compliance Division audited Predecessor and discovered multiple documents, including an Asset Purchase Agreement between Taxpayer and Predecessor whereby Taxpayer agreed to purchase all of Predecessor's business and assets for \$. . . . The assets included all of Predecessor's 19 vehicles, tools, office equipment, and inventory.<sup>5</sup> Section 7 of the purchase agreement -- "IRS Considerations" -- provided that any sale would be conditional on Predecessor obtaining any necessary release of discharge of IRS liens.

On August 1, 2012, Predecessor was inactivated by Office of the Washington Secretary of State for failure to file an annual report.

<sup>5</sup> The assets involved were 19 vehicles, as follows:

2008 Ford E350	\$. . .	1994 Ford Ranger Pickup	. . .
2008 Ford E350	. . .	2004 Ford F150 Pickup	. . .
2008 Ford E350	. . .	1995 Chevrolet K1500 Pickup	. . .
1995 Ford Econoline Van	. . .	2001 Ford Expedition	. . .
2006 Ford E250 Van	. . .	2002 GMC K1500 Pickup	. . .
2004 Ford F250 Pickup	. . .	2002 Ford F350 Pickup	. . .
1999 Ford Ranger Pickup	. . .	2004 Western Dump Trailer	. . .
2006 Ford F150 Pickup	. . .	2004 Eagle Trailer	. . .
1996 Ford Econoline Van	. . .	Meyer ST 7.5 Snow Plow	. . .
1997 Ford F150 Pickup	. . .	SUBTOTAL:	. . .
		Amount subject to debt	. . .
		VEHICLE TOTAL	\$. . .

Other assets were:

Miscellaneous Office Equipment	\$. . .
Miscellaneous Tools	. . .
Miscellaneous Inventory	. . .
TOTAL MISCELLANEOUS	. . .
TOTAL VEHICLES AND MISC	\$. . .

On September 5, 2012, Compliance issued Predecessor a tax assessment (Doc. No. 201303114) for business and occupation (B&O) tax under the retailing and wholesaling tax classifications in the amount of \$. . . and for collected but unremitted retail sales tax in the amount of \$. . . .

On September 28, 2012, the Controller for both Predecessor and Taxpayer telephonically advised the Department that Predecessor had ceased operations in November 2011, and that the IRS had seized the assets and sold them to [Mr. A] in exchange for all the cash on hand.<sup>6</sup>

On October 8, 2012, Predecessor closed its business registration with the Department effective November 30, 2011. The last return reporting business receipts was for September 2011.

On November 6, 2012, the Department issued Tax Warrant No.165217A against Predecessor for the period January 1, 2008 through March 31, 2012 in the amount of \$. . . .<sup>7</sup>

On November 15, 2011, [Mr. A] mailed the IRS two cashier's checks totaling \$. . . in partial payment of Predecessor's unpaid federal employment tax liability. One check for \$. . . represented the value of Predecessor's remaining cash on hand. The second was a \$. . . check from [Mr. A's] credit union account in an amount equal to the net value of Predecessor's tangible personal property, although [Mr. A] made no mention in the cover letter to the IRS about releasing Predecessor's vehicles, tools, office equipment, and inventory from the IRS lien. [Mr. A] asserts the purchase and sale agreement between Taxpayer and Predecessor was never executed and that he acquired Predecessor's tangible personal property in his own name, and then transferred it into Taxpayer's name as his member contribution. No documentation, other than the cancelled check to the IRS, has been submitted to substantiate this claim.

On November 21, 2012, the Department mailed levy letters to multiple banks in an attempt to collect the outstanding balance on Predecessor's account. Predecessor, however, had already closed its accounts.

On November 28, 2012, the Department informed Taxpayer that it would be pursuing a Successorship assessment for Predecessor's outstanding tax debt because Taxpayer had acquired

<sup>6</sup> However, [Mr. A] advises in his Declaration dated April 12, 2013 that he had purchased a \$. . . cashier's check from his personal credit union account on November 15, 2011 and paid the Department of Treasury. This check was in addition to the separate cashier's check in the amount of \$. . . , which was the amount remaining in Predecessor's account.

<sup>7</sup> This liability included the following:

Tax Due		\$. . .
Delinquent Penalty		. . .
Warrant Penalty		. . .
Audit Interest		. . .
Additional Penalty		. . .
Total Due		\$. . .

Predecessor's assets. [Taxpayer's Controller], advised that the IRS had found Predecessor's Vice President, solely responsible for federal back taxes, and suggested that the Department should conclude likewise. The Controller never submitted documentation supporting any of these claims, and we note that Predecessor's Annual Report filings with the Secretary of State dated November 18, 2010 and May 19, 2011, did not list [the Controller] as the corporation's treasurer or controller.

On December 4, 2012, Compliance mailed Taxpayer an Assessment of Successorship liability in the amount of \$ . . . , the amount of tax (minus interest and penalties) owed on the warrant issued against Predecessor on November 6, 2012, based upon the following:

- Use of same website ([www. . . .com](http://www. . . .com))
- Same vehicles, which, although sold to Taxpayer, are still registered in Predecessor's name
- Same telephone number ( . . . )
- Same mailing address ( . . . )
- Similar logos ( . . . ), used on Predecessor's and Taxpayer's trucks (only the name across it has changed)

. . .

- Similar trade names ( . . . )
- Two of Predecessor's four officers/members.

As of this writing, Washington's Department of Licensing records indicate:

- All but two of the vehicles<sup>8</sup> are still registered in Predecessor's name,
- Vehicles still have Predecessor's purchase money liens in place, and
- IRS UCC filings against Predecessor's vehicles have not been cancelled.

Taxpayer has presented no evidence that [Mr. A] ever took title to Predecessor's vehicles and then transferred them into Taxpayer's name.

#### ANALYSIS

RCW 82.04.180, effective August 1, 2003, 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; . . .

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<sup>8</sup> One vehicle has been destroyed and another titled out of state.

(Emphasis added.) Thus, when one taxpayer quits, sells out, exchanges, or disposes of a business, and conveys either directly or indirectly more than fifty percent of the fair market value of either the tangible or intangible assets, the person acquiring such assets will be a “successor.”

RCW 82.32.140(2) further provides:

. . . 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. If the fair market value of the assets acquired by a successor is less than fifty thousand dollars, the successor's liability for payment of the unpaid tax is limited to the fair market value of the assets acquired from the taxpayer. The burden of establishing the fair market value of the assets acquired is on the successor. . . .

(Emphasis added.) WAC 458-20-216 (Rule 216), effective July 31, 2005, explains:

(2)(a)(ii) A person, however, is not a "successor" if the person acquires more than fifty percent of the fair market value of the tangible or intangible assets of the taxpayer through insolvency proceedings, regular legal proceedings to enforce a lien, security interest, or judgment, or by repossession under a security agreement.

(3) What are tangible and intangible assets for purposes of this rule?

(a) Tangible assets. "Tangible assets" include, but are not limited to, materials, supplies, merchandise, inventory, equipment, or other tangible personal property.

(b) Intangible assets. "Intangible assets" include, but are not limited to, all moneys and credits including mortgages, notes, accounts, certificates of deposit; tax certificates; judgments; state, county and municipal bonds; bonds of the United States and of foreign countries; bonds, stocks, or shares of private corporations; personal service contracts; trademarks; trade names; brand names; patents; copyrights; trade secrets; franchise agreements; licenses; permits; core deposits of financial institutions; noncompete agreements; business name; telephone numbers and internet addresses; customer . . . lists; favorable contracts and financing agreements; reputation; exceptional management; prestige; good name; integrity of a business; or other intangible personal property

(Emphasis added.) Taxpayer argues that Predecessor did not convey, directly or indirectly, its tangible personal property. It alleges that [Mr. A], in his individual capacity, acquired Predecessor's tangible personal property from the IRS and then conveyed it to Taxpayer as a contribution to capital. Taxpayer argues that this is a factual situation that is controlled by Det. No. 90-377 10 WTD 173 (1990). We disagree; 10 WTD 173 is distinguishable.

In 10 WTD 173, a corporation was held not to be a successor when it acquired tangible personal property on which the IRS had placed a lien. In that case, the acquiring corporation paid off all superior encumbrances and costs related to the properties' appraisal and sale, paid over the resulting equity to the IRS, and received a Certificate of Discharge of the Lien. Thus, the

property was acquired free and clear from any liens. We held that the acquiring corporation obtained those assets through “regular legal proceedings to enforce a lien.”

In this case, Taxpayer began conducting its business in August 11, 2011, as evidenced by the Washington excise tax return filed in September 2011. [Mr. A] did not submit a check to the IRS in order to clear the lien from Predecessor’s vehicles, tools, office equipment and inventory until November 30, 2011. Taxpayer used all of this property -- still owned by Predecessor -- in order to conduct business during this time. According to vehicle titles, [Mr. A] never took title to the vehicles or paid off or assumed their underlying debts. The titles to 17 of the 19 vehicles, in fact, still remain in Predecessor’s name, and have never been transferred to either Taxpayer’s owner or to Taxpayer. While the IRS may have issued a Certificate of Discharge,<sup>9</sup> this merely would have protected the vehicles, tools, office equipment, and inventory from IRS seizure.

Thus, because the IRS UCC liens are still in place, we hold that Taxpayer did not acquire Predecessor’s vehicles, tools, office equipment, or inventory through a regular IRS legal proceeding to enforce a lien. Taxpayer took possession and used all of Predecessor’s vehicles, tools, office equipment, and inventory, none of which was obtained by Taxpayer’s owner or by Taxpayer from the IRS, which still holds liens against them. Predecessor transferred this tangible personal property to Taxpayer either by bailment (without payment) or in exchange for the payment of their underlying purchase contracts.<sup>10</sup>

We therefore hold that Predecessor thus “otherwise conveyed” all (i.e., 100%) of its tangible personal property to Taxpayer.<sup>11</sup>

Moreover, Taxpayer’s reliance on 10 WTD 173 is misplaced, as this determination preceded the change in RCW 82.04.180 that added the transfer of [intangible assets] to the definition of “successor.”<sup>12</sup>

For purposes of Rule 216, “[intangible assets]” include but are not limited to: trademarks; trade names; brand names, business names, telephone numbers, internet addresses, customer lists, reputation, management, prestige, good name, business integrity, or other intangible personal property

Taxpayer argues that Taxpayer has a different physical location from Predecessor’s. The physical location of a construction company’s office, however, is not a customer concern to a non-walk in business. We note that Taxpayer retains the following:

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<sup>9</sup> We note that Taxpayer has not produced such a certificate.

<sup>10</sup> A “sale,” under RCW 82.04.040(1), includes “any transfer of the . . . possession of property for a valuable consideration. . .”

<sup>11</sup> [See RCW 82.04.180(1)]

<sup>12</sup> Prior to August 1, 2003, to be a “successor” required only the acquisition of “a major part of the materials, supplies, merchandise, inventory, fixtures, or equipment” from a predecessor. (Emphasis added.)

1985 Laws of Washington, c 414 § 6

- Phone number,
- Website address
- Email address
- Logo used on vehicles (except for a slightly-altered corporate name)
- Predecessor's customer list
- Maroon shirts worn by Taxpayer's employees -- with “. . .” across their backs
- Reputation (noting that Predecessor's website stressed that its business was by word-of-mouth)
- Management – two of Predecessor's four managers

Taxpayer argues that the website and email domain names were obtained only after the Predecessor's ownership rights expired “due to nonrenewal” when they “became available to the general public.” We conclude, however, that because the individual members are the same individuals who were the corporate officers of the Predecessor, they at all times had control of the website. They were free to update it, renew or not renew it, and to repurchase the rights after it was not renewed. Thus, even if supported by documentation, such renewals were within Taxpayer's member's control.

Further, Taxpayer, on its website, talks of its “years of experience” in the construction business, thus relying on Predecessor's time as a contractor and years in business for its reputation, good name, and integrity. Taxpayer explains that its General Manager advised Predecessor's customers that Predecessor had discontinued operations, but that Taxpayer would be available to service their construction needs. Taxpayer's registered trade names are those, or almost identical to those, used by Predecessor.

In sum, we conclude that Predecessor “directly or indirectly” conveyed virtually all of its [intangible assets] property -- its telephone number, internet address, logo, website, mailing address, customer list, and reputation to Taxpayer – that enhanced Taxpayer's ability to continue Predecessor's business operation and former customers without interruption. Thus, it kept essentially the same business going as a successor.

Thus, we hold that not only did Predecessor convey more than 50% of its tangible personal property to Taxpayer, but it also conveyed more than 50% of its [intangible assets]. Accordingly, we uphold the issuance of the Notice of Successorship Liability and conclude that the assessment is correct.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied and the Assessment of Successorship Liability is upheld.

Dated this 6th day of February 2014.