Cite as Det. No. 96-073, 16 WTD 79 (1996)

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. 96-073
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

RULE 216; RCW 82.04.080, RCW 82.32.140: RETAILING B&O TAX -- RETAIL SALES TAX -- USE TAX -- SUCCESSORSHIP -- NOTICE OF ASSESSMENT TO SUCCESSOR. After receiving written notice of acquisition from a successor, a notice of successorship from the Department of Revenue merely indicating liability resulting from purchasing the seller's business or assets, without mailing a copy of the seller's assessment within six months to the successor or, at least, a written notice stating an amount due, type of tax, and a payment due date, is not an assessment notice as required by RCW 82.32.140. Accord: Det. No. 92-306, 12 WTD 473 (1992); Allied Medical Associates, Inc. v. Department of Rev., BTA Docket No. 92-70 (1994)

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 corporation, its shareholders, and officers (collectively referred to as the buyer) protest the assessment of successorship liability imposed against them for the excise tax liabilities incurred by another corporation (the seller).

FACTS:

De Luca, A.L.J. -- On January 11, 1988, the buyer sent a letter of intent to the owner of the seller outlining the manner in which the buyer proposed to purchase the seller's franchise and certain assets, including signs, special mechanics tools, materials, inventory parts, and its new vehicle inventory. On or about February 9, 1988, the seller's president provided the buyer

with affidavits that he signed along with attached schedules, which listed the business assets to be transferred and the names of the seller's creditors.

On February 17, 1988 the seller and the buyer entered into an agreement for the purchase and sale of these assets. On February 18, 1988, the buyer, as the transferee, mailed a "Notice of Bulk Transfer" to the seller's creditors and to the Department of Revenue (the Department) describing the sale. The Department received the notice and the schedules of property and creditors on February 19, 1988. Among other information, the notice informed the Department and the creditors that a bulk transfer of goods would be made on February 29, 1988 from the seller to the buyer.

On March 3, 1988, the Department sent a letter to the buyer acknowledging receipt of the "Bulk Sales Affidavit." It stated that a "final field audit would be performed on the seller covering the period January 1, 1984 through June 30, 1987 to the closing date of business." The letter continued by stating:

This letter is not a final clearance of the account, nor is it a final statement of the tax liability of the vendor through the date of transfer.

The letter also served notice that the Department "may hold the purchaser responsible" for all of the seller's unpaid tax liability pursuant to RCW 82.32.140.

On March 30, 1988, the Department mailed another letter to the buyer that again acknowledged receipt of the "Bulk Sales Affidavit." The letter next stated:

An outstanding amount . . . remains unpaid on completed field audits covering the period of January 1, 1984 through June 30, 1987. . . . This letter is not a final clearance of the account, nor is it a final statement of the tax liability of the vendor through the date of transfer.

This letter again informed the buyer that the Department may hold it responsible for all of the seller's unpaid tax liability. We have no evidence indicating that the Department provided a copy of the assessment to the buyer along with its March 30th letter. The Department's letter did not make a demand for payment or identify a due date.

On April 6, 1988, the Department mailed another letter to the buyer entitled "Notice of Successorship." The letter stated the Department had information that "indicates" the buyer is a successor to the seller as defined by RCW 82.04.180. The letter added:

The assessments covering these periods [January 1, 1983 through December 31, 1987] are currently under appeal. Therefore, the exact amount of unpaid liability cannot be established until the final determination of liability is issued.

The Department's letter did not include a copy of the assessment.

On April 13, 1988, the Department mailed a letter to the buyer's attorney, who had inquired with the Department about its April 6, 1988 letter. The Department's April 13th letter informed the buyer that the Department would continue to attempt to collect the taxes due from the seller as long as there were "reasonable means of obtaining payment from this source." The letter then stated:

The notice of successorship is not a demand for payment at this time. The purpose is to notify [the buyer] of [its] successorship liability pursuant to RCW 82.32.140."

The April 13th letter did not state the amount of money owing, or include a copy of the assessment.

During this period, the buyer requested its attorneys to keep the purchase money for the seller's business and assets in their trust account until the seller established that it had paid the Department the taxes it owed. The seller then sued the buyer in Pierce County Superior Court and demanded payment of the purchase money. The buyer filed a third party complaint against the Department and a national bank, a secured creditor of the seller. The Attorney General's office represented the Department in the action at Superior Court. The buyer kept the purchase money in the trust account until the court made its decision.

In August, 1988, the bank moved for summary judgment against the Department in the Superior Court action. The bank claimed its security interest in the seller's assets took priority over any claim asserted by the Department in the funds deposited in the court by the buyer. The Department did not oppose the bank's motion and did not appear at the hearing. In an August 8, 1988 letter to the bank, which was submitted to the court, the Department stated:

. . ., the Department of Revenue has not yet asserted its successorship claim against the [buyer]. The Department of Revenue is not interested in obtaining the specific funds now on deposit. . . . The Department does not oppose [the bank] obtaining the specific funds being withheld now.

The Department's letter added that it might ". . . at some time in the future assert its successorship claim against [the

buyer]." The court granted summary judgment for the bank on September 6, 1988.

On November 19, 1990, more than two years after the summary judgment and more than two and one-half years after the buyer's Notice of Bulk Transfer, the Department mailed a "Notice of Successorship Tax Liability" to the buyer. The November 19, 1990 letter referenced the April 6, 1988 "Notice of Successorship" by restating that the earlier notice did not provide an amount due because the seller had appealed the assessment. The seller had appealed first to the Department's Interpretation and Appeals Division and then to the Board of Tax Appeals (BTA), which later dismissed the appeal. The November 19, 1990 letter continued:

A determination has now been issued on the above tax liability. The amount of unpaid tax owed by [the seller] is . . . . This amount constitute tax only and does not include any penalties, interest, or costs.

The letter gave the buyer twenty days to pay the assessment.

On December 7, 1990, the seller filed for bankruptcy.

On May 10, 1994, the Department mailed the buyer an "Assessment of Successorship Liability" letter with a due date of June 10, 1994. On May 13, 1994, the buyer's attorney, by letter, acknowledged receipt of the Department's May 10, 1994 letter and asked for a copy of the assessment issued against the seller and any proof of mailing a copy of the assessment to the buyer or the attorney. The letter stated that the attorney and the buyer did not recall ever receiving a copy of the assessment. On May, 19, 1994, the Department amended the Notice of Assessment by letter and informed the buyer that the amount due had been reduced. The Department's May 19th letter did not answer the question of whether it ever provided the buyer with a copy of the assessment. Our review of the files and discussions with Compliance Division do not indicate that the buyer ever received a copy of the assessment. The assessment remains in dispute and is the subject of this appeal.

BUYER'S EXCEPTIONS:

The buyer raises four arguments why the successorship assessment is inapplicable. First, it claims the Department did not give it notice of the assessment within the time limits set forth in RCW 82.32.140.

Second, the buyer claims it meets the successorship exception in WAC 458-20-216(6)(a) (Rule 216.) That part of the rule provides that if there is a foreclosure of a security interest, then the buyer who purchases the repossessed property from the secured

creditor, and continues the business, is not a successor. The buyer in the present matter asserts that when the bank foreclosed its security interest against the seller, it (the buyer) ultimately purchased the assets.

Third, the buyer contends the Department is estopped from asserting an assessment against it based on the Department's August 8, 1988 reply to the bank's motion for summary judgment.

Fourth, the buyer argues the purpose of RCW 82.32.140 does not warrant imposing successorship liability on the buyer when it attempted to get the Department paid by including it in the Superior Court action.

ISSUES:

1. Did the Department timely notify the buyer of the successorship assessment?

2. Is the buyer exempt from being a successor if it purchased the seller's property from a secured creditor who repossessed it?

3. Is the Department estopped from asserting successorship liability against the buyer in light of the Department's August 8, 1988 letter, which disclaimed successorship at that time and conceded a national bank's priority over the purchase money deposited in trust by the buyer?

DISCUSSION:

RCW 82.04.080 defines "successor" to mean:

. . . 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.

RCW 82.32.140 provides:

Whenever any taxpayer quits business, or sells out, exchanges, or otherwise disposes of his business or his stock of goods, any tax payable hereunder shall become immediately due and payable, and such taxpayer shall, within ten days thereafter, make a return and pay the tax due; and any person who becomes a successor shall become liable for the full amount of the tax and 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 and, if such 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, and the payment thereof by such successor shall, to the extent thereof, be deemed a payment upon the purchase price, and if such payment is greater in amount than the purchase price the amount of the difference shall become a debt due such successor from the taxpayer.

No successor shall be liable for any tax due from the person from whom he has acquired a business or stock of goods if he gives written notice to the department of revenue of such acquisition and no assessment is issued by the department of revenue within six months of receipt of such notice against the former operator of the business and a copy thereof mailed to such successor.

The first two paragraphs of Rule 216 repeat the language found in RCW 82.32.140. The remainder of Rule 216 provides the notice requirements for bulk transfers, in addition to other matters.

We first address whether the Department timely notified the buyer of the successorship assessment. RCW 82.32.140 states once a successor gives written notice to the Department about acquiring a business or stock of goods, the Department must issue an assessment against the former operator within six months, with a copy mailed to the successor. Otherwise, the successor shall not be liable for any tax due from the former operator.

The Department has addressed this issue previously. Det. No. 92-306, 12 WTD 473 (1992) ruled that the Department was not time-barred from issuing an "Assessment of Successor Liability" letter more than six months (in fact, six months and seventeen days) after it had sent a "Notice of Successorship" to the successor. The successor in that matter had not notified the Department in writing of its business acquisition.

However, the determination states:

RCW 82.32.140 is clear. Only if a successor gives written notice to the department must the assessment be issued by the department within six months.

The determination added that written notice from the successor to the Department about acquiring a business or stock of goods is ". . . the only bar to the Department's assessing successorship liability. . . ."

Det. No. 92-306 clearly differentiates a "Notice of Successorship" from an "Assessment of Successorship Liability." The determination described the successorship notice as merely

informing the person that the Department had obtained information indicating the person may be liable for tax as a successor. By contrast, the assessment notice demanded payment of a specific amount of tax from the successor by a certain date.

The BTA has also addressed the six month notice requirements in RCW 82.32.140 that pertain to successors. Allied Medical Associates, Inc. v. Department of Rev., BTA Docket No. 92-70 (1994) concerned a corporation (Allied) that took possession of the inventory and accounts of a bankrupt taxpayer, M.G. Medical, Inc. The Department notified Allied in writing that it might be a successor to M.G. Medical. However, the Department failed to send Allied a copy of the assessment issued against M.G. Medical within six months after sending Allied the successorship notice. The issue was whether the Department's failure to send Allied a copy of M.G. Medical's assessment within the six month period relieved Allied of any tax liabilities incurred by M.G. Medical. The BTA ruled that Allied was relieved of any tax liabilities incurred by M.G. Medical.

The BTA explained that RCW 82.32.140, "by its plain terms", required the Department to send a successor a copy of the assessment issued against its predecessor. The BTA held it did ". . . not see any significance in the fact that Allied never formally notified the Department that it was a successor to M.G. Medical." The BTA saw no purpose to require Allied to inform the Department of something the Department had already asserted.

The BTA also rejected the Department's argument that the "Notice of Successorship" sent to Allied effectively fulfilled the purpose of sending a copy of the assessment to Allied. The BTA explained the "Notice of Successorship" only contained M.G. Medical's name, but did not set forth the amount owed by M.G. Medical. The BTA then noted that the tax statutes do not specifically define a tax "assessment." Consequently, it declared:

However, since a tax "assessment" fixes a person's tax liability, at a minimum, the "assessment" should be a written document containing the name of the taxpayer, the type and amount of tax claimed to be due, and the date on which payment is due.

The dissenting opinion in Allied Medical disagreed with the majority opinion only because it believed RCW 82.32.140 required Allied to send the Department written notice of its acquisition of M. G. Medical's inventory and accounts. The dissenting opinion declared if a ". . . successor actually sends the Department notice that it has succeeded to the business," then ". . . the statute triggers the Department's duty to fully notify the successor of the predecessor's tax assessment. . . ."

In the present matter, there is no question that the buyer and the seller on February 19, 1988 notified the Department of the bulk transfer, effective February 29, 1988. The Department acknowledged receipt of the transfer notice in its March 3, 1988 and March 30, 1988 letters to the buyer. Neither one of those two Department letters is an assessment notice because each one states: "this letter is not a final clearance of the account, nor is it a final statement of the tax liability of the vendor through the date of transfer."

The Department's April 6, 1988 "Notice of Successorship" also was not an assessment notice to the buyer because it declared:

The assessment covering these periods are currently under appeal. Therefore, the exact amount of unpaid liability cannot be established until the final determination of liability is issued.

A week later, on April 13, 1988, the Department wrote to the buyer's attorney regarding the April 6, 1988 notice by stating:

The Notice of Successorship Liability is not a demand for payment at this time. The purpose is to notify [the buyer] of [its] successorship liability pursuant to RCW 82.32.140.

Certainly, the April 13, 1988 letter was not an assessment notice because it expressly stated that it did not demand payment and did not give an amount owing.

The next correspondence from the Department was its August 8, 1988 letter in reply to the bank's motion for summary judgment against the Department. The letter stated "the Department of Revenue has not yet asserted its successorship claim against [the buyer]." Likewise, this letter was not an assessment notice because it declares the Department had not even asserted that the buyer was a successor at that time.

On November 19, 1990, which was more than two and one half years after the Department received the Notice of Bulk Transfer, it mailed the buyer a letter entitled "Notice of Successorship Liability." For the first time a Department notice gave the buyer not only the seller's name and the audit period, but also the amount due, and a demand for payment with a due date.

Three and a half years later, on May 10, 1994, the Department sent an "Assessment of Successorship Liability" to the buyer. The notice named the seller, and provided the audit period, the warrant number issued against the seller, the amount due, and a payment due date. On May, 19, 1994, the Department amended the amount in the May 10, 1994 assessment notice.

In light of these facts and the six month limit placed upon the Department by RCW 82.32.140 and Rule 216 to mail a copy of the seller's assessment to the buyer, we find the Department failed to meet the statutory notice requirements. The Department received the Notice of Bulk Transfer from the buyer and the seller on February 19, 1988. The statute required the Department to mail a copy of the seller's assessment to the buyer by August 19, 1988. The Department failed to do that. It was not until November 19, 1990 that the Department for the first time provided the buyer with an assessment notice that demanded payment of a certain amount by a specific date.

Consistent with Det. No. 92-306, supra, and both the BTA majority and dissenting opinions in Allied Medical, supra, the successorship assessment against the buyer is time-barred. A notice of successorship merely indicating liability resulting from purchasing the seller's business or assets, without a copy of the assessment or, at least, a written notice stating an amount due and a payment due date, is not an assessment notice as required by RCW 82.32.140. Id.

We need not address the remaining issues raised by the buyer.

DECISION AND DISPOSITION:

The buyer's petition is granted. The successorship assessment is cancelled.

Dated this 30th day of April, 1996.