

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Anastasia Agne
Collection Policy

from: Laurence Williams
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subject: The Test for “Predecessor” in I.R.C. § 6330(f) and (h)

I.R.C. § 6330(f) permits the Internal Revenue Service to collect by levy certain employment tax liabilities without giving section 6330(a) Collection Due Process (CDP) hearing rights if the levy is a disqualified employment tax levy (DETL). A DETL, as defined in section 6330(h), is a levy to collect an employment tax liability if the taxpayer or a *predecessor* requested a hearing under section 6330 for unpaid employment taxes arising in the two-year period prior to the beginning of the taxable period to be collected by levy. The purpose behind requiring a prior CDP hearing request within this time period is to ensure that a taxpayer has had a recent opportunity to resolve the collection of employment tax liabilities in a CDP hearing. Accordingly, a taxpayer must have a sufficient identity with the predecessor such that the CDP hearing given to the predecessor may be imputed to the taxpayer.

The Service should use the following test to determine if a business that requested a CDP hearing for a prior employment tax quarter is a “predecessor” of the taxpayer against whose assets a DETL may be served. If a business is a “predecessor” of the taxpayer, then under section 6330(h) the taxpayer is deemed to have had a prior CDP hearing to resolve its employment tax liabilities.

Test:

Determine whether a business is a predecessor business for the purpose of section 6330(h) by applying the following factors:

1. The taxpayer has substantially the same owner(s) or shareholder(s) and the same officer(s) as the prior business.
2. The same individual(s) are actively involved in running the taxpayer that were actively involved in running the prior business, regardless of whether they are officially listed as the owners/shareholders/ officers.
3. There is no evidence that the taxpayer’s owner(s) or shareholder(s), if different than before, acquired the business in an arms-length transaction for fair market value.
4. The taxpayer provides substantially the same product(s), service(s), or function(s) as the prior business.

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5. The taxpayer has substantially the same customers as the prior business.
6. The taxpayer has substantially the same assets as the prior business
7. The taxpayer has the same location/telephone number/fax number, etc. as the prior business.

No one factor is determinative. A tax-avoidance motivation for the change is not a requirement.

A business will not be considered a predecessor if there has been a genuine change in control and ownership of the business. A genuine change in control and ownership of the business is present if (1) it was acquired in an arm's length transaction for fair market value, and (2) the previous owner(s) has (have) ceased all involvement in running the business.

If the previous owner serves for a limited period as a consultant to the new business solely in an advisory capacity, then the prior owner should not be deemed to have any involvement in running the new business.

EXAMPLE #1:

Company A, in the business of selling equipment, was owned by Individual X. After Company A failed to pay employment taxes for several quarters in Year 1, the Service sent Company A a CDP notice. Company A requested a CDP hearing. After the CDP hearing, Individual X formed Company B, which also sold equipment. Company B used the same supervisors, sold the same equipment, was in the same location, and had the same phone number as Company A. Company A is a predecessor of Company B.

EXAMPLE #2:

Company C, in the business of storage, was owned by Individual W. After Company C failed to pay employment taxes for several quarters in Year 1, the Service sent a CDP notice to Company C. Company C requested a CDP hearing. After the CDP hearing, Individual W sold the assets of Company C to Individual Y for fair market value in an arm's length transaction. Individual Y used these assets to form Company D, which also engaged in the storage business and used the same employees and maintained the same customers, location, and phone number as Company C. Individual W was not involved in the operation of Company D. Company C is not a predecessor of Company D.

EXAMPLE #3:

Company E, in the business of providing childcare, was owned by Individual G. After Company E failed to pay employment taxes for several quarters in Year 1, the Service sent a CDP notice to Company E. Company E requested a CDP hearing. After the CDP hearing, Individual G's daughter, Individual H, formed Company F, which also

provided childcare. Individual G was actively involved in running Company F. Company F used the same supervisors, cared for the same children, was in the same location, and had the same phone number as Company E. Company E is a predecessor of Company F.

If you have any questions, please contact Elizabeth Cowan at (202) 622-3283.