

Cite as Det. No. 15-0261, 35 WTD 280 (2016)

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. 15-0261
)	
...)	Registration No. . . .
)	

RULE 216; RCW 82.04.140; RCW 82.04.180: SUCCESSORSHIP – INDICIA OF SUCCESSORSHIP. For a business to be a successor, it must acquire assets from a defunct business, and the acquired assets must constitute more than fifty percent of the fair market value of either the tangible assets or the intangible assets of the defunct business.

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.

Weaver, A.L.J. – A sole proprietor of an auto body shop protests the assessment of successorship liability. We find the taxpayer is not a successor and conclude that he is not liable for the tax in the outstanding warrants filed against the defunct business. Taxpayer’s petition is granted.¹

ISSUES

Whether, under RCW 82.04.140, RCW 82.04.180, and WAC 458-20-216, Taxpayer is a successor of a defunct business, and is therefore, liable for the unpaid taxes of the defunct business.

FINDINGS OF FACT

[Taxpayer], d/b/a . . . , was a sole proprietor engaged in the business of running an auto body shop from approximately August 2014 through April 2015. On March 31, 2015, the Compliance Division of the Department of Revenue (Department) issued Taxpayer an Assessment of Successorship Liability for the unpaid taxes of [Defunct Business] for the period of January 1, 2011 through September 30, 2014. The face value of the successorship assessment is \$ Taxpayer appeals this assessment.

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

The Defunct Business operated in . . . , Washington as a used automobile dealer from June 1, 2011 through September 23, 2014. The Defunct Business was closed due to the imposition and posting of a final order to revoke its certificate of registration, posted by the Department of Revenue (Department). The final order of revocation was posted at the Defunct Business address on September 23, 2014.

The Department's Compliance Division issued Warrant No. . . . against the Defunct Business on January 23, 2014, Warrant No. . . . against the Defunct Business on January 30, 2014, and Warrant No. . . . against the Defunct Business on October 24, 2014. On August 13, 2015, the Department's Compliance Division issued Warrant No. . . . against Defunct Business. These Warrants all remain unpaid.

After the business certificate of the Defunct Business was revoked, the Compliance Division made random visits to ensure the Defunct Business was not operating in violation of the revocation order. On March 26, 2015, the Compliance Division discovered the revocation order was removed from the door upon which it was posted.

The Compliance Division visited the Defunct Business location and asked an employee at the location to call the Defunct Business's only registered corporate officer. By telephone, the Compliance Division asked the corporate officer if he was continuing to operate the business in violation of the posted revocation. The corporate officer said that he was not and indicated that a new person was operating the business. The Defunct Business's corporate officer advised the Compliance Division that there was another certificate of registration posted at the location in Taxpayer's name. The Compliance Division confirmed that Taxpayer's certificate of registration was posted at the location.

The Compliance Division asked the corporate officer of the Defunct Business if he worked for Taxpayer. The corporate officer of the Defunct Business said that he used to work for Taxpayer but did not do so any longer. The Compliance Division asked the corporate officer of the Defunct Business if he sold the Defunct Business to Taxpayer. The corporate officer said no. The corporate officer of the Defunct Business did say that he owed Taxpayer money and, to pay off his personal debt, he gave Taxpayer a paint booth and a framing machine. The officer of the Defunct Business stated that there was no documentation for this transaction.

On March 31, 2015, Taxpayer called the Compliance Division and said that he waived a debt that the Defunct Business owed him in exchange for the paint booth and framing machine. Taxpayer states that the corporate officer of the Defunct Business asked Taxpayer for a loan to pay his taxes. Taxpayer lent the corporate officer \$. . . in August, 2014. On September 3, 2014, the corporate officer asked Taxpayer for an additional \$ Taxpayer and the corporate officer entered into a contract, dated September 3, 2014, which stated that Taxpayer would receive rights to ownership of a paint booth and frame machine from the corporate officer of the Defunct Business, in exchange for the \$. . . , in the event the corporate officer could not repay the loan.² According to Taxpayer, in about November 2014, the corporate officer of the Defunct Business

² We note that the contract was between Taxpayer and the corporate officer of the Defunct Business in a personal capacity. The contract was not between Taxpayer and the Defunct Business itself.

informed Taxpayer that he could not repay the loan and Taxpayer took possession of the paint booth and frame machine.³

After revoking the business certificate of the Defunct Business, the Compliance Division made a nationwide search for UCC security agreements for Taxpayer, under his personal name, trade name, social security number, and the name of the Defunct Business. The Compliance Division found no filing or any type of security agreement. The Compliance Division did not find any written notice to the Department from Taxpayer of any acquisition of the Defunct Business's assets.

The Compliance Division took photographs of Taxpayer's business on April 14, 2015, and established that Taxpayer was operating at the same business address as the Defunct Business. The signage outside the premises displayed the Defunct Business's name and the Defunct Business's telephone number. The Compliance Division noticed a yellow checkered taxi cab on the premises, which was also on the premises during the time the Defunct Business was operating. The Compliance Division also saw the paint booth and framing machine on the premises.

On appeal, Taxpayer states that he rented space at the business location from the same landlord who rented space to the Defunct Business. Taxpayer indicates that the work area where he operated his body shop was in back of the building that the Defunct Business used as its used car showroom. Taxpayer states that he paid the landlord \$. . . /month in rent and that amount gave Taxpayer the right to use about 70 square feet on the south side of the building to store his tools, the 300 square feet where the frame machine and paint booth were located, and about 500 square feet of the parking lot on the south side of the building. Taxpayer states that he never purchased or rented space from the Defunct Business. Taxpayer maintains that he ran a separate auto body business that had no affiliation with the Defunct Business's used car operation.

According to Taxpayer, the Defunct Business once rented the entire building, but when the Defunct Business could not pay the rent, the landlord began renting portions of the building (and parking lot) to other businesses, including himself. For example, Taxpayer states that there was an auto detail shop and an airport valet company that also rented space at the business location from the landlord during the time Taxpayer was engaged in his auto body business.

Taxpayer states that he never put up a sign for his business, but did have a logo designed. Taxpayer estimated that he operated the business part-time for about four months.⁴ Taxpayer closed his business in April, 2015, when it became clear that he would not make any money. According to Taxpayer, the landlord claimed the paint booth belonged to him, because it was affixed to the floor. As of the date of the hearing, the frame machine was still at the location.

Taxpayer states that he never knowingly purchased anything from the Defunct Business. According to his records, he took possession of the frame machine and paint booth from the

³ Taxpayer states that the frame machine was in poor condition and that its hydraulic system leaked. Taxpayer estimates that its value was about \$ Taxpayer estimates that the value of the paint booth was approximately \$. .

⁴ Taxpayer's primary source of employment was as a truck driver.

corporate officer of the Defunct Business in repayment of a personal loan. Taxpayer states that he does not own the yellow checkered taxi cab and does not know who does. Taxpayer indicated that the corporate officer of the Defunct Business was not involved in Taxpayer's business, other than to help obtain parts for cars that Taxpayer was repairing. Taxpayer states that he never paid any money to the corporate officer as an employee. Taxpayer denies that the corporate officer was ever an employee of Taxpayer's and there is no documentary evidence in the record that the corporate officer ever worked for Taxpayer. Taxpayer states that he, at all times, was engaged in a separate line of business from the Defunct Business and he does not know what happened to the used car inventory, or any of the other assets of the Defunct Business.

The Compliance Division bases its successorship assessment on the following: 1) An allegation that the Taxpayer acquired assets of the Defunct Business in the form of the paint booth and the frame machine; and 2) a finding that Taxpayer was operating at the Defunct Business's business location, using the same signage, reputation, and goodwill of the Defunct Business.

ANALYSIS

RCW 82.32.140 provides that if a taxpayer quits doing business and any tax is not paid within ten days from the date of the disposal, a successor shall become liable for the payment of the tax. Specifically, RCW 82.32.140 provides that:

Any person who becomes a successor shall 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. 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 The burden of establishing the fair market value of the assets acquired is on the successor.

RCW 82.32.140(2); *see also* WAC 458-20-216(4), (5)(a) and (c) (Rule 216(4), (5)(a) and (c)). If the fair market value of the assets transferred is less than fifty thousand dollars, the successor's liability is limited to the fair market value of those assets.⁵ *See* RCW 82.32.140(2); Rule 216(5)(c).

"Successor" is defined as:

(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;

RCW 82.04.180(1). Rule 216 offers additional guidance on the question of who is a "successor."

⁵ . . .

(2) **Who is a “successor”?**

(a) **“Successor” on or after July 1, 2003.**

(i) RCW 82.04.180 provides that a “successor” is:

(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;

(B) Any surviving corporation of a statutory merger; or

(C) Any person obligated to fulfill the terms of a contract as a surety or guarantor of a defaulting contractor, in which case the person is deemed a successor only to tax liability arising out of that contract.

(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.

Rule 216(2).

Taxpayer is, therefore, a successor to the Defunct Business if: (1) the Defunct Business quit, sold out, exchanged, or disposed of its business; (2) the Defunct Business sold or otherwise conveyed, directly or indirectly; (3) in bulk or in the ordinary course of the Defunct Business's business; (4) more than fifty percent of the fair market value of either tangible or intangible assets; (5) to Taxpayer. *See* Det. No. 05-0313, 26 WTD 27 (2007).

In this case, most of the indicia of a successorship are missing. The only assets that the Compliance Division has shown were acquired by Taxpayer were the paint booth and the frame machine. However, the contract provided by Taxpayer shows that the transaction was between Taxpayer and the corporate officer of the Defunct Business in his personal capacity.⁶ While it may be possible that those pieces of machinery were indeed the property of the Defunct Business, there is no evidence provided to prove that fact. More importantly, there is no evidence in the record that the value of those pieces of machinery constituted more than fifty percent of the value of the [tangible assets of] Defunct Business. . . .

Moreover, there is no evidence that the Taxpayer acquired any of the Defunct Business's intangible assets. In successorship cases, the acquisition of the following types of intangible assets are often relevant: “[t]he predecessor's business/trade name, business address, business telephone number/answering service, customer list, and goodwill.” 26 WTD at 30. In this case, the Taxpayer operated its business... [near] the Defunct Business, but there is [insufficient evidence] that [it] “acquired” ... the Defunct Business [location]. Indeed, the evidence provided shows that Taxpayer rented space adjacent to the Defunct Business from a third-party landlord. There is no evidence that the Taxpayer acquired the Defunct Business's line of business, trade name, telephone number, customer list, or goodwill. Taxpayer was an auto body business and the

⁶ We note that the date of the contract between the corporate officer and the Taxpayer regarding the paint booth and the frame machine was September 3, 2014. This pre-dated the date the revocation was posted, September 23, 2014. Therefore, the Defunct Business was ostensibly still in business when the contract was executed and, at that point, still had the capacity to do business in the state.

Defunct Business was a used car dealership. ...[Although] the Defunct Business [may also have done auto body work, as shown by the equipment on the premises, there] is no evidence that Taxpayer acquired the Defunct Business's customer lists or that Taxpayer acquired any goodwill from the Defunct Business. The signage on the building stated the Defunct Business's name, not Taxpayer's; and there is no evidence that Taxpayer could be reached at the telephone number listed on the sign. For these reasons, we hold that Taxpayer did not acquire any of the Taxpayer's intangible assets.

The Department has held that the acquisition of property subjecting a taxpayer to successorship liability does not have to be by virtue of a direct conveyance or a sale by a predecessor. *See* Det. No. 86-304, 2 WTD 053 (1986). . . . While the written agreement, referenced above, evidences a contract between the corporate officer of the Defunct Business and the Taxpayer with respect to the paint booth and the frame machine, that agreement was signed by the corporate officer of the Defunct Business in his personal capacity and was in exchange for \$. . . in loans from the Taxpayer to the corporate officer personally and not to the Defunct Business. [While a written agreement for a conveyance of assets is not necessary to find successorship liability, the absence of any agreement, written or oral, between Taxpayer and the Defunct Business tends to show that Taxpayer did not acquire sufficient tangible or intangible assets from the Defunct Business to be held a successor to the Defunct Business, in light of all the facts discussed above.]

.....For these reasons, we hold that the [evidence is insufficient to conclude] that the Taxpayer was a successor of the Defunct Business.

DECISION AND DISPOSITION

Taxpayer's petition is granted. The successorship assessment against Taxpayer is hereby canceled.

Dated this 28th day of September, 2015.