

**Board of Review
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**Issue ID: 0012 8653 99
Employer ID: 10-055672**

BOARD OF REVIEW DECISION

0012 8653 99 (July 30, 2014) – As a party to the transaction with freer access to evidence, the Board allocates the burden of production and persuasion to the employer. Transfer of inn and lounge constituted transfer of substantially all the assets and the entire business under G.L. c. 151A, § 14(n), even though buyer intended to cater to a different clientele.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), that the entire organization, trade, or business of another employer, or substantially all the assets thereof, were transferred to the appellant employer (hereafter, “appellant”), rendering the appellant responsible for a higher recalculated contribution rate. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On May 7, 2012, the agency determined that the appellant was a successor organization and liable for the experience rating account of its predecessor, pursuant to G.L. c. 151A, § 14(n)(1). The appellant appealed that determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency’s determination in a decision rendered on October 9, 2012. The appellant appealed to this Board.

After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the appellant’s appeal, we remanded the case to take further evidence on the transfer of assets from the predecessor employer to the appellant. Both parties participated in the remand hearing. The review examiner then issued her consolidated findings of fact. Following receipt of these findings, we afforded the appellant as well as the DUA the opportunity to submit to the Board in writing reasons for agreeing or disagreeing with the decision. Both the employer and the agency responded. 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 is the transferee of its predecessor’s entire organization, trade, or business, or substantially all the assets thereof, is supported by substantial and credible evidence and free from any error of law.

Findings of Fact

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

1. [Employer] LLC (“[Employer]”), based in Massachusetts, purchased the parcel of real estate located at [Address], in [Town], Massachusetts on 3/31/11 for \$1.21 million from [Seller] LLC (“[Seller]”). [Employer] leased the property back to [Seller] in order [for] [Seller] to satisfy its entertainment contracts for the summer months of 2011. [Seller] operated the business known as “[Seller’s d/b/a]” at the [Address] location. The property’s liquor license transferred from [Seller] to [Employer] with the sale of the property.
2. [Seller] operated a seasonal inn, along with a disco and entertainment venue which was equipped with air hockey and pool tables. [Seller] operated its business from April to November and closed for the “off season”.
3. [Employer] purchased the property in order to operate a year round business consisting of an inn, lounge, and function rooms. [Employer] sought to service the local artist community during the off season and provide a place where interns, students, guests, and residents could meet and stay. [Employer] had no interest in operating the business which had been run by [Seller]. [Employer] intends to maintain a full-time, year round staff and provide health insurance benefits for its employees.
4. [Employer] and [Seller] entered into an additional agreement whereby [Employer] agreed to purchase [Seller]’s license and goodwill for \$50,000. Additionally, [Employer] agreed to purchase personal property, including furniture already in the 20 bedrooms; refrigerators and cold room in the basement; and sound system and electronics equipment in the former nightclub for \$90,000. The dollar value of the assets transferred to the employer by the [X] Realty Trust and [Seller] LLC was \$90,000. [Employer] subsequently sold the sound system and electronics equipment from the nightclub. The dollar value of any assets not transferred to the employer by the [X] Realty Trust and [Seller] LLC is unknown. [Employer] withheld the \$140,000 for these purchases from [Seller] to ensure [Seller] operated its business ethically and efficiently through the summer months of 2011 and did not jeopardize the property’s liquor license. The parties’ agreement for the purchase of license, goodwill, and personal property was effective 9/15/11.
5. [Employer] did not solicit an independent appraisal of the property and its fixtures prior to entering into the purchase agreement with [Seller]. [Employer] was aware that [Seller] had personal injury litigation pending. [Employer] and [Seller] did not discuss [Seller]’s unemployment insurance rate.
6. A former employee of [Seller] applied for a front desk position with [Employer] and was hired. No other former employee of [Seller] is employed by [Employer].

7. After taking ownership of the property, [Employer] did not immediately reopen. [Employer] renovated the property and reopened in May 2012 under the name “[Employer’s d/b/a]”.
8. On 1/20/12, [Employer] notified the DUA’s Revenue Unit of its acquisition.
9. [Seller] closed its business, laid off its employees, and vacated the property effective 9/15/11. The DUA suspended its account effective the date of the change of ownership.
- [10.] In a notice dated 5/7/12, the DUA Revenue Unit notified [Employer] that it was a subject employer because it acquired an organization, trade, business, or substantially all assets of another employing unit. Likewise, [Employer] was notified that it had been determined a successor business and as such assumed the account balances and liabilities previously held by [Seller]. [Employer] appealed this determination.
- [11.] [Seller] has not reported wages to the DUA since 2/15/11. [X] Realty Trust is not registered with the DUA. [Employer], LLC has reported wages since 2011; it last reported wages for the first quarter of 2013.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether these 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 findings of fact. As discussed more fully below, we believe that the review examiner’s findings of fact support the conclusion that there was a transfer to the appellant of an entire organization, trade, or business, or substantially all the assets of another employer.

G.L. c. 151A, § 14(n), provides, in relevant part, as follows:

- (1) 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....

The determinative issue in the present case is whether the employer is the transferee of its predecessor’s “entire organization, trade or business... or substantially all the assets thereof.” G.L. c. 151A, § 14(n)(1); *see also* National School Bus Service, Inc. v. Comm’r of Department of Employment & Training, 49 Mass. App. Ct. 445, 453 (2000). At the heart of this case, as in all other cases under G.L. c. 151A, § 14(n)(1), is a business transaction to which the employer was a party. The employer as buyer of the real estate in question is most likely to know what, if anything, was not sold and to have freer access to evidence regarding the transaction. Thus, allocating the burden of production and persuasion to the employer in G.L. c. 151A, § 14(n)(1), cases “is consistent with the general principal that the burden is properly borne by the party who has ‘freer access to the evidence’” or who is most likely to possess information about the issues

in dispute. Kasper v. Registrar of Motor Vehicles, 82 Mass. App. Ct. 901, 903 (2012), *quoting* Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

Here, the record reflects that the predecessor, which operated an inn and lounge, effectively transferred its entire business to the appellant. We note that while the review examiner found that the appellant intended to cater to different clientele, the predecessor operated an inn and entertainment venue, and following the transfer of various assets to the appellant (discussed more fully below), the appellant also intended to operate an inn and entertainment venue at the same location. *See, e.g., Sea Crest Hotel v. Dir. of Division of Employment Security*, 330 Mass. 226 (1953) (holding that there was a successorship where the employer continued to operate a summer hotel that it had acquired from the predecessor).

Furthermore, we believe that the review examiner correctly concluded that the predecessor conveyed substantially all of its assets to the appellant. We note that the Bill of Sale (included in the record as Remand Exhibit 9) states that the sale to the appellant “does not constitute a sale of all or substantially all the assets of [the predecessor].” However, the record reflects that the appellant purchased significant assets from the predecessor including the real estate parcel where the predecessor’s inn and entertainment venue had been located, the liquor license, goodwill, and various personal property items including furniture, appliances, and electronics equipment. The review examiner found that the value of any assets *not* transferred to the appellant is unknown, and the Asset Purchase Agreement, which is included in the record as Remand Exhibit 8, indicates that “[t]he Seller desires to sell... the assets of the business which has been operated by [Seller] LLC...” to the appellant. Even where it is unknown what, if any, assets a predecessor retained after a transfer, the purchasing entity can still be a successor, within the meaning of G.L. c. 151A, § 14(n), where there is evidence that substantially all of the predecessor’s assets were transferred. National School Bus Service, 49 Mass. App. Ct. at 451-453. Here, the evidence strongly suggests that such a transfer occurred, and there is insufficient evidence to the contrary.

The review examiner also found that, since the transfer, the predecessor has not reported any wages to the DUA. There is no evidence in the record that the predecessor continues to operate an active business, and the absence of any ongoing business activity by the predecessor supports the conclusion that its “business” and “assets” were transferred to the successor. *Id.* at 450. *Contrast, L & CP Corp. v. Dir. of Division of Employment Security*, 28 Mass. App. Ct. 961 (1990) (holding that where an employer transfers only one division or portion of its business to another entity, but continues other business operations after the transfer has occurred, there is no successorship, under G.L. c. 151A, § 14(n)(1)).

Ultimately, given: (1) the similar businesses operated by the predecessor and the appellant; (2) the significant assets transferred to the appellant during the transfer; (3) the lack of sufficient evidence of assets retained by the predecessor; and (4) no evidence of any ongoing business activity by the predecessor after the transfer had occurred, we see no basis to overturn the review examiner’s conclusions.

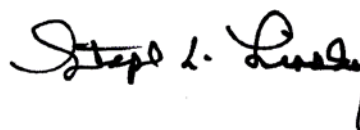
We, therefore, conclude as a matter of law that there was a transfer to the appellant of an entire organization, trade, or business, or substantially all the assets thereof, within the meaning of G.L. c. 151A, § 14(n).

The review examiner's decision is affirmed.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2014



Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, 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