



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-109766-XA (April 14, 2010) – Since a predecessor car dealership was divided up, with the Chevrolet assets transferring to GMAC before its Kia assets transferred to the employer, this was only a partial transfer under G.L. c. 151A, sec. 14N(a). Although predecessor owner did not participate in the successor's business, it is deemed to be a transfer of common management or control under G.L. c. 151A, sec. 14N(k)(2), because ownership transferred from son to father, and both had similar authority for operating their respective businesses.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which found the employer to be a successor business under G.L. c. 151A, §14N, and thereby responsible for all of the unemployment benefit charges of its predecessor. We review, pursuant to our authority under G.L. c. 151A, §§ 12 and 41, and affirm in part while reversing in part.

On October 17, 2008, the agency determined that the employer was a successor organization and liable for the experience rating and account balance of its predecessor. The employer appealed that determination to the DUA hearings department. Following a hearing on the merits attended by both the employer and a representative from the DUA Employer Liability Unit, a review examiner affirmed the agency's determination in a decision rendered on March 25, 2009. The employer appealed, and we accepted the case for review. Our decision is based upon the 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 on appeal is whether the employer acquired all, or merely a portion, of the assets of another company.

Findings of Fact

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

1. On 10/17/08, [employer] was issued a status determination notifying it that it was subject to the Mass. Employment and Training Law with the employer tax number of [XXX] and a contribution rate of 9.27% (rather than a lower new employer tax rate) because it was determined that there was a transfer of an organization, trade, or business of another employer ([seller]) which at the time of such transfer was an employer in which there is substantially common ownership, management, or control of the transferor and the transferee under Section 14N(a),(c),(e), and (f), and Section 14(n)(1) of the Law.
2. In a letter dated 10/24/08, [employer] appealed the determination.
3. On 9/25/08, [employer] submitted an "Employer Status Report" notifying the DUA that the assets of a predecessor employer, [seller] Inc., (dba [seller name]), was acquired as of 6/13/08. The report also indicated that the Chevrolet portion of the business was re-acquired by General Motors Corp.
4. [Seller], Inc. was a car dealership (organized in 1972) with Chevrolet and Kia franchises located at the same address. The owners of [seller] were listed as [son] (son) and [father] (father). The owner of the new Kia dealership is also listed as [father].
5. [Father] sold his dealership to [son] in 2002. [Father] still owned the property and buildings of the dealership. However, several years later, the business was in financial difficulty and [father] returned to resolve the situation.
6. The Chevrolet portion of the dealership was purchased by General Motors and the car inventory was taken away. That portion of the business no longer operated.
7. However, the Kia dealership was still viable and the assets of that portion of the dealership were purchased and the dealership continued to operate at the same location. The assets included franchise, place of business, customers, accounts receivable, workforce, stock, tools, fixtures, equipment and furniture.
8. [Father] continues to operate the Kia dealership to date. [son] is not part of the new Kia dealership.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

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

(a) If an employer transfers its trade or business, or a portion thereof, to another employer or employing unit and, at the time of transfer, there is substantially common ownership, management or control of the transferor and transferee, then the account of the transferor shall be transferred to the transferee. . . . The transfer of some or all of such employer's workforce . . . shall be considered a transfer of trade [or] business when, as a result of the transfer, the transferring employer no longer performs that portion of the trade or business with respect to the transferred workforce, and the trade or business is performed by the employer to whom the workforce is transferred.

(k) As used in this section the following words shall . . . have the following meanings: --

(2) "Common management or control of corporations" means a chief executive officer, chief financial officer, or any other person holding similar authority for the transferring employer, served as, or had a continuing family relationship with, a chief executive officer, chief financial officer or person holding similar authority for the transferee employer.

In June, 2008, [son] transferred what was left of his dealership, [seller], Inc. ("predecessor"), to his father. Since GMAC had already bought the Chevrolet portion, all that remained was the Kia franchise. It is this transfer of the Kia franchise that is at issue.

It was clear from the employer's testimony at the hearing that these transfers all occurred within the same period of time, and that [father] took over the Kia franchise of his son's business and formed [employr] ("successor") after GMAC acquired the Chevrolet assets.¹ Since the predecessor's business was divided up, the Chevrolet assets going to GMAC and the Kia assets going to his father, the Kia assets constituted only a portion of the predecessor's business. Therefore, the successor acquired only a portion of the predecessor's business.

Although [son] did not participate in the successor's business, G.L. c. 151A, § 14N(k)(2) deems this to have been a transfer of common management or control from the predecessor corporation to the successor corporation, because of the continuing family relationship between father and son.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006).

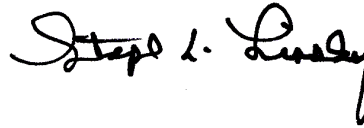
Since only a portion of the predecessor's assets were transferred to the employer, we conclude as a matter of law that there was a transfer of only a portion of the business to the appellant within the meaning of G.L. c. 151A, § 14N.

The review examiner's decision is affirmed to the extent that the appellant is a successor to the Kia dealership, but reversed to the extent that the appellant did not acquire the business that was sold to GMAC. The DUA Employer Liability Unit is instructed to recalculate the employer's contribution rate and account consistent with this decision.

BOSTON, MASSACHUSETTS
DATE OF MAILING - April 14, 2010



John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- May 14, 2010

ab/jv