

0012 2826 37 (Oct. 14, 2014) – Where an employer acquired the seller’s only place of business in Massachusetts, eight of its ten vehicles, 90% of its inventory, all of its accounts receivable, the customer base, goodwill, and all nine employees, there was a transfer pursuant to G.L. c. 151A, § 14(n). While the employer acquired only a portion of the seller’s overall business in North America, it acquired the entirety of its business in Massachusetts, or at the very least, substantially all the assets thereof.

Board of Review
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Issue ID: 0012 2826 37
Employer Account Number: 10-057275

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), that it is a successor organization and is subject to a higher recalculated contribution rate. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On December 20, 2012, the agency determined that, under G.L. c. 151A, § 14(n)(1), the employer acquired the entire organization, trade, or business of a predecessor, or substantially all the assets thereof, and therefore was responsible for a higher recalculated contribution rate. The employer appealed that determination to the DUA hearings department. Following a hearing on the merits, attended by the employer and the DUA status unit, the review examiner affirmed the agency’s determination in a decision rendered on April 7, 2014. We accepted the employer’s application for review.

After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the employer’s appeal, we remanded the case to the review examiner to take additional evidence on the business activities of the predecessor. The employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion that the employer acquired the entire organization, trade, or business of the predecessor business or substantially all of the assets thereof is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The employer business is a wholesale distributor of batteries, brand name [A]. The employer's DUA Identification number is [Number A]. The employer's business is located at [Street Address A], Canton, MA.
2. The employer entered into an agreement to purchase the business [B] Inc., DUA Identification number {Number B}. That business was located at [Street Address A], Canton, MA. The purchase took place on or about February 23, 2012.
3. In addition to the Canton site, the business, [B] Inc., had forty-two other locations. Those locations were within the United States and Canada (British Columbia and Quebec City).
4. The employer did not acquire any other site besides the Canton, Massachusetts location at that time, on or about February 23, 2012.
5. The predecessor discontinued operations only at the Canton location on or about February 23, 2012.
6. As part of that sale, the employer purchased from [B] Inc., eight of their ten vehicles, ninety percent of their inventory, all of the accounts receivable, the customer base and the goodwill.
7. When the employer made the purchase, [B] Inc. was at a leased location. The employer took over the lease at that location and remained there. The employer also maintained the former [business'] telephone number.
8. [B] Inc. listed nine employees on the DUA Wage Report in the fourth quarter of 2011. [B] Inc. did not file any wage reports with the DUA after the fourth quarter of 2011.
9. In the first quarter of 2012 all nine employees who had been registered as working for [B] Inc. were registered as employees of the employer.
10. On December 20, 2012 the employer was issued a notice from the Employer Liability Unit indicating in part that "you have been determined to be subject to the provisions of the Massachusetts Unemployment Insurance Law (G.L. Chapter 151A), as of 2/10/2012. Reason for your status as a subject employer: Acquisition of an organization, trade or business, or substantially all assets thereof, of another employing [unit]. Which at the time of such acquisition was an employer under Section 8(d), Section 14N (a), (c), (e), (f) & Section 14(n) (1) of the Law." The employer's UI Contribution Rate was contained in

the document, indicating a rate of 12.270% effective 2/10/2012. The employer filed a timely appeal to the determination.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. Furthermore, as discussed more fully below, we affirm the review examiner's conclusion that the employer acquired the entire organization, trade or business of the predecessor, or substantially all of the assets thereof.

Since it is undisputed that the employer acquired certain assets from a predecessor, this case is governed by G.L. c. 151A, § 14(n)(1), which provides, in pertinent part, as follows:

If the entire organization, trade or business of an employer, or substantially all the assets thereof, are transferred to another employer or employing unit, the transferee shall be considered a successor for the purpose of this section.

The review examiner concluded in her original decision that the employer is a successor organization because it acquired substantially all of the assets of the predecessor company. We remanded the case to take additional evidence on what portion of the predecessor's business was acquired by the employer, in light of the employer's argument that only one distribution site of the predecessor had been acquired, and that the predecessor continued its business operations at the remaining sites.

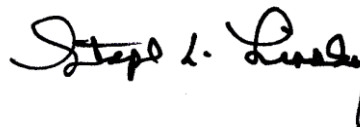
The additional testimony and evidence provided at the remand hearing supports the review examiner's original conclusion. Where a company transfers only one division or portion of its overall business, and otherwise continues its remaining business operations, there may be no successorship, under G.L. c. 151A, § 14(n)(1). See L & CP Corp. v. Dir. of Division of Employment Security, 28 Mass. App. Ct. 961 (1990). In this case, however, the record reflects that the predecessor transferred all of its *Massachusetts* business to the employer, and after the transfer was complete, the predecessor had no other business activities in Massachusetts (*see* Remand Exhibit # 20). The review examiner found that the employer acquired the predecessor's only place of business in Massachusetts, eight of ten vehicles, 90 percent of inventory, all of the accounts receivable, the customer base, goodwill, and all nine employees that had worked for the predecessor in Massachusetts. Thus, while the employer acquired only a portion of the predecessor's overall business in North America, it acquired the entirety of its business in Massachusetts, or at the very least, substantially all of the assets thereof. Compare L & CP Corp., 28 Mass. App. Ct. at 961-962 (where the transferee acquired only a portion of the predecessor's Massachusetts business, and the predecessor continued to conduct business activities in Massachusetts as well as in other states). We note that an employer's experience rating is based only on the employment of individuals in Massachusetts, not in other states, and we thus view our conclusion as consistent with the intent of G.L. c. 151A, § 14(n)(1), and the unemployment statute as a whole. See, e.g., G.L. c. 151A, § 8(b) (an employer is subject to the Massachusetts unemployment statute if it employs at least one person in the Commonwealth).

The review examiner's decision is therefore affirmed. The employer is a successor organization and is subject to a recalculated contribution rate consistent with this decision.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 14, 2014



Paul T. Fitzgerald, Esq.
Chairman



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ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AM/rh