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From:
Sent: Monday 10/19/2009 2:40 PM
To:
Cc:
Subject: Retention of Payment Made by Successor Corporation,

Generally, a Maryland corporation that acquires the assets of another corporation does not acquire the other corporation's liabilities. Nissen Corp. v. Miller, 594 A.2d 564, 565-566 (Md. 1991). Four exceptions to this general rule exist: (1) there is an express or implied agreement that the purchasing company will assume the liabilities; (2) the purchase results in a consolidation or merger; (3) the successor entity is a mere continuation of the predecessor entity[1]; and (4) the transaction was fraudulent, made in bad faith, or there was insufficient consideration for the transaction. Id. If any of the four exceptions exist, then a court will impose successor liability upon the purchasing company.

Here, there was no express or implied agreement that Company B would assume Company A's responsibilities because the sales agreement between the companies specifically stated that Company A's shareholders were personally responsible for Company A's prior tax liabilities. However, without more specific information about the transaction between Company A and Company B it is impossible to determine whether Company B should be liable for Company A's tax debt as Company A's successor.

Regardless, the Internal Revenue Code only authorizes the Service to issue a refund when an overpayment exists and to issue the refund to the person who made the overpayment. I.R.C. § 6402(a); Lewis v. Reynolds, 284 U.S. 281, 283 (1932). An overpayment is any amount in excess of a tax liability or any amount assessed or collected after the expiration of the applicable limitations period. I.R.C. § 6401; Jones v. Liberty Glass, 332 U.S. 524, 531 (1947) reh'g denied, 333 U.S. 850 (1948). Here there is no overpayment because Company B paid an owed tax liability. As a result, Company B's payment did not create an overpayment. Because the Service is only authorized to make a refund if an overpayment exists and because no overpayment

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[1] Successor liability under a continuity of entity theory exists when there is a continuation of directors and management, shareholder interest, and inadequate consideration for the purchase of the defunct company. Acad. of IRM v. LVI Envtl. Servs., Inc. 687 A.2d 669, 677-678 (Md. 1997). The corporate entity rather than the business operation must continue to exist in order to impose successor liability. Id. at 678.

exists here, the Service cannot refund Company B the money it paid to satisfy Company A's tax liability.

I.R.C. § 7426, authorizing suits by third parties, is the only avenue for a third party regarding a taxpayer's liability. See e.g. First Am. Title Ins. Co. v. United States, 520 F.3d 1051, 1053 (9th Cir. 2008); Wagner v. United States, 545 F.3d 298, 303 (5th Cir. 2008). However, neither I.R.C. § 7426 nor 28 U.S.C. §1346(a) (conferring jurisdiction on district courts to hear refund suits) provide for a third party to bring a refund suit when the third party voluntarily paid a taxpayer's liability. Therefore Company B does not have standing to bring a refund suit for the payment it made to satisfy Company A's tax liability.

In similar cases, third parties that sought a refund of taxes paid to satisfy his company's tax liability have been found to have no standing by some district courts but standing in other district courts. Barris v. United States, 851 F.Supp. 696 (W.D. Pa. 1994) (finding that the plaintiff had standing to seek a refund of taxes paid by plaintiff to satisfy company's liability); Richard Craig Krause, P.C. v. United States, 1996 WL 882652 (W.D. Mich.) (finding that the plaintiff had no standing to seek a refund), However, these cases are both prior to the decisions in First American Title Insurance Co. and Wagner which establish § 7426 as the exclusive avenue for third parties to challenge assessments against taxpayers. Therefore, should Company B file a refund suit in district court, it is most likely that the district court would hold that Company B has no standing to bring such a refund suit.

Please let me know if you have any questions or concerns.