

Employer acquired the entire operation or substantially all of the assets of another events venue business within the meaning of G.L. c. 151A, § 14(n)(1). Regardless of whether it was the employer entity that purchased the largest asset, real estate, the employer held a beneficial interest, as it used the land to operate its business.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

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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), which concluded that the employer is a successor business organization within the meaning of G.L. c. 151A, rendering it responsible for a higher recalculated contribution rate. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On April 5, 2019, the agency determined that the employer was a successor organization pursuant to G.L. c. 151A, §§ 14(n)(1), and 14N, and, therefore, subject to the experience rating account, benefit charges, and contribution rate of its predecessor. The employer appealed that determination to the DUA hearings department. Following a hearing on the merits attended by the employer and a representative from the DUA Employer Liability Unit, the review examiner affirmed the agency's determination in a decision rendered on September 19, 2019. We accepted the employer's application for review.

Concluding that the employer acquired substantially all of the assets of the predecessor business at the time of the transfer, the review examiner determined that there was a successorship pursuant to G.L. c. 151A, § 14(n)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that an employing unit in the business of providing a venue for clambakes and weddings had transferred substantially all of its assets within the meaning of G.L. c. 151A, § 14(n)(1), to the employer, who used the assets in a year-round events venue, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On August 29, 2018, the employer, [Employer company name] LLC registered its business with the Department of Unemployment Assistance (the DUA). When they registered, the employer answered in the negative to the following questions: “Did you acquire any assets/inventory of an already existing business operating in Massachusetts?”; “Was there a purchase and sale agreement with another entity operating in Massachusetts?” and “Was there an acquisition, merger or consolidation with another entity operating in Massachusetts?”
2. On March 18, 2019, the DUA’s Employer Liability Unit issued a letter to the employer requesting an update on the information provided to the DUA regarding the relationship between [Employer company name] LLC and [Predecessor company name] LLC.
3. The employer did not respond to the DUA’s request for information.
4. On April 4, 2019, the DUA suspended the account of the employer, [Predecessor company name] LLC with an EAN [X] because the transfer was full in nature.
5. On April 5, 2019, the DUA issued a determination to [Employer company name] LLC under Sections 8(d), 14N(a), (c), (e), (f) & 14(n)(1) of the Law, which notified the employer that the experience rating of the predecessor was transferred to its account and used to determine the contribution rating. The contribution rates were computed as follows: Beginning August 29, 2018, UI Contribution Rate: 6.720% and Workforce Training Fund: 0.056%; and effective January 1, 2019, UI Contribution Rate: 11.310% and Workforce Training Fund: 0.056%.
6. The DUA received a request for a hearing from [Employer company name] LLC in an envelope, which bore a postmark date of April 13, 2019.
7. On May 16, 2019, at the request of the Hearings Review Examiner, the employer submitted a copy of the Purchase and Sale Agreement between [Employer company name] LLC and [Predecessor company name] LLC. The Purchase and Sale Agreement was for consideration paid of \$2,300,000.00 by [Employer company name] LLC to [Predecessor company name] LLC, for the [Location A] land, located at [Location A], [Town A], MA [zip code], for all its business assets, equipment, inventory, client lists, business name, telephone numbers, licenses and permits. The Purchase and Sale Agreement was dated February 23, 2018.
8. [Employer company name] LLC did not acquire any former employees of [Predecessor company name] LLC.
9. The employer did purchase the business name, [Location A].

10. Prior to the sale, [Predecessor company name] LLC operated a wedding venue and held clambakes.

11. [Employer company name] LLC operates as a year around events venue at [Location A], [Town A], MA [zip code].

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 7 fails to accurately reflect that the transfer of assets was actually contained in two separate documents dated February 23, 2018, which were admitted into evidence as Exhibits 13 and 15. Exhibit 13 is an Asset Purchase Agreement, transferring both the liquor license and other personal property. Exhibit 15 is a Purchase and Sale Agreement transferring real property. The statement in Finding of Fact # 8 that the employer did not acquire any of the predecessor's former employees is misleading and fails to reflect that Exhibit 3 ([Predecessor company name] LLC's DUA Employment and Wage Detail History) and Exhibit 4 ([Employer company name] LLC's DUA Employment and Wage Detail History) include many of the same employees listed on wage reports submitted to the DUA for both businesses. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we also agree with the review examiner's legal conclusion that the employer is a successor business.

The review examiner rendered her decision under G.L. c. 151A, § 14(n), which 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 . . . and the transferee continues such organization, trade or business, the transferee shall be considered a successor. . . .
- (2) The successor shall take over and continue the employer's account, including its plus or minus balance and all other aspects of its experience under this chapter. . . .

The employer, [Employer company name], LLC, urges the Board to conclude that it did not acquire substantially all of the assets of [Predecessor company name], LLC (hereinafter, “[Predecessor company name]” or “predecessor”). It does not dispute that, through the Asset Purchase Agreement, the employer bought the predecessor's equipment, inventory, fixtures, client lists, and liquor license. *See* Finding of Fact # 7 and Exhibit 13. Nor does it dispute that it acquired and uses the predecessor's business name “[Location A].” *See* Finding of Fact # 9. However, the employer points out that these assets were sold for only \$50.00, a small fraction of the value of [Predecessor company name]'s primary asset, the real property located at [Location A], worth \$2.3 million. Thus, the employer argues that the transaction was not for substantially all of the predecessor's assets. We disagree.

The express terms of the Asset Purchase Agreement provided that the personal property asset sale was contingent upon the buyer consummating the purchase of 59 acres more or less of land in [Town A], Massachusetts. *See* Finding of Fact # 7 and Exhibit 13, paragraph 1.07. In fact, the transfer of this parcel was included in a Purchase and Sale Agreement executed on the same day, February 23, 2018. *See* Finding of Fact # 7 and Exhibit 15.¹ The fact that one sale was expressly contingent upon the other supports our view that this was all one transaction between the parties.

We have also considered the employer's argument that a separate legal entity acquired the major asset. The documents speak for themselves. The Asset Purchase Agreement buyer is [Individual A] d/b/a [Employer company name], LLC. Mr. [Individual A] also signs for the buyer on the final page of the agreement. Signing for the seller is [Individual B], Manager of [Predecessor company name], LLC.² [Individual A] is also the buyer in the Purchase and Sale Agreement, though it is as [Individual A] d/b/a [Location A] Holdings, LLC. The Purchase and Sale Agreement seller includes [Predecessor company name], LLC and [Individual B] among the partners.³

From his use of the "d/b/a" and by his signature as "manager" of both LLC entities, we can reasonably infer that Mr. [Individual A] operates both [Employer company name], LLC and [Location A] Holdings, LLC. Under these circumstances, insisting that the buyers are different companies is to put form over substance. The designation "d/b/a" means "doing business as" and is merely descriptive of the person who does business under another name. We do not believe that it creates a separate legal entity from the person operating the business.

Even if a separate legal entity did acquire the land, we would reach the same conclusion. It is not necessary that the employer own the business location. The Supreme Judicial Court has stated that a successor employer need not acquire an estate in fee simple, merely a real, beneficial interest in the assets of its predecessor. Sea Crest Hotel v. Dir. of Division of Employment Security, 330 Mass. 226, 227–228 (1953) (interest taken by successor lessee of hotel, "while not a fee simple, was one of substance"). Here, the employer uses the parcel of land acquired from [Predecessor company name] in the operation of its business. *See* Finding of Fact # 11. We do not know whether this was pursuant to a formal lease agreement or whether a lease was not necessary because all of the assets are owned by the same party. But, there is no question that the employer has a beneficial interest in the asset, as it uses [Location A] to host its year round events. *See* Finding of Fact # 11.

Another indication that there was a transfer under G.L. c. 151A, § 14(n)(1), is the absence of ongoing business activity by the predecessor. National School Bus Service, Inc. v. Comm'r of

¹ While not explicitly incorporated into the review examiner's findings, the terms of the written agreements in Exhibits 13 and 15 are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *See Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005). We note that the entire parcel of real estate was located on several street addresses, including [Location B] and [Location A].

² *See* Exhibit 13, ¶ 1.07, and page 8.

³ *See* Exhibit 15 under description of Parties, and the signature page.

Department of Employment and Training, 49 Mass. App. Ct. 445, 450 (2000). The review examiner found that the predecessor had operated a venue for weddings and clambakes, and it appears that it stopped engaging in this type of activity at some point during the summer of 2018. *See* Finding of Fact # 10 and Exhibit 5. The employer corroborates this during the hearing with its testimony that, after the sale, it has honored the predecessor's pre-booked wedding commitments so that it can maintain goodwill in the community.⁴

Nonetheless, the employer asks the Board to conclude that [Predecessor company name] did not cease all of its business activity, because the predecessor also engaged in the business of excavation and construction work from the property and has continued such work after the transfer. In support of this assertion, the employer's witness, Mr. [Individual A], testified that, while living on the property between February and September, 2018, he observed the predecessor use the farm to store a lot of construction vehicles. This, by itself, does not constitute substantial evidence of the predecessor's on-going business activity. As the review examiner notes in her decision, nothing in the record establishes that these excavation and construction activities were conducted by [predecessor company name], LLC. *Compare L & CP Corporation v. Dir. of Division of Employment Security*, 28 Mass. App. Ct. 961, 961–962 (1990) (no successorship under G.L. c. 151A, § 14(n)(1), where buyer acquired one division with no separate corporate existence from the seller's larger diversified business).

Finally, the employer argues that the transfer of assets does not constitute a successorship under G.L. c. 151A, § 14(n)(1), because the employer did not continue the predecessor's organization, trade or business. It asserts that the employer's business operates year-round, hosting events substantially different than the summer weddings and clambakes held by [Predecessor company name]. In our view, they are not substantially different. As stated, the employer continued to host weddings after the transfer. Although the employer expanded into a year-round operation offering a wider variety of different events, they are both an event-venue business. *See* Board of Review Decision 0012 8653 99 (July 30, 2014) (held predecessor inn and lounge transferred its entire business even though appellant's inn and entertainment venue intended to cater to a different clientele).

We, therefore, conclude as a matter of law that the employer is a successor business within the meaning of G.L. c. 151A, § 14(n)(2), because the record shows that it acquired the entire organization, trade or business of [Predecessor company name], LLC, or substantially all the assets thereof.

The review examiner's decision is affirmed.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 17, 2019

⁴ This testimony is also part of the undisputed evidence in the record.



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

AB/rh