



Buyers Beware

...of the Department of Treasury!

That new liquor license may come with something you didn't expect: The previous owner's tax burden.

According to published reports, the story goes like this: A purchaser of a liquor license (specially designated distributor or SDD license selling beer, wine and liquor for consumption off the premises) purchased a liquor license that was being held in escrow with the Michigan Liquor Control Commission for 9 months. In January 2003, the purchaser applied to have the SDD license transferred to the Buyer and the MLCC investigated and approved the transfer. At no time during the nine-month transfer application process was the Buyer made aware that the state of Michigan was asserting tax liens and after the MLCC approved the Buyer for the transfer, the Buyer paid the Seller and the SDD license transferred to the Buyer in September 2003.

In April 2004, the Michigan Department of Treasury sent a letter to the Buyer demanding \$100,000 for sales and single business taxes owed by the previous owner of the SDD license! The Buyer is now informed that between 1996 and 2002, the Seller failed to pay over \$70,000 in actual taxes due and had incurred over \$30,000 in penalties and interest. Normally, the Department of Treasury will look to the taxpayer for payment of back taxes, but in this case, the Department took the position that the Buyer has "successor liability" for the back taxes because the Buyer purchased the SDD license from the Seller. The Department argues that the Buyer should obtain a "Tax Clearance Certificate" before he/she purchases a license in order to be sure that there are no taxes owed by a previous licensee

... even if the Department never files a lien.

Unfortunately, we have seen too many liquor license deals go south because the Seller and Seller's counsel refuse to obtain tax clearance certificates and argue that since the Department of Treasury has not filed a lien, there is no need to obtain a Tax Clearance Certificate and the Buyer should be comforted that there are no filed liens. We have been communicating with the Department of Treasury for quite some time to get clarification on the State's position on this issue.

It is the position of the Michigan Department of Treasury that the acquisition of a liquor license gives rise to potential successor liability under MCL 205.27a(1) in those instances where funds are not escrowed and a Tax Clearance Certificate is not obtained. The Department relies on the Revenue Act, MCL 205.27a(1), which provides:

If a person liable for a tax administered under this act sells out his or her business or its stock of goods or quits the business, the person shall make a final return within 15 days after the date of selling or quitting the business. The purchaser or succeeding purchasers, if any, who purchase a going or closed business or its stock of goods shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the state treasurer or the state treasurer's designated representative showing that the taxes due are paid, or a certificate stating the taxes are not due ... If the purchaser or succeeding purchasers of a business or its stock of goods

fail to comply with the escrow requirements of this subsection, the purchaser is personally liable for the payment of taxes, interest, and penalties accrued and unpaid by the business of the former owner. The purchaser's or succeeding purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in section 29(1).

According to case law, a liquor license is property that has value and can be sold. *Underground Flint, Inc. v Viro, Inc.*, 80 BR 87, 88 (ED Mich, 1982) states in part: "a liquor license is personal property in the sense that it has value even though it is not tangible." Another case, *In re Terwilliger's Catering Plus, Inc.*, 911 F2d 1168, 1171 (Oh, 1990), says: "a liquor license has pecuniary value to its holder since the license enables the holder to sell alcoholic beverages and can be sold for value. Since the state has vested the owner of a liquor license with these beneficial interests, a liquor license constitutes 'property' or 'rights to property'."

The Department of Treasury also relies on out of state case law in *Steman v Shibley*, 1981 WL 5664 (Ohio App 6 Dist), wherein the Ohio court held: "Sales taxes follow the liquor license and accrue to the liability of a purchaser of business (where the liquor license is involved) if they are unpaid. Thus, when assets, including the liquor license, are finally transferred to a purchaser ... any unpaid and/or subsequently accruing taxes follow the license and in fact the purchaser becomes personally liable for the payment of taxes."

According to the Department of Treasury's analysis, the application of Section 27a(1) and the judicial authority establish that the purchaser of a predecessor's business assets in the form of a liquor license is subject to successor liability. The purpose of successor liability statutes, argues the Department, is to impose personal liability on the purchaser of assets who "disregards" the statutory obligations.

The Department takes this position a step further, holding that even unfiled tax liens are subject to successor liability. So, even if a purchaser does its due diligence and performs a Uniform Commercial Code search of the Seller and discovers no tax liens filed or recorded, the purchaser cannot rely on these publicly filed documents. The Department takes the position that under *C J Rogers, Inc v Department of Treasury*, 6 MTT 148 (1989), Section 27a(1) of the Revenue Act imposes successor liability on a subsequent purchaser even if such taxes were not due and owing at the time of the transaction. The Department of Treasury may impose successor liability on a purchaser even if the taxes owed by the Seller are not due.

Without getting into the merits of the Department's position, Buyers Beware! Even though a Buyer may obtain a UCC search showing that there are no filed security interests or tax liens, do not close a liquor license acquisition or transfer until you have a Tax Clearance Certificate from the Department of Treasury indicating that there are no taxes due or owing.

When Sellers challenge you that there is no need for a Tax Clearance Certificate, it's your responsibility to insist ... or just walk away. And remember to always consult your own legal counsel. ■

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