

06-0271
Successor Liability Assessment
Signed 01/18/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 06-0271
v.)	
)	Account No. #####
TAXPAYER SERVICES DIVISION,)	
UTAH STATE TAX COMMISSION,)	Tax Type: Successor Liability
)	
Respondent.)	Presiding: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Tax Compliance Agent

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing on November 6, 2006, pursuant to Utah Code Sec. 59-1-502.5. Petitioner is appealing an assessment of proposed liability against a successor in business, issued pursuant to Utah Code Sec. 59-12-112. The Statutory Notice was dated December 15, 2005. The proposed assessment was based on a sales tax deficiency in the amount of \$\$\$\$ owed by COMPANY A. The period for when the liability was incurred was from April 2004 through May 2005. Additional penalties and interest have been assessed against COMPANY A, but are not included in the proposed successor liability assessment.

APPLICABLE LAW

The tax imposed by this chapter shall be a lien upon the property of any person who sells out his business or stock of goods or quits business. Such person shall complete the return provided for under Section 59-12-107, within 30 days after the date he sold his business or stock of goods, or quit business. Such person's successor in business shall withhold enough of the purchase money to cover the amount of taxes due and unpaid until the former owner produces a receipt from the commission showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods fails to withhold such purchase money and taxes are due and unpaid after the 30-day period allowed his personally liable for the payment of the taxes collected and unpaid by the former owner. Utah Code Sec. 59-12-112.

DISCUSSION

OWNER 1 had run COMPANY A as a sole proprietorship for 18 years until 2002 or 2003 when he incorporated as COMPANY A. For most of the period he had operated out of a building that he owned, but had to sell the building in 2000 or 2001 to the city. He moved the business into a building that he rented. This, according to Petitioner's representative, was a financial hardship as the rent was too high for the business. OWNER 1 later moved into a new building sometime after the incorporation of COMPANY A and prior to the take over of the business by COMPANY B. The newer building had a lower rent, but less visibility.

OWNER 1 developed serious health issues and could no longer work and manage the business. It was due to this situation and moving to the building with the high rent that the business

began incurring the tax liability that it at issue. In May 2005 his son OWNER 2 incorporated under the name COMPANY B, and the business was transferred to the new entity in exchange for which OWNER 2 was to pay his father, who was no longer able to work, a monthly draw of \$\$\$\$\$ and take over the leases on the building and equipment. It is unclear if OWNER 2 paid his father any additional amount for the business as there was some discussion about medical expenses or insurance. A copy of any purchase agreement has not been submitted.

From the proffer of Petitioner's representative once this occurred, there were all new employees of the business. There were issues with an embezzlement and failure to maintain the books and records or file tax returns that occurred after OWNER 2 had taken over the business. However, this occurred after the period that is at issue in this appeal and may be subject to other proceedings.

Upon reviewing the information, COMPANY B took over the business location, the lease on the building and equipment, and continued to operate the same type of business. The name of the new corporation also was similar enough to be an attempt at retaining the goodwill of the existing customer base. Regardless of whether none of the employees continued to work for the new corporation, COMPANY B is a successor in business of COMPANY A.

As a successor in business, according to Utah Code Sec. 59-12-112, Petitioner should have been withholding purchase money to pay for the taxes incurred by the prior business. In this situation, it is unclear whether Petitioner made only the \$\$\$\$\$ per month payments, or whether there was some other transfer of funds, which may have been payment of medical expenses, health

insurance or assumption of liabilities. Petitioner would have the burden of showing that there had been no other funds paid to his father for the transfer of the business. Because it appears that at least some payment was made for the transfer of the business, Petitioner is liable for the payment of the taxes collected and unpaid by the former owner up to the amount Petitioner paid to the prior owner for the business. Payment need not be a direct payment, but could also have included payment of medical bills, insurance premiums, assumption of liabilities and all other consideration. Petitioner has the burden of proving what amount was actually made as payment to the former owner for the business. The Commission acknowledges that this amount could be less than the successor liability assessment, but has insufficient evidence before it to abate any portion of the assessment. If Petitioner would like to make a showing that the payment for the business was less than the successor liability assessment, Petitioner may request a Formal Hearing and should be prepared to submit evidence to support its position. In addition to successor liability payment of the taxes, the taxes are a lien upon any assets transferred with the business.

DECISION AND ORDER

Based upon the foregoing, the Commission assesses the Liability Against a Successor in Business as proposed in the Statutory Notice Dated December 15, 2005. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the

Appeal No. 06-0271

Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2007.

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice: If the Petitioner does not request a Formal Hearing within the thirty-days as discussed above, failure to pay the amount of deficiency that results from this order may result in an additional penalty.

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