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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-193966 DATE: April 12, 1979

MATTER OF: Ship-Rite Transporters, Inc. DLG00029

[Liability of Carrier for Overcharges of Related Carrier]

DIGEST:

Even though corporation and debtor corporation were formed by same officers and shareholders, acquisition by corporation of operating rights of debtor and carrying on of debtor's business with same personnel do not establish that the purchasing corporation is mere continuation of selling corporation and do not justify deductions from monies due corporation for overcharges collected by debtor, where there is evidence that corporation was in corporate existence for several years prior to acquisition, transfer was accomplished through formal administrative proceedings for fair consideration in cash, and debtor remains in corporate existence. B-191129, September 8, 1978, distinguished.

In a letter of January 17, 1979, Alan D. Gould, President of Ship-Rite Transporters, Inc. (Ship-Rite), 210 Verdi Street, Farmingdale, New York, requests review by the Comptroller General of action taken by the General Services Administration (GSA) in AGC00017 recovering by deduction from freight charges otherwise due Ship-Rite, alleged overcharges billed and collected by Empire Household Shipping Company of New York, Inc. (Household). A deduction action constitutes a settlement within the meaning of Section 201(3) of the General Accounting Office Act of 1974. 49 U.S.C. § 66(b) (Supp. V, 1975). Under regulations implementing Section 201(3) of the Act, a deduction action constitutes a reviewable settlement action (4 C.F.R. §§ 53.1(b)(1) and 53.2 (1978)); Ship-Rite's letter complies with the criteria for requests for review of such an action. 4 C.F.R. § 53.3 (1978).

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The validity of the overcharges is not in issue; the issue for resolution is whether it was proper for GSA to make the deductions of $5,367.43 from monies due Ship-Rite. While GSA apparently recognizes that Household is the debtor, GSA contends that the corporation known as Ship-Rite is the mere continuation of the corporation known as Household. The facts relied on by GSA for its contention are derived from the record in Interstate Commerce Commission (ICC), Finance Docket No. 28461, in which the ICC's

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order of August 8, 1977, authorized the transfer to Ship-Rite of the freight forwarder operating rights, FF-245, Sub 5, issued to Household on December 12, 1973.

GSA stresses that the two corporations share a common identity of officers and principal shareholder, pointing to Alan D. Gould as president and sole shareholder of both companies, apparently through a holding company, Empire Surface Air Enterprises, Inc. On these facts GSA asserts that our decision B-191129, September 8, 1978, is applicable. There we held, among other things, that the burden of showing that a new company is not a mere continuation or reorganization of an old company is on the corporation seeking to avoid liability for debts of the old company.

In B-191129, as well as here, the possessor corporation contended that while it acquired the operating rights of the debtor corporation it did not assume its obligations. In both cases there is a common identity of corporate officers and shareholders. Other pertinent facts were considered in B-191129.

The record there disclosed that all the stock of the debtor corporation, Astro Airways, Inc., d/b/a Mission Airlines (debtor), was purchased in 1973 by the same person who later incorporated and became president of the possessor corporation, Express Airways, Inc. (Express). The assets of the debtor were purchased at a judicial sale on July 15, 1975, by Express which was incorporated only five weeks previously, June 9, 1975, by the president of the debtor corporation. Further, we found that in addition to carrying on the debtor's business under the same rate system with the same personnel, prior to the sale of the debtor's assets, some freight bills were paid to Express in behalf of the debtor, and the common officer identified to both corporations petitioned the Federal Aviation Administration for a change of name on the operating certificate, rather than for a transfer from the debtor to Express.

Some facts in the Ship-Rite record, in addition to common officers and shareholder, tend to indicate a common corporate identity, such as both corporations at various times have had the same address, 210 Verdi Street, Farmingdale, New York, and both corporations were represented by the same legal counsel in the ICC transfer proceedings; however, the Ship-Rite record also discloses material distinctions in facts.

By application signed by Alan D. Gould, President, on September 10, 1958, Household acquired a permit from the ICC to operate as a freight forwarder. Presumably, Household's operations under that authority gave rise to the overcharges that eventually resulted in this review.

On April 21, 1977, the date on which the joint transfer application was filed with the ICC in Finance Docket 28461 by the debtor corporation (Household) and the possessor corporation (Ship-Rite) requesting transfer of the operating rights in FF-245, Sub 5, from Household to Ship-Rite, Ship-Rite had been in corporate existence in New York for over 23 years, albeit incorporated on August 26, 1953, in the name of Empire Foreign Air Forwarders, Inc. (Foreign). The corporate name was changed to Ship-Rite by certificate of amendment under Business Corporation Law § 805 on February 16, 1977. Apparently Foreign had been engaged in international air forwarding since January 8, 1960. See B-183647, May 16, 1975.

Exhibit C of the transfer application shows that consideration of $7,500 was to be paid in cash by Ship-Rite for the purchase of the operating rights. Exhibit C-6 shows that plans had been made by Ship-Rite to borrow the consideration, if necessary, if the cash was not available at the time of consummation of the transfer. Exhibit C disclaims any assumption by Ship-Rite of Household's obligations.

In a letter of September 15, 1978, to GSA, Ship-Rite explained that Household was still in corporate existence. An enclosure to Ship-Rite's letter of January 22, 1979, to this Office, contains advice of Ship-Rite's legal counsel that in an unidentified judgment obtained in a case styled "Sutes, S.P.A. v. Empire Household Shipping Company of New York, Inc., d/b/a Ship-Rite Transporters, Inc.," the defendant's name was changed by striking the phrase "d/b/a Ship-Rite Transporters, Inc."

To summarize the material distinctions of fact in the Ship-Rite record, Ship-Rite had been in corporate existence for several years prior to acquisition of the operating rights from Household; formal application was made to the regulatory agency for a transfer of operating rights; no evidence appears challenging the fairness of the consideration allocated by Ship-Rite for Household's operating rights; the consideration is cash; there is no evidence refuting

continued existence of Household; there is no allegation or evidence of fraud. These facts clearly distinguish Ship-Rite from our decision in B-191129.

In B-191129, the possessor corporation, that is, the one acquiring the operating rights of the debtor, was newly formed and controlled to some extent the finances, freight billings and general business activities of the debtor corporation. These facts, more than common identity of officers and shareholder, determined our decision in B-191129. Here, the GBLs were issued to Household, the payment vouchers were submitted by Household, or waived to an agent, other than Ship-Rite, and Notices of Overcharge were issued to Household.

The mere acquisition by one corporation of the assets of another corporation and the carrying on of the seller's business without change of personnel, even though the buyer is organized by the shareholder and officers of the selling corporation, are not sufficient to support the proposition that the purchasing corporation is merely a continuation of the selling corporation, one of the exceptions to the general rule that a corporation that purchases assets of another is not liable for liabilities of the seller. McKee v. Harris-Seybold Co., Div. of Harris-International Corp., 264 A.2d 98, aff'd 288 A.2d 585 (Sup. Ct. N.J. 1972). What is involved is weighing the policy to protect corporate creditors against the policy to respect separate corporate identity. 264 A.2d at 106.

We have carefully analyzed the facts against other exceptions to the general rule. In addition to the "mere continuation" theory, the court in Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F.Supp. 834 (S.D.N.Y. 1977) noted other exceptions such as an express or implied agreement to assume the seller's debts, or a merger or consolidation, including a de facto merger. The court in the McKee case noted another exception, inadequate consideration for the transfer of assets (264 A.2d at 102), and the court in Kloberdanz v. Joy Mfg. Co., 288 F.Supp. 817 (D. Colo. 1968) noted still another exception, fraudulent transaction to escape liability for debts.

There is no evidence of fraud, but there is evidence of fair consideration and the continued existence of Household; therefore, the Government has a remedy against the debtor. These facts rule out the existence of an implied assumption of liabilities. See 431 F.Supp. at 839.

No de facto merger exists where the sale of assets is for cash, and where the seller remains in existence and possesses assets to satisfy demands of creditors. Fehl v. S.W.C. Corp., 433 F.Supp. 939 (D. Del. 1977); see also 431 F.Supp. at 839.

There appears to be no theory under the facts in this record by which Ship-Rite can be held liable directly for the debts of Household. Household and Ship-Rite appear to be distinct corporate entities, despite common officers, shareholder, corporate location and legal counsel. On this record it was improper to make the deductions from monies due Ship-Rite for overcharges collected by Household.

Settlement should be made by GSA consistent with this decision.

R. F. Keller

Deputy Comptroller General
of the United States