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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-176 / 89-1295

KEOKUK FERRO-SIL, INC.,

Appellant,

171

vs.

IOWA DEPARTMENT OF JOB SERVICE,

Appellee.

Appeal from the Iowa District Court for Lee County, William S. Cahill, Judge.

Appellant challenges the district court decision which affirmed the agency's decision holding that appellant was a successor employer under Iowa Code sections 96.19(5)(b) and 96.7(2)(b). **REVERSED AND REMANDED.**

John H. Smith of Dickey, Smith, Kultala & McDonald, Keokuk, for appellant.

Walter F. Maley, Iowa Department of Job Service, for appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Appellant challenges the district court decision which affirmed the agency's decision that when appellant purchased an Iowa manufacturing plant, appellant became a successor employer under Iowa Code sections 96.19(5)(b) and 96.7(2)(b).

Foote Mineral Company, a large Pennsylvania metal manufacturer with plants in several states, had conducted a ferrosilicon manufacturing operation in Keokuk, Iowa. Because of decreasing demand for its products, Foote decided to discontinue its operations in Keokuk. Foote informed its customers and employees at the Keokuk plant of its decision to close the plant as of December 31, 1987. The plan was to terminate all the Keokuk employees and dismantle the plant.

Before the actual closing took place, the eight-person local management staff of the Keokuk operation negotiated a purchase agreement with the Foote executives. On December 30, 1987, Foote transferred the plant assets to Keokuk Ferro-Sil, Inc. (Ferro-Sil), a new corporation formed by the Iowa management staff. Ferro-Sil thereby acquired the manufacturing facility which included approximately ninety acres of land along with all the structures, buildings, fixtures, vehicles, raw materials, supplies, and other items of personal property used in connection with the manufacturing process. Ferro-Sil also

acquired Foote's customer lists and the right to deal with Foote customers.

Foote did not transfer certain of its finished inventory, its accounts receivable, cash, goodwill, or its trade name. The Foote executives, which had been directing personnel, finance, sales, public relations, marketing, or operations management from the Pennsylvania office, did not become Ferro-Sil employees. After the sale, the eight Iowa managers took over these responsibilities.

Ferro-Sil also agreed to take on Foote's approximately 140 workers, thereby eliminating $870,000 that Foote would owe in severance pay. Most of these local hourly employees were hired upon the acquisition, and the Keokuk plant was never actually closed.

Prior to the sale, Foote had a separate unemployment account with the Iowa Department of Job Service for the Keokuk plant. In January 1988, Ferro-Sil applied for its employer account number. A Job Service investigator set the tax rate at 8.5% based on Foote's job insurance experience. Ferro-Sil unsuccessfully fought the assessment before the agency, urging that it should be treated as a new business and receive a beginning company rate of 2.1%. The district court affirmed the agency and Ferro-Sil appeals.

On appeal, Ferro-Sil urges that since Iowa Code sections 96.7(2)(b) and 96.19(5)(b) are statutes of a

taxing nature, they should be construed strictly against the taxing body and liberally in favor of the taxpayer. Under such an interpretation of 96.7(2)(b), a successor would not assume the position of a predecessor with respect to contribution rates unless that successor had applied to assume those rates within sixty days of the succession. By strictly construing 96.19(5)(b), Ferro-Sil is not a successor employer since it did not acquire substantially all of Foote's assets, rather it only acquired less than 20% of the total asset value of the Keokuk plant.

Ferro-Sil suggests that it is not a successor employer because the court failed to give substantial weight to those intangible assets it did not receive such as goodwill, accounts receivable, trade name, management personnel, and corporate wherewithal.

Ferro-Sil then argues that it should not have been assessed Foote's excessive rate since Foote had many other factors which caused it to have layoffs that Ferro-Sil is not likely to have. Unlike Foote, Ferro-Sil is not unionized and does not have plants in other states to which business can be transferred to cause Iowa plant reductions. Finally, Ferro-Sil believes that the district court's interpretation of these statutes is contrary to the public policy of attempting to encourage new businesses and preserving jobs for Iowa residents. Assessing the bad debt of an old company against the earnings of a new company

which is owned, operated, and financed by different persons, cannot be deemed as treating a new business fairly. New companies should have their contribution rates set and adjusted to reflect their own claim experience.

This appeal results from a contested case state agency proceeding. See Iowa Code § 17A.2(2) (1987). In "contested case" proceedings, the agency, rather than the district court, is empowered to hear evidence and make findings of fact. Iowa Code § 17A.19(7) (1987). The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. Iowa Code § 17A.19(8) (1987). Kohorst v. Iowa State Commerce Comm'n., 348 N.W.2d 619, 621 (Iowa 1984). Our review of the district court's decision is limited to correction of errors at law. Roberts v. Iowa Dep't of Job Service, 356 N.W.2d 218, 221 (Iowa 1984). We, like the district court, are bound by the agency's fact findings if those findings are supported by substantial evidence. Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Peoples Memorial Hospital v. Iowa Civil Rights Comm'n., 322 N.W.2d 87, 91 (Iowa 1982).

Ferro-Sil contends the statutes conferring successor liability are taxing statutes and therefore must be construed in favor of the taxpayer. In Moorman v. Unemployment Compensation Comm'n., 230 Iowa 123, 130, 296

N.W. 791, 794 (1941), the Iowa Supreme Court construed the predecessor to Iowa Code section 96.7. The court held that even though the statute was of a remedial character, the statute was of a taxing nature and therefore must be construed against the taxing body. Id. There is little question that section 96.7 is of a taxing nature. Although it is true that courts give weight to administrative interpretation of statutes, it is well settled in this state that in the interpretation of taxing statutes doubtful language is to be resolved in favor of the taxpayer and against the taxing body. General Expressways, Inc. v. Iowa Reciprocity Bd., 163 N.W.2d 413, 423 (Iowa 1968). With this rule of construction in hand we now approach the remaining issues.

The statutes in question state in pertinent part:

> If an enterprise or business, or a clearly segregable and identifiable part of an enterprise or business, for which contributions have been paid is sold or transferred to a subsequent employing unit, or if one or more employing units have been reorganized or merged into a single employing unit, and the successor employer, having qualified as an employer as defined in section 96.19, subsection 5, paragraph "b", continues to operate the enterprise or business, the successor employer shall assume the position of the predecessor employer or employers with respect to the predecessors' payrolls, contributions, accounts, and contribution rates to the same extent as if no change had taken place in the ownership or control of the enterprise or business. However, the successor employer shall not assume the position of the predecessor employer or employers with respect to the predecessor employer's or employers' payrolls, contributions, accounts, and contribution rates which are attributable to that part of the enterprise or business transferred, unless the

> successor employer applies to the division within sixty days from the date of the partial transfer, and the succession is approved by the predecessor employer or employers and the division.

Iowa Code section 96.7(2)(b).

> "Employer" means:
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> Any employing unit (whether or not an employing unit at the time of acquisition) which acquired the organization, trade or business, or substantially all of the assets thereof, or another employing unit which at the time of such acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade, or business of another employing unit which at the time of such acquisition was an employer subject to this chapter. Provided, that such other employing unit would have been an employer under paragraph "a" or this subsection, if such part had constituted its entire organization, trade or business.

Iowa Code section 96.19(5)(b).

Ferro-Sil contends the language in section 96.7(2)(b), requiring an application by the successor employer within sixty days of the transfer in order to assume the position of the predecessor employer, applies to its situation. Section 97.7(2)(b) clearly intends the sixty-day notice to apply only in the case of a partial transfer where the successor employer hopes to receive something less than the predecessor employer's full contribution rate. The statute clearly states that the application must be made within sixty days "of the partial transfer." In addition, it would make little sense to require a successor employer to assume the rate of its predecessor, and then in the same section allow the successor the choice of whether to assume

the old rate. The sixty-day limitation does not apply to the appellant's situation.

The next issue raised by appellant is whether the district court properly determined that substantially all of the assets had been transferred within the meaning of Iowa Code section 96.19(5)(b). That section provides two separate tests to determine whether the successor is required to assume the previous contribution rate. The first is whether the acquisition was of all or part of the organization, trade, or business of the transferor. The second is whether there was acquisition of substantially all of the assets of the transferor. See Riteway Oil & Gas Co. v. Iowa Dep't of Job Service, 423 N.W.2d 550, 551 (Iowa 1988). These are alternate tests. Contract Services v. Iowa Dep't of Job Service, 372 N.W.2d 212, 214 (Iowa 1985). Ferro-Sil claims the determination challenged in this case was based upon the agency's conclusion that Foote transferred substantially all of the assets to Ferro-Sil. However, it is apparent from the record the agency may have used either or both tests in making its determination. Therefore, we will examine the facts under both tests.

The Iowa Administrative Code provides guidance on when either of the tests set out in Iowa Code section 96.19(5)(b) are satisfied. 345 Iowa Adm. Code 3.28(2) and 3.28(3) set out the requirements to satisfy the tests, and state as follows:

> An "organization," "trade" or "business" as used in section 96.19(5)"b" is acquired if an employing unit acquires factors of an employer's organization, trade or business sufficient to constitute an entire existing going business unit as distinguished from the acquisition of merely 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:
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> a. The place of business.
> b. The staff of employees.
> c. The customers.
> d. The good will.
> e. The trade name.
> f. The stock in trade.
> g. The accounts receivable.
> h. The tools and fixtures.
> i. Other assets.

Iowa Adm. Code 3.28(2).

> Substantially all of the assets as used in section 96.19(5)"b" are acquired if an employing unit acquires substantially all the assets of any employer which generate substantially all of the employment, except those retained incident to the liquidation of obligations.

Id. at 3.28(3).

The test requiring the acquisition of factors of an employer's organization, trade or business has not been satisfied in this case. The record is clear that Ferro-Sil, rather than acquiring an entire existing going business, acquired merely assets from which it built a new business. Riteway Oil & Gas Co., at 551. Ferro-Sil did not acquire Foote's accounts receivable, trade name, or goodwill. Id. It did acquire some of the work force but not the upper echelon of employees. All that continued from Foote's business was the operation of the same generic

type of business at the same location. Id. This is not enough to constitute the continuity of business envisioned by the statute. Id. We hold that as a matter of law Ferro-Sil did not continue to operate all or part of Foote's business and, therefore, does not qualify as a successor employer within section 96.7(2)(b).

The test apparently used by the agency and claimed to have been used by the appellant is the test requiring acquisition of substantially all of the assets. A major concern of the appellant is the failure of the district court to factor in the accounts receivable as an asset. Spagnola v. State, 237 Iowa 645, 647, 23 N.W.2d 433, 435 (Iowa 1946), held that accounts receivable were assets within the contemplation of the statute. The accounts receivable in this case were in excess of four million dollars. Ferro-Sil in effect only purchased 20% of the total assets of the Foote operation. This cannot constitute substantially all of the assets within the meaning of section 96.19(5)(b). The appellee contends that the failure to transfer accounts receivable should be given very little weight. Appellee relies on Contract Services v. Iowa Dep't of Job Service, 372 N.W.2d 212, 216 (Iowa 1985). In that case the court held that the failure to transfer liquid assets such as accounts receivable will be reflected in a lower purchase price and should not be given great weight. However, Contract Services was dealing with

the first test of section 96.19(5)(b), not the "substantially all of the assets" test. The facts in Contract Services also supported the conclusion that the purchase price reflected the failure to transfer the accounts receivable and other liquid assets, while the facts in this case do not. In addition, Spagnola specifically held that accounts receivable were to be considered, and Riteway Oil & Gas, a 1988 case, relied on the failure to transfer accounts receivable in order to reverse a contribution rate assessment.

The test in question requires transfer of substantially all of the assets. The accounts receivable in this case make up such a large portion of the company that as a matter of law the transfer did not include substantially all of the assets. The appellant in this case did not acquire substantially all the assets of the business, did not succeed to the prior status of Foote as an employer, and is not liable for the same contribution rate under Iowa Code section 96.7(2)(b). We reverse the district court's affirmation of the agency decision. We also remand for a determination of a new contribution rate by the agency.

We need not address the remaining issues raised by the appellant.

REVERSED AND REMANDED.