

Cite as Det. No. 99-278, 20 WTD 15 (2001)

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. 99-278
)	
... )	Registration No. . . .
)	FY. . . /Audit No. . . .

- [1] RULE 216; RCW 82.32.140: MERGER -- LIABILITY OF SURVIVING CORPORATION FOR PENALTIES IMPOSED ON DISAPPEARING CORPORATION. The surviving corporation of a merger is not a successor corporation under the successor corporation statute and rule that limit a successor corporation to liability for taxes only because the disappearing corporation did not sell or convey the assets to the surviving corporation. The surviving corporation of a merger is liable for interest and penalties, as well as taxes, imposed on the disappearing corporation prior to the merger. Citing, *Palmer v. Department of Revenue*, 82 Wn.2d 367, 917 P.2d 1120 (1996); *InQuest, Inc. v. State*, BTA Docket No. 97-61 (October 28, 1998).
- [2] RULE 228; RCW 82.32.105: WAIVER OF PENALTIES -- CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER. The taxpayer whose circumstances must be scrutinized to be entitled to waiver is the taxpayer against whom the penalties were assessed, not the surviving corporation who must ultimately pay them.

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:

[Surviving Corporation] requests abatement of \$. . . in penalties imposed as a result of the failure of the [Disappearing Corporation], with which [Surviving Corporation] later merged, to register or pay wholesaling business and occupation tax and litter tax.<sup>1</sup>

Bianchi, ALJ:

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

## ISSUES:

1. Whether a surviving corporation is liable for tax penalties that were incurred by a disappearing corporation prior to the merger of the two corporations.
2. Whether the surviving corporation's inability to control the disappearing company's compliance with tax laws prior to the merger constitutes circumstances beyond the control of the taxpayer, justifying waiver of the penalties.

## BACKGROUND:

In 1998, the Audit Division of the Washington State Department of Revenue sent a Master Business Application and a Washington Business Activities Statement to the [Disappearing Corporation]. [Disappearing Corporation] had been incorporated in New Jersey during the assessment period and, for a portion of the assessment period, had been a subsidiary of [Surviving Corporation]. On June 30, 1995, [Disappearing Corporation] merged with [Surviving Corporation]. The [Surviving Corporation] tax manager completed and returned the forms on August 24, 1998, noting that the company had merged into [Surviving Corporation].

The Washington Business Activities Statement showed that [Disappearing Corporation] had employees in Washington State and had been making sales of its . . . products here since 1991. The Audit Division assessed wholesaling B&O taxes and the litter tax for the prior seven years, covering January 1, 1991, through December 31, 1995, in light of [Disappearing Corporation]'s failure to voluntarily register or pay. [Surviving Corporation], as the surviving corporation of the merger, paid the taxes and interest imposed on [Disappearing Corporation] but protested the penalties on the ground that it had not had responsibility for [Disappearing Corporation]'s compliance with Washington tax laws during the period assessed.

## ANALYSIS:

**[1] 1. The liability of a surviving corporation for tax penalties imposed on the disappearing corporation.**

Under RCW 82.32.140 and WAC 458-20-216, a successor corporation is obligated to pay only the tax imposed on the prior corporation, not interest or penalties. A "successor" however, is defined in RCW 82.04.180:

"Successor" means 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 added]

Under this statutory definition, the surviving corporation of a merger is not a “successor.” A company can be a “successor” only if it obtains the assets of the disappearing corporation by sale or conveyance. *Palmer v. Department of Revenue*, 82 Wn. App. 367, 917 P.2d 1120 (1996). In a merger, the disappearing taxpayer does not “sell” or “convey” property to the surviving corporation. The Official Comments to the Model Business Corporation Act hold that a merger is not a conveyance or transfer (sale). *Model Business Corp. Act* (ABA) § 11.06 (1984), 3 *Model Business Corp. Act, Annotated* at 11-69 (Supp. 1996). Therefore, RCW 82.32.140 does not apply to mergers.

As the result of a merger, liabilities of a corporation flow to the surviving corporation through business corporation statutes rather than the Revenue Act. For example, under Washington law, “[t]he surviving corporation has all the liabilities of each corporation party to the merger.” RCW 23B.11.060. Accordingly, in Washington, the Board of Tax Appeals has held that a surviving corporation succeeds to the tax liability of a disappearing corporation, because it stands in the shoes of the surviving corporation. *InQuest, Inc., v. State*, BTA Docket No. 97-61 (October 28, 1998)<sup>2</sup>. And see *Birmingham Trust National Bank v. State*, 292 Ala. 335, 294 So.2d 153 (1974), which also held that, in a merger, the surviving corporation retains all the liabilities of the disappearing corporation.

The effect of a merger, as a matter of conflicts of law, is determined by the law of the states in which the corporations are incorporated. *Aspinook Corps. v. Commissioner of Corps., & Taxation*, 326 Mass. 327, 329, 94 N.E. 2d 366 (1950). Both corporations in *Aspinook* were Delaware corporations. So is [Surviving Corporation]. Under Delaware law, a surviving corporation succeeds to all the liabilities the disappearing corporation had before the merger. 8 Del. C. §§252, 259 (1998). [Disappearing Corporation] was a New Jersey corporation. Under New Jersey law, a surviving corporation also succeeds to all the liabilities the disappearing corporation had before the merger. N.J. Stat. 14A:10-6 (1999).<sup>3</sup>

Because under both Delaware law, which applies to [Surviving Corporation], and New Jersey law which applies to [Disappearing Corporation], the surviving corporation is liable for the liabilities of the disappearing corporation, the only issue remaining is whether penalties are such liabilities. If they are, under *InQuest* and *Birmingham* they become the obligation of the surviving corporation upon the merger.

We think the answer is beyond dispute. Even though the term “penalties” is not defined in the Revenue Act, its common dictionary meaning, according to *Webster’s Third New International Dictionary*, 1993, is “[t]he suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense . . . *spec.* a fine or mulct

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<sup>2</sup> This case involved liability for tax, not penalties. Its analysis, however, would embrace penalties. The BTA found that the merger statute’s use of the word “liabilities” included “all claims cognizable in a court.” BTA Docket No. 97-61 (October 28, 1998), at 8.

<sup>3</sup> In fact, as of 1995, all 50 jurisdictions provide that the surviving corporation is liable for all the prior liabilities of the surviving corporation. *Model Business Corp. Act* (ABA) §11.06 (1984), 3 *Model Business Corp. Act Annotated*, at 11-72 (Supp. 1996).

imposed as such a punishment.” Because penalties at issue are civil monetary fines imposed on the disappearing corporation, they are a debt or liability of the disappearing corporation.<sup>4</sup> The corporation surviving the merger is obligated to pay them.

We conclude that [Surviving Corporation] is liable for tax penalties incurred by [Disappearing Corporation] before its merger with [Surviving Corporation].

## [2] 2. Waiver of Penalties

We are authorized to waive penalties on only a few grounds, none of which is present here. RCW 82.32.105 states:

- (1) If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax. [Emphasis added]

Washington Administrative Code 458-20-228(6) repeats the caution:

The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason. Penalties will not be cancelled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability. [Emphasis added]

In the context of this statute and rule, the “taxpayer” whose circumstances must be considered is the one against whom the penalties were assessed, not the one who ultimately has to pay it. The issue is whether there were circumstances beyond the control of the [Disappearing Corporation], not whether [Surviving Corporation] had the opportunity to control [Disappearing Corporation]’s tax compliance. At all times relevant to the assessment, the [Disappearing Corporation] had control over its own failure to register and pay taxes. The fact that another company has become liable for those penalties through corporate merger does not constitute a circumstance beyond the control of the taxpayer that actually incurred the penalties.

We conclude that [Disappearing Corporation] is not eligible for waiver of such penalties on the grounds that circumstances beyond its control prevented it from timely registering and paying. Nor is [Surviving Corporation], which stands in [Disappearing Corporation]’s shoes, eligible for such waiver.

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<sup>4</sup> A different result might arise if the penalties at issue were criminal penalties. See *U.S. v. Seaboard Coast Line R.R. Co.*, 326 F. Supp. 897 (M.D. Fl. 1971).

DECISION AND DISPOSITION:

The assessment is affirmed.

Dated this 30<sup>th</sup> day of September 1999.