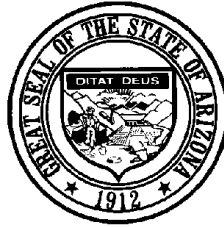


Unemployment Insurance Tax Program Appeals Board Decisions – 2019



**1st QUARTER OF
CALENDAR YEAR 2019**

Arizona Department of
Economic Security



Appeals Board

Appeals Board No. T-1617178-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% PHILLIP R WOOTEN, ASST
ATTORNEY GENERAL CFP/C
2005 N CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is *****April 18, 2019*****.

DECISION
DISMISSED

PETITIONER has withdrawn its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A) pursuant to the Withdrawal of Petition for Hearing dated March 14, 2019.

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
 - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for April 16, 2019, is cancelled. This decision does not affect any agreement entered into between Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 3/19/2019

APPEALS BOARD

WILLIAM G. DADE, Chairman

JANET L. FELTZ, Member

NANCY MILLER, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the

appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 3/19/2019
to:

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Acct. No: T5

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(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
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By: _____
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1608397-001-B

XXX

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 4, 2019 *****.

DECISION
REVERSED

THE **PETITIONER** petitioned for hearing from the Department's Reconsidered Determination issued on August 30, 2018, which affirmed the October 6, 2017, Determination of Unemployment Insurance Liability, and held in part as follows:

... that "Petitioner" acquired or succeeded the organization, trade, or business of "Predecessor" whereby the experience

rating account of “Predecessor” was properly transferred to “Petitioner”.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted by JOSE PAVON, an Appeals Board Administrative Law Judge, on **January 22, 2019**. All parties were given the opportunity to present evidence on the following issue:

- (1) Whether Petitioner is properly liable as a successor entity for the tax liability and tax rate of a predecessor entity, with UI tax rates based upon the predecessor’s experience rating account that is transferred to the Petitioner, under A.R.S. §23-613.

The Petitioner appeared with two witnesses, who testified. The Department appeared with counsel and three witnesses who testified. Board Exhibits 1-4 were incorporated and made part of the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The predecessor was an attorney for approximately 40 years.
2. The predecessor primarily practiced in the areas of civil law (personal injury), criminal law, and family law. He also practiced immigration law.
3. The predecessor’s cases were comprised of 15% immigration, 30% criminal law, 30% family law, and 25% civil law.
4. The Petitioner worked for a year and half as an immigration intern for the predecessor while attending law school.
5. After graduating from law school, the Petitioner worked for other law firms.
6. On August 6, 2016, the Petitioner formed his business entity, “The Law Office of Dario Romero”.
7. On August 6, 2016, the predecessor sent letters to his clients advising them that he was no longer able to represent them. The letter also advised the clients that the Petitioner was willing to meet with them and reach an independent retainer agreement with them.
8. On August 6, 2016, the predecessor advised his employees that they needed to find other employment because he was closing his law firm.

9. On October 20, 2016, the predecessor filed Articles of Termination with the Arizona Corporation Commission (Exh. D9-1).
10. On October 31, 2016, the predecessor was placed on a long term suspension by the State Bar. On February 2, 2017, the predecessor was disbarred (Exh. D8-1).
11. The predecessor's civil law (personal injury), criminal law, and family law cases were either taken by the predecessor's former business partner or other third party legal counsel.
12. Some of the predecessor's immigration clients hired Petitioner to represent them.
13. The predecessor transferred his business phone number to Petitioner in order to facilitate the case file transfer to other counsel and to Petitioner.
14. Two of the eight employees employed by the predecessor were hired by the Petitioner.
15. The Petitioner did not purchase or have transferred to him any of the assets associated with the predecessor.
16. The Petitioner never conducted business activities out of any location that was associated with the predecessor. The predecessor terminated the lease on his business location upon the closing of his business.
17. The predecessor's contracts for electrical services, telephone, internet, copier, and cleaning services were all terminated upon the closing of his business.
18. Desks and other office furniture that were used by the predecessor had been borrowed from the landlord and were returned to the landlord once the business was closed.
19. The predecessor did not sell any computers to the Petitioner.
20. The predecessor did not provide a list of his clients to the Petitioner.
21. During this time period the Petitioner primarily practiced in the area of immigration law.
22. There are no official documents with the Arizona Corporation Commission that indicate any transfer of the business from the predecessor to the Petitioner.
23. On September 5, 2017, a Department employee tried to contact the predecessor at the phone number on file. The person who answered the phone stated that it was the Petitioner's business

and that the predecessor business had been purchased by the Petitioner about a year earlier.

24. On October 6, 2017, the Department issued a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, which held that "Petitioner"... succeeded to or acquired the organization, trade or business, or substantially all of the assets thereof, and continued such organization, trade or business of another employer ...". The Petitioner objected to the transfer of the predecessor's experience rating account to its experience rating account (Exh. D-3).
25. The DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was mailed to the wrong address for the Petitioner, causing a delay in his request for reconsideration.
26. On June 11, 2018, the Petitioner filed his request for reconsideration.
27. On August 30, 2018, the Department issued its Reconsidered Determination.
28. On September 28, 2018, the Petitioner filed a petition for hearing disputing the decision and the determined rate (Exh. D-16).

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.
- B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The

reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

* * *

- D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

* * *

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

- C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.
2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:
 - a. The place of business
 - b. The trade name
 - c. The staff of employees
 - d. The customers
 - e. The goodwill
 - f. The inventory
 - g. The accounts receivable/accounts payable
 - h. The tools and fixtures
 - i. Other assets.
3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer.
...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
 - a. Exempt employment; or
 - b. Employment necessary for the liquidation of the trade or business; or
 - c. Employment arising from the activities establishing another trade or business; or
 - d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

* * *

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.
2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

* * *

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D). [Emphasis added].

* * *

The evidence in this case establishes that there was no transfer of substantially all the assets of the predecessor employer to the Petitioner. The factors in this case do not show an acquisition of a business.

The only issue to be resolved is whether the Petitioner was properly adjudicated to be a successor employer, causing the experience rating account of predecessor to be transferred to Petitioner.

We conclude that the tests for successor transition are set forth in A.R.S. § 23-733(A), and are supplemented by implementation factors in Arizona Administrative Code, Section R6-3-1713, and by case law including *Warehouse Indemnity Corporation v. Department of Economic Security*, 128 Ariz. 605, 627 P.2d 235 (App. 1981). Specifically, the purchase of substantially an entire existing operating business unit suffices to satisfy the statutory requirements requiring transfer of an experience rating account. The evidence establishes that the majority of factors are not supported in this case.

In this case, the predecessor was facing suspension and ultimately was disbarred by the Arizona State Bar. The Petitioner had previously worked as an intern for the predecessor so they had an established relationship. The Petitioner was familiar with some of the predecessor's clients and their cases. As the predecessor was winding down his business, he sent a letter to his immigration clients advising them that the Petitioner was willing to meet with them and reach an independent retainer agreement for representation.

At the time the predecessor was disbarred, he closed his business. Upon closing his practice, the majority of his cases were taken over by his former business partner and third party attorneys. Some of his immigration clients engaged the services of the Petitioner. Also, two of the predecessor's eight employees were hired by Petitioner.

The Petitioner did not keep the same place of business. The entity did not keep the same business name. For the most part, the Petitioner did not hire the predecessor's employees. The Petitioner was retained by a small number of the

immigration clients that had previously engaged the predecessor. The predecessor was disbarred so there would be very little goodwill that could be transferred to Petitioner's business. There was no inventory, or accounts receivable or payable, to be assumed by the Petitioner. No tangible property, tools, fixtures, or assets were purchased or transferred by the Petitioner. These factors show that this entire existing operating business unit was not sold to Petitioner or acquired by Petitioner.

The Petitioner did not engage in a sale or transfer to acquire the organization, trade or business of the previous operator. The transfer of the successor's experience rating account to the Petitioner, as a successor employer that inherited the experience rating account of a seller, is improper. We conclude the Petitioner has presented sufficient evidence to overcome the presumption of successor status, pursuant to Arizona Administrative Code, Section R6-3-1713(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated August 30, 2018, regarding the successor status of the Petitioner.

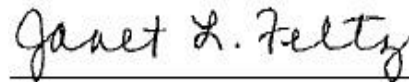
The experience rating account of the predecessor employer was not properly transferred to Petitioner as a successor employer.

DATED: 3/5/2019

APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, Member



NANCY MILLER, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

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- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the

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3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

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A copy of the foregoing was mailed on 3/5/2019
to:

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By: LS
For The Appeals Board

Arizona Department of
Economic Security



Appeals Board

Appeals Board No. T-1599737-001-B

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 18, 2019 *****.

DECISION
AFFIRMED

THE **PETITIONER**, through counsel, petitioned for hearing from the Department's reconsidered determination issued on May 18, 2018, which affirmed the August 2, 2017, Determination of Unemployment Insurance Liability, and held in part as follows:

... that Petitioner was properly determined to have acquired or succeeded the organization, trade, or business of the successor and that successor's experience rating account

was properly transferred to Petitioner.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted by JOSE R. PAVON, an Appeals Board Administrative Law Judge, on **February 19, 2019**. All parties were given the opportunity to present evidence on the following issues:

- (1) Whether Petitioner was liable for Unemployment Insurance Taxes based on being a successor to a liable employer; and
- (2) Whether the predecessor's experience rating account was correctly transferred to the Petitioner, potentially resulting in amounts due in tax, interest, and penalties.

Authority: Arizona Revised Statutes ("A.R.S.") §§ 23-613, 23-613.01, 23-615, 23-617, 23-622, 23-724, or 23-733; and Arizona Administrative Code ("A.A.C.") Sections R6-3-1705, R6-3-1713, and R6-3-1723.

The Petitioner's counsel appeared with no witnesses. The Department appeared with counsel and one witness who testified. Five Board Exhibits were admitted into evidence without objection.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On June 14, 2017, the Department received a Report of Changes from Predecessor, which stated that "All" of its Arizona business was transferred to Petitioner as of December 31, 2016 (Exh. D18).
2. On August 2, 2017, the Department issued a Determination of Unemployment Insurance Liability (Exh. D15), which the Petitioner appealed on September 25, 2017 (Exh. D2).
3. On May 18, 2018, the Department issued a Reconsidered Determination.
4. On June 15, 2018, the Petitioner filed its Petition for Hearing (Exh. D16).
5. The Last Unemployment Tax and Wage Report filed by Predecessor for 2016 4th Quarter was prepared by its director of operations, and had twelve employees listed (Exh. D5).
6. The Unemployment Tax and Wage Report filed by Petitioner for 2017 1st Quarter, was prepared by its director of operations,

and had twelve employees listed (Exh. D7). The list of employees was identical to the list that was included in the Unemployment Tax and Wage Report filed by Predecessor for the 2016 4th Quarter.

7. The Petitioner entity had the same business address as the Predecessor entity according to the Unemployment Tax and Wage Reports.
8. The Petitioner entity retained the customers/accounts that had previously belonged to the Predecessor.
9. The Petitioner's website has Predecessor's name prominently displayed as part of its subheadings (Exh. D12).
10. The Petitioner entity retained a portion of the Predecessor's name as part of its entity name.

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor.

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.
- B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for

hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

* * *

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

- C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.
2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:
 - a. The place of business
 - b. The trade name

- c. The staff of employees
 - d. The customers
 - e. The goodwill
 - f. The inventory
 - g. The accounts receivable/accounts payable
 - h. The tools and fixtures
 - i. Other assets.
3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer.
- ...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
- a. Exempt employment; or
 - b. Employment necessary for the liquidation of the trade or business; or
 - c. Employment arising from the activities establishing another trade or business; or
 - d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

* * *

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.
2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

* * *

The evidence in this case establishes that the transfer was of substantially all the assets of a liable employer. The factors constituting acquisition of a business clearly support this conclusion.

According to the Department, no Unemployment Insurance debts were due and unpaid by Predecessor (Exh. D15, pgs. 6-7). The only issue to be resolved is whether the transaction was properly adjudicated as a successor transition, causing the experience rating account of Predecessor to be transferred to Petitioner.

We conclude that the tests for successor transition are set forth in A.R.S. § 23-733(A), and are supplemented by implementation factors in Arizona Administrative Code, Section R6-3-1713, and by case law including *Levy v. Arizona Dept. of Economic Security*, 132 Ariz. 1, 643 P.2d 704 (1982). Specifically, other factors considered in determining acquisition or succession are: 1) was the business an operating unit upon acquisition, 2) did the management from the Predecessor continue with the Petitioner, 3) did the Predecessor have the same ownership as the Petitioner, 4) did employees from the Predecessor continue with the Petitioner, 5) did the Petitioner continue with substantially the same identity as the Predecessor, 6) did the Petitioner continue with substantially the same business as the predecessor.

The Predecessor filed a Report of Changes which stated that "All" of its Arizona business was transferred to Petitioner as of December 31, 2016. No evidence was presented to refute the Predecessor. In transferring all of its business the Predecessor also transferred its employees and company officials,

including the director of operations, who filed Unemployment Tax and Wage Reports for both the Predecessor and Petitioner.

The Petitioner's place of business was at the same location as that of the Predecessor. The Petitioner retained the same customers/accounts that had previously belonged to the Predecessor. The Petitioner's website has Predecessor's name prominently displayed on it as its Phoenix, Arizona location (Exh. D9). The Petitioner also kept the main portion of the Predecessor's business name which allowed it to benefit from the goodwill built up by the Predecessor.

The Petitioner was represented by Counsel at the hearing but did not appear to provide testimony. The Department's witness provided credible uncontested testimony.

The Petitioner engaged in a transfer of the organization, trade or business of the Predecessor, but has requested separate and distinct status from the previous operator. The transfer of the Predecessor's experience rating account to the Petitioner, as an entity that inherited the experience rating account of the previous entity, is required. We conclude the Petitioner has not presented sufficient evidence to overcome the presumption of successor status, pursuant to Arizona Administrative Code, Section R6-3-1713(A)(3). Accordingly,

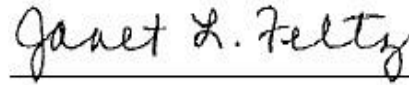
THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination decision dated May 18, 2018, that Petitioner is a Successor to a liable Employer.

DATED: 3/19/2019

APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, Member



NANCY MILLER, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
 - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 3/19/2019
to:

Er: XXX

Acct. No: T4

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By: _____
For The Appeals Board