BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
HI COUNTRY BUICK GMC, INC. **No. 14-19**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO. L1537828416

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on April 7, 2014 before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Attorney Zachary McCormick appeared representing Hi Country Buick GMC, Inc. ("Taxpayer"). Mr. Jeff Thomas, Taxpayer's President, appeared and testified. Bradford Furry, represented by R. Tracey Sprouls, appeared as a Taxpayer witness. Staff Attorney Cordelia Friedman appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Andrick Tsabetsaye and Bureau Chief Kimberly Lowe appeared as a witness for the Department. Taxpayer Exhibits #1, #2, #4-12, and #14 were admitted into the record. Department Exhibits A, C-G, and I were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. At the request of the hearing officer, the parties submitted legal briefing on April 21, 2014 the date this matter became ripe for a decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On May 20, 2011, the Department assessed Taxpayer as a successor in business for $217,957.51 in tax, $47,859.15 in penalty, and $17,094.32 in interest for a total assessment of $282,910.98. **[Letter id. no. L1537828416]**.

2. The assessment included a second page titled "Period Breakdown of Successor in Business Tax Assessment," listing the monthly liabilities of tax, penalty, and interest.

3. On May 25, 2011, Taxpayer asked for an extension of time in which to file a protest of the assessment.

4. On May 27, 2011, the Department granted Taxpayer an extension of time until August 18, 2011 to file a protest.

5. On August 4, 2011, Taxpayer protested the Department's assessment.

6. In Taxpayer's August 4, 2011 protest letter, Taxpayer's representative acknowledged consulting with the Department and learning that the successor in business assessment covered gross receipts tax and withholding tax.

7. On August 15, 2011, the Department acknowledged receipt of Taxpayer's protest.

8. On November 5, 2012, Taxpayer's previous representative withdrew from representing Taxpayer.

9. On July 19, 2013, the Department requested a hearing in this matter.

10. On July 25, 2013, Chief Hearing Officer Monica Ontiveros sent the parties a letter asking the Department to provide any other assessments the Department may have issued to this taxpayer or an argument as to why the assessment sufficiently stated the nature of the assessed tax.

11. On July 29, 2013, the Hearings Bureau issued Notice of Administrative Hearing, scheduling this matter for December 9, 2013 at 9:00 a.m.

12. On November 25, 2013, Taxpayer moved to continue the hearing until it could secure new representation. The Department did not oppose the continuance, but made clear that it would be oppose any future continuances.

13. On December 2, 2013, the Hearings Bureau issued an order granting Taxpayer's request for continuance and setting a new hearing dates of April 7, 2014. The Hearings Bureau's ordered cautioned that any future continuances were unlikely.

14. On February 7, 2014, Attorney Zachary L. McCormick entered his appearance on behalf of Taxpayer in this matter.

15. On March 7, 2014, the parties submitted a stipulated request to continue the scheduled administrative hearing.

16. On March 10, 2014, the Hearings Bureau denied the stipulated request for a continuance.

17. On March 21, 2014, Taxpayer filed an amended protest and a supplemental statement of the grounds for protest.

18. On March 21, 2014, the parties filed their Joint Prehearing Statement.

19. On March 27, 2014, the Department filed a "Response to this Hearings Bureau's *sua sponte* Request for the Department to Specify a Tax Program in Dispute and also to Taxpayer's Supplemental Statement of Grounds for Protest."

20. On April 2, 2014, the Hearings Bureau issued an Order Reserving Ruling on Effectiveness of Assessment.

21. In accord with the Hearing Officer's April 2, 2014 order, on April 21, 2014, Taxpayer and Department submitted supplemental briefing addressing the effectiveness of the Department's assessment in this matter. This matter became ripe for a decision on that date.

22. There are numerous corporate entities involved at some level in this protest and referenced throughout exhibits (sometimes only referenced partially or in a confusing manner). A brief summary of the corporate entities involved, their pertinent associated presidents and/or

principals, and their doing business as relationship is necessary in providing clarity to the record, the remaining findings of fact, and this decision and order:

a. Taxpayer's corporation, Hi Country Buick GMC, Inc., for which Mr. Jeff Thomas is the president.

b. High Desert Automotive, Inc., and its wholly owned subsidiary Basin Motor Company, d/b/a Performance Buick Pontiac GMC Isuzu[1], a car dealership located near or at 1700 San Juan Blvd. in Farmington, NM.

c. Basin Acquisition Corporation, d/b/a Performance Mazda, Mitsubishi, Isuzu, and Suzuki, a car dealership located on East Main Street in Farmington, NM.

d. High Desert Automotive of Santa Fe, Inc. ran a Buick GMC car dealership of unspecified name at the intersection of Camino Carlos Rey and Cerrillos Road in Santa Fe, NM.

e. Equity Properties, Inc., a corporation for which Mr. Jeff Thomas was president.

f. Radio Properties, Inc., a corporation for which Mr. Jeff Thomas was president.

g. BDF Acquisitions, a corporation for which Mr. Bradford Furry was President.

h. Ally Financial, Inc., which was formerly GMAC, a financial institution closely associated with General Motors and the car dealership business.

23. Mr. Bradford Furry was involved in the automobile dealership business during the pertinent time.

24. At some point before April 1, 2008, Mr. Furry possessed 1/3 of the stock of three auto dealership businesses: High Desert Automotive, Inc., d/b/a Performance Buick Pontiac

[1] It is unclear on the record whether the Isuzu franchise was only part of this dealership, only part of the other Performance dealership, or part both dealerships. However, the parties did not ever address any significant issues related to Isuzu and this uncertainty has no relevance to the resolution of this protest.

GMC Isuzu; Basin Acquisition Company d/b/a Performance Mazda Mitsubishi Suzuki; and High Desert Automotive of Santa Fe, Inc. **[Taxpayer Ex. #1-2]**.

25. On or about April 12, 2008, Mr. Furry sold his 1/3 ownership interest in those three car dealerships, High Desert Automotive, Inc, Basin Acquisition Corporation, and High Desert Automotive of Santa Fe, Inc., to his former business partners, John M. and Susan Steigleman (hereinafter "Steiglemans"). **[Taxpayer Ex. #1-2]**.

26. To complete the sale, the Steiglemans' made a promissory note to Mr. Furry for $5,600,000.00, secured in pertinent part by the corporate stock and assets of the three car dealerships, High Desert Automotive, Inc, Basin Acquisition Corporation, and High Desert Automotive of Santa Fe, Inc. **[Taxpayer Ex. #1-4]**.

27. On or before September 24, 2009, Mr. Furry alleged numerous defaults under the promissory note, including failure to remove Mr. Furry as a personal guarantor on lines of credit from GMAC/Ally Financial, Inc. [**Taxpayer Ex. #5**].

28. Mr. Jeff Thomas was also involved in the car dealership business during the pertinent time and was the President of the Hi Country Chevrolet auto dealership in Aztec, NM. [**Taxpayer Ex. #6.43**].

29. Hi Country Chevrolet at that time was a competitor with the Performance Buick Pontiac GMC Isuzu car dealership in Farmington, NM.

30. In 2009, Mr. Jeff Thomas became aware of the Steiglemans' apparent difficulty in fulfilling the terms of the promissory note to Mr. Furry.

31. On August 26, 2009, Equity Properties, Inc., a company for which Mr. Thomas was president, entered into an agreement with Mr. Furry for assignment of the promissory note that Mr. Furry held from the Steiglemans. [**Taxpayer Ex. #6**].

32. On September 4, 2009, the Steiglemans initiated a suit for declaratory judgment, temporary restraining order, injunctive relief and damages against Mr. Furry and Mr. Thomas' Equity Properties, Inc. regarding the potential assignment of the promissory note. Mr. Furry and Mr. Thomas' Equity Properties, Inc. counterclaimed. [**Taxpayer Ex. #7**].

33. Because of various agreements between the parties pending litigation, the sale and assignment of the promissory note from Mr. Furry to Mr. Thomas' Equity Properties, Inc. never closed and did not occur.

34. The Department made Performance Buick Pontiac GMC Isuzu aware that it was not in compliance with its filings of CRS-1 returns and payments. Without making any payment, Performance Buick Pontiac GMC Isuzu filed its CRS-1 returns self reporting gross receipts tax liability, withholding tax liability, and applicable penalty and interest.

35. The Department entered into a payment plan with Performance Buick Pontiac GMC Isuzu.

36. Performance Buick Pontiac GMC Isuzu did not make the required payments under the payment plan with the Department.

37. In August of 2010, Ally Financial, Inc., (formerly GMAC), conducted a floor line of credit audit of inventory at both Performance auto dealerships in Farmington and the High Desert Automotive of Santa Fe, Inc. auto dealership.

38. A floor line of credit is a phrase used in the automobile business to describe the financial arrangement whereby Ally provides a line of credit to the dealership for most of the dealership's car inventory.

39. The floor line of credit from an approved lending institution is a requirement to maintain a franchise agreement with General Motors and other car companies. Without it, the car companies would pull the franchise agreement.

40. Before he sold his interests to the Steiglemans, Mr. Furry had provided personal guarantees and collateral to secure the floor line of credit from Ally at both Performance auto dealerships in Farmington and the High Desert Automotive of Santa Fe, Inc. auto dealership.

41. Shortly after Ally Financial, Inc., initiated its audit, Mr. Furry received a demand letter from Ally for $16,000,000.00.

42. Under his agreement with the Steiglemans, Mr. Furry was to be removed as a personal guarantor of the Ally Financial, Inc.'s floor line of credit. Mr. Furry believed that the Steiglemans' failure to do so, and the subsequent Ally Financial, Inc.'s demand letter, constituted a default on the promissory note.

43. Because of the default, Mr. Furry took possession of all the corporate stocks that served as collateral under the promissory note of the three car dealerships, High Desert Automotive, Inc, Basin Acquisition Corporation, and High Desert Automotive of Santa Fe, Inc. By seizing the corporate stocks and collateral under the promissory note, Mr. Furry took over the operations of those three entities and car dealerships.

44. On September 14, 2010, Ally Financial, Inc., filed an application for a Writ of Replevin in the United States District Court, District of New Mexico, against Basin Acquisition Corporation, Basin Motor Company (a wholly owned subsidiary of High Desert Automotive, Inc) and High Desert Automotive of Santa Fe, Inc. The Honorable M. Christina Armijo of the United States District Court, District of New Mexico, initially granted Ally a preliminary injunction and ultimately granted Ally the Writ of Replevin. [**Taxpayer Ex.'s # 10-11**].

45. Under the Writ of Replevin, Ally Financial Inc., could have sold all the vehicles and other assets of High Country Automotive, Inc., and Basin Acquisition Corporation, effectively terminating the franchise agreement with General Motors and ending the Buick GMC franchise presence in Farmington.

46. Mr. Thomas learned of Ally Financial, Inc.'s Writ of Replevin from Mr. Furry.

47. Mr. Thomas apparently had a good financial standing with Ally Financial, Inc. from their business transactions at Hi Country Chevrolet and worked closely with Ally Financial, Inc. to delay execution of the Writ of Replevin.

48. Mr. Thomas also worked with Mr. Furry and Ally Financial, Inc. to purchase the two Performance Farmington auto dealerships respectively owned by High Country Automotive, Inc., and Basin Acquisition Corporation.

49. On September 10, 2010, High Country Automotive, Inc., and Basin Acquisition Corporation entered into an Asset Purchase Agreement with Radio Properties, Inc., a company controlled by its President Mr. Thomas. The agreement allowed Radio Properties, Inc., to assign the assets to a company of its choice, which it eventually did in the form of Taxpayer. [**Taxpayer Ex. #12**].

50. Because the asset purchase agreement was contingent upon the approval of Ally Financial, Inc., General Motor's approval of Mr. Thomas as the franchise dealer, and the state's approval of Mr. Thomas as the franchise dealership, the asset purchase agreement could not be closed on immediately.

51. In order to delay execution of the Writ of Replevin while the asset purchase agreement's closing was still pending, Ally Financial, Inc., required Mr. Furry and Mr. Thomas to reach a management agreement whereby Mr. Thomas' corporation operated the two

Farmington Performance dealerships owned respectively by High Country Automotive, Inc., and Basin Acquisition Corporation.

52. On September 13, 2010, Mr. Furry entered into a management agreement with Radio Properties, Inc., owned by Jeff Thomas, to manage and operate High Desert Automotive, Inc. d/b/a/ Performance Buick Pontiac GMC Isuzu and Basin Acquisition Corporation d/b/a/ Performance Mazda Mitsubishi Suzuki Isuzu. [**Taxpayer Ex. #14**].

53. Around this time in September, the Steiglemans attempted to secure a preliminary injunction in State District Court against Mr. Furry and Radio Properties, Inc., but were unsuccessful.

54. On or about September 16, 2010, when the District Court declined to issue and/or extend the Steiglemans' requested preliminary injunction, Mr. Furry and Mr. Thomas terminated all employees of High Desert Automotive, Inc., and Basin Acquisition Corporation.

55. On or about September 17, 2010, Mr. Thomas took over the operation of the two Farmington Performance auto dealerships owned by High Desert Automotive, Inc., and Basin Acquisition Corporation pursuant to the management agreement. On this day, the dealerships were not open for public business.

56. While some former employees of the two Farmington Performance dealerships were eventually rehired, most of the former employees moved on from the dealerships and Mr. Thomas hired a new core management team.

57. Within a few days after September 17, 2010, Performance Buick Pontiac GMC Isuzu managed by Mr. Thomas was reopened to the public for the sale of vehicles.

58. Taxpayer reported and paid Performance Buick Pontiac GMC Isuzu's gross receipts tax for September 2010 reporting period, using Performance Buick Pontiac GMC Isuzu's CRS number and name.

59. After October 1, 2010, BDF Acquisitions, Inc., a company owned by Mr. Furry, took control of the third dealership involved in the Steiglemans' financial difficulties and default under the promissory note, High Desert Automotive of Santa Fe. Mr. Furry acknowledged that BDF Acquisitions, Inc. is paying off High Desert Automotive of Santa Fe's outstanding state tax liability as a successor in business.

60. Mr. Thomas was able to secure the approval of Ally, General Motors, and the state for the transfer of the lines of credit, the various franchise agreements, and the state dealership license by about February of 2011.

61. As a result of those approvals, the asset purchase agreement between High Desert Automotive, Inc., Basin Acquisition Corporation, and Mr. Thomas closed sometime in February 2011.

62. Under the asset purchase agreement, High Desert Automotive, Inc. and Basin Acquisition Corporation agreed to transfer to Taxpayer (as assignee of Mr. Thomas' Radio Properties, Inc.) the following assets: inventory of new and used parts, special tools, shop equipment, body shop equipment, office furniture, telephone systems, computers, non-leased credit card machines, televisions, franchise agreements, goodwill, customer lists, all intellectual property, and the right to use the "Performance" name to sell cars in San Juan County. [**Taxpayer Ex. #12.13].**

63. Both Performance Buick Pontiac GMC Isuzu as managed by Mr. Thomas and later as owned and operated by Taxpayer were obligated by General Motors to provide General

Motor's warranty services on cars previously sold by Performance Buick GMC, the cost of which General Motors reimbursed to the dealership.

64. The assets of Performance Buick Pontiac GMC Isuzu remained at the same physical location of the dealership when Mr. Thomas first managed that dealership and then owned that dealership as president of Taxpayer, Hi Country Buick GMC.

65. Without the assets of Performance Buick Pontiac GMC Isuzu that Ally might have seized under the Writ of Replevin, General Motors likely would have withdrawn the franchise agreement for the dealership, ending the prospect of Taxpayer's continuing of business at that location.

66. Financially, keeping the vehicle assets of Performance Buick Pontiac GMC Isuzu was critical in Taxpayer maintaining a viable continuing business because the loss of those assets would result in an unsustainable two-month lag in vehicle inventory.

67. Mr. Thomas assumed and paid Performance Buick Pontiac GMC Isuzu' s floor plan line of credit liabilities of Ally Financial, Inc., as part of its asset purchase agreement with High Desert Automotive, Inc. and Basin Acquisition Corporation so that he could maintain the vehicle inventory of the dealership.

68. Sometime after the closing of the asset purchase agreement in February 2011, Taxpayer replaced the Performance signs with the Hi Country signs. Taxpayer continued to sell vehicles from the same locations as the previous car dealerships.

69. On April 8, 2011, under letter id. no. L1790646848, the Department sent Taxpayer a request for information to determine whether Taxpayer was a successor in business to Performance Buick Pontiac GMC Isuzu. [**Department Ex. C**].

70. On May 20, 2011, the Department sent the successor of business assessment to Taxpayer to the address on record.

DISCUSSION

There are three main issues at protest. The first issue is whether the Department's successor in business assessment to Taxpayer was effective. The second issue is whether Taxpayer is a successor in business to Performance Buick Pontiac GMC Isuzu. And the final issue is whether a successor in business is liable for the penalty and interest assessed to the previous business.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

Effectiveness of Assessment

At issue in the protest is whether the Department's successor in business assessment to Taxpayer was effective. NMSA 1978, Section 7-1-63 (A) (1997) requires the Department to assess a successor in business if they do not pay the amount due within 30-days. But Section 7-1-63 does not define the term "assess" or proscribe the method of issuing an effective assessment. NMSA 1978, Section 7-1-17 (B) (2) (2007) describes what is an effective assessment under the Tax Administration Act ("TAA"). By using the term "assess" without providing a more specific definition of that term for the purposes of Section 7-1-63, it appears that the Legislature intended

"assess" to have the same meaning it has under Section 7-1-17 (B) for all other purposes under the TAA. In pertinent part, in order to be an effective assessment, NMSA 1978, Section 7-1-17 (B) (2) (2007) requires a document "stating the nature and amount of taxes assertedly owed by the taxpayer…" There is no dispute that the assessment stated the amount of taxes owed. But Taxpayer argues that the assessment did not state the nature of the tax owed.

Both parties submitted briefs and made arguments at hearing on whether the assessment properly described the nature of the tax. At hearing, citing Judge Sutin's concurring opinion in *Sterling Title Co. v. Comm'r of Revenue*, 1973-NMCA-086, ¶19, 85 N.M. 279, the Department argued that successor in business, as the "imposition of a secondary liability", was the nature of the tax due and assessed. Additionally, the Department argued that the assessment's reference of CRS was sufficient to describe the nature of the tax. Citing *Flynn, Welch & Yates, Inc. v. State Tax Comm'n*, 1934-NMSC-001 ¶10, 38 N.M. 131, Taxpayer argued that the nature of tax is not about whom may be liable for the tax, but on what is being taxed and on what grounds. Therefore, Taxpayer argued that successor in business assessment in this matter does not describe the nature of the tax, but rather whom is liable for the tax. Taxpayer further argued that a CRS is not a statutory tax program but a reporting method, and therefore insufficient to describe the nature of the tax imposed. While *Sterling Title Co.* and *Flynn, Welch & Yates, Inc.*, are helpful, neither one is controlling or dispositive of the question in this matter of whether the Department's assessment adequately described the nature of taxes for purposes of Section 7-1-17 (B) (2).

Without ever expressly objecting, the Department's filings suggest concern that the Hearings Bureau *sua sponte* asked the parties to address this issue. However, jurisdictional questions are always potentially relevant even if neither party argues the issue. *See Alvarez v.*

State Taxation & Revenue Dep't, Motor Vehicle Div., 1999-NMCA-006, ¶6, 126 N.M. 490. In fact, whether or not a party raises jurisdiction, the Hearings Bureau's first conclusion of law in most if not all decisions and orders issued addresses subject matter jurisdiction. Whether a Notice of Assessment is effective under Section 7-1-17 and a taxpayer's subsequent protest of that assessment under NMSA 1978, Section 7-1-24 (2013) are both parts of determining the Hearings Bureau subject matter jurisdiction over a particular tax protest. *See Alvarez*, ¶10 (subject matter jurisdiction only vests when the statutorily required administrative steps are followed); *See also Grand Lodge of Ancient & Accepted Masons v. Taxation & Revenue Dep't*, 1987-NMCA-081, ¶22, 106 N.M. 179 (statutorily required procedures must be satisfied to confer jurisdiction). Therefore, the Hearings Bureau properly asked the parties to address the issue to the extent that the question relates to subject matter jurisdiction. Nevertheless, while subject matter jurisdiction is always an issue, there is a presumption of administrative regularity that a taxpayer must overcome when it comes to adequacy of notice. *See Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶29, 111 N.M. 735.

In this case, the Department issued Taxpayer an assessment with an explanation of liability listing successor in business, for $217,957.51 in tax, $47,859.15 in penalty, and $17,094.32 in interest for a total outstanding liability of $282,910.98. The Department's assessment also had a CRS number listed on the document, and "CRS" written in large letters in the lower right corner. Further, the Department attached a second page to the assessment, which was a spreadsheet of the month-by-month tax liabilities

While Taxpayer argues that the assessment provided an insufficient description of the nature of the taxes, under the facts of this case, the Department's assessment did provide a description of the general nature of the tax and therefore was effective for two reasons. First, the

face of the Notice of Assessment indicated that Taxpayer was liable as a successor in business and clearly listed CRS in two places. *Sterling Title Co.*, ¶19, indicates that a successor in business is type of secondary tax liability. Regulation 3.1.4.7 NMAC indicates that a CRS liability means "the total of state gross receipts tax due for a period plus the amounts due for the same period for all other taxes collected with the state gross receipts tax… compensating tax and withholding tax." Given the regulatory definition of CRS as gross receipts, compensating, and withholding tax, the assessment's indication of CRS liabilities, and assessment's statement that Taxpayer was liable as a successor in business, the Department provided Taxpayer with a general description of the nature of taxes owed: the previous business' outstanding gross receipts tax, compensating tax, and/or withholding tax.

The second reason why the assessment was effective under the facts of this case is because as a practical matter, Taxpayer was aware of the nature of taxes owed before Taxpayer filed its protest. According to Taxpayer's own protest letter, before Taxpayer filed its protest Taxpayer learned from the Department that the nature of the underlying tax liability in the assessment was for gross receipts and withholding tax. Taxpayer thus had notice of the nature and amount of the taxes assertedly due and an opportunity to challenge the assertion of that tax liability in the form of the protest letter. *See Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶28, 148 N.M. 21 (in administrative law, due process generally means "notice of the opposing party's claims and a reasonable opportunity to meet them."). Therefore, under the facts of this protest, the Department's assessment of tax was effective and placed Taxpayer on notice of the nature and the amount of tax liability assertedly due.

Taxpayer was a Successor in Business.

Numerous statutes under the TAA address the tax obligations of a successor in business. NMSA 1978, Section 7-1-61 (B) (1997) establishes that the "tangible and intangible property used in any business remains subject to liability for payment of the tax due on account of that business to the extent stated herein, even though the business changes hands." Section 7-1-61 (C) requires the successor to place into a trust account sufficient money to cover the outstanding tax liability until the Department either issues a clearance certificate or makes a demand or assessment for the outstanding liability. Under Section 7-1-63 (C), the successor can "discharge as assessment made… by paying to the department the full value of the transferred tangible and intangible property."

The purpose of the successor in business statute is "to make tangible and intangible property security for payment of the tax." *Sterling Title Co.*, ¶23. In other words, the tax liability of the predecessor business follows the tangible and intangible assets to the successor business. According to Judge Sutin's concurring opinion in *Sterling Title Co.*, ¶28, under the successor in business statutory scheme, "[t]he burden is placed on the purchaser, at the time of the purchase of tangible and intangible property used in a business, to determine whether a gross receipts tax is due and payable by the seller."

Regulation 3.1.10.16 NMAC (1/15/01) addresses what constitutes a successor in business for the purposes of the TAA. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Regulation 3.1.10.16 (A) NMAC establishes eight indicia in determining whether a business is a successor:

> (1) Has a sale and purchase of a major part of the materials, supplies, equipment, merchandise or other inventory of a business enterprise

> occurred between a transferor and a transferee in a single or limited number of transactions?
> (2) Was a transfer not in the ordinary course of the transferor's business?
> (3) Was a substantial part of both equipment and inventories transferred?
> (4) Was a substantial portion of the business enterprise that had been conducted by the transferor continued by the transferee?
> (5) By express or implied agreement did the transferor's goodwill follow the transfer of the business properties?
> (6) Were uncompleted sales, service or lease contracts of the transferor honored by the transferee?
> (7) Was unpaid indebtedness to suppliers, utility companies, service contractors, landlords or employees of the transferor paid by the transferee?
> (8) Was there an agreement precluding the transferor from engaging in a competing business to that which was transferred?

If any of these eight indicia are present, then the Department "may presume that ownership of a business enterprise has transferred to a successor in business." *See* Regulation 3.1.10.16 (B) NMAC.

Despite the financial and legal saga that ultimately led to Taxpayer's acquisition of Performance Buick Pontiac GMC Isuzu's tangible and intangible property, there is little doubt that Taxpayer was a successor in business under Section 7-1-67 and Regulation 3.1.10.16 (A) NMAC. While the Department may presume that the new owner is a successor if any single factor is established, in this case the first seven of the eight factors articulated under Regulation 3.1.10.16 (A) NMAC support that Taxpayer was a successor in business to High Desert Automotive, Inc. d/b/a/ Performance Buick Pontiac GMC Isuzu. Of particular weight in reaching that conclusion are the list of transferred assets in asset purchase agreement and the testimony of Mr. Thomas about the importance of maintaining Performance Buick Pontiac GMC Isuzu's inventory in the face of Ally's Writ of Replevin. Under the asset purchase agreement, Taxpayer obtained the major part of equipment, merchandise, and other inventory of Performance Buick Pontiac GMC Isuzu from High Desert Automotive, Inc. and Basin Acquisition Company. Under

the Asset Management Agreement, Performance Buick Pontiac GMC Isuzu's goodwill was transferred to Taxpayer, along with the right to use the Performance name for the sale of automobiles in San Juan County. As evidenced by the litigation between the Steiglemans, Mr. Furry, Mr. Thomas, and their respective corporate entities, the transfer of the business was most certainly not in the ordinary course of High Desert Automotive, Inc., Basin Acquisition Company, or Taxpayer's business.

The vehicle inventory, the parts inventory, and the intellectual property of Performance Buick Pontiac GMC Isuzu were transferred to Taxpayer. In fact, Mr. Thomas' testimony established that without protecting the vehicle inventory and other assets of Performance Buick Pontiac GMC Isuzu, there would likely be no dealership business left to acquire. In other words, the assets of Performance Buick Pontiac GMC Isuzu business were critical to Taxpayer's continuing business.

To maintain the integral assets of Performance Buick Pontiac GMC Isuzu in the interim period between signing the asset purchase agreement and closing on that agreement, Taxpayer in fact managed Performance Buick Pontiac GMC Isuzu. During this time, Taxpayer assumed and paid Performance Buick Pontiac GMC Isuzu's floor line credit obligations with Ally Financial, Inc. Taxpayer also filed and paid Performance Buick Pontiac GMC Isuzu's September 2010 New Mexico CRS tax obligations during this interim period.

After the asset purchase agreement finally closed in this matter, Taxpayer continued to operate a Buick GMC franchise automobile dealership at the same physical location in Farmington, selling some of the transferred inventory (including parts even if as Mr. Thomas speculated that most of the cars had already sold during Taxpayer's interim management period), and using the same maintenance equipment as Performance Buick Pontiac GMC Isuzu. Under its

franchise agreement with General Motors, Taxpayer was obligated to honor the vehicle warranties of vehicles previously sold by Performance Buick Pontiac GMC Isuzu (or any other General Motors authorized dealer), although General Motors reimbursed Taxpayer for these expenses. While of course Taxpayer made changes to the business, including replacing most of the work force and changing the management team, the tangible and intangible property of the previous business initially remained at the core of Taxpayer's business. Indeed, without protecting and transferring those assets, Mr. Thomas' testimony established that Taxpayer would not likely have been able to maintain its franchise agreement or continue to operate a successful automobile dealership business. Because Regulation 3.1.10.16 (A) NMAC factors 1-7 were met, the Department rightfully concluded that Taxpayer was a successor in business to Performance Buick Pontiac GMC Isuzu.

Nevertheless, Taxpayer argued that it was not a successor in business under Regulation 3.1.10.16 (F) (2) NMAC. Under Regulation 3.1.10.16 (F) (2) NMAC, a successor means "any transfer of a business or property of a business, except to the extent it would be materially inconsistent with the rights of secured creditors that have perfected security interests or perfected liens on the business or property of the business." Excluded from the definition of a successor in business under Regulation 3.1.10.16 (F) (2) NMAC is "a disinterested third party who purchases property at a commercially reasonable foreclosure sale, a bank or other financial institution or government that acquires and operates a business for a limited period of time in order to protect its collateral for eventual resale in a commercially reasonable manner…" Taxpayer argues that since Mr. Furry only operated the business for a limited period to protect his collateral under the promissory note, Mr. Furry could not have been a successor in business under Regulation 3.1.10.16 (F) (2) NMAC, and Taxpayer could not be found liable as successor by acquiring the

property from Mr. Furry because Mr. Furry was not liable for the tax. This argument does not persuade legally or factually.

In *Sterling Title Co.*, the taxpayer argued that the predecessor business was no longer engaged in business at the time of the transfer of the assets, shielding the taxpayer from the outstanding tax liability. That is a similar argument to the one Taxpayer makes here: since Mr. Furry was not liable for successor taxes under Regulation 3.1.10.16 (F) (2) NMAC because he was simply protecting his collateral, Taxpayer could not inherit any tax liability from Performance Buick Pontiac GMC Isuzu when it acquired the assets from Mr. Furry. However, under *Sterling Title Co.*, ¶23, the liability follows the tangible and intangible property of a business. *Sterling Title Co.*, ¶29, in rejecting the taxpayer's claim that it was not liable for successor tax liability, found the successor business liable when it acquired all "operating assets of [the predecessor business] and continued to operate that business, even though [the predecessor business' was dormant or insolvent…"

Likewise, under the rationale articulated by *Sterling Title Co.*, ¶23-29, although Performance Buick Pontiac GMC Isuzu may have been insolvent when Mr. Furry acted to protect his security interest, Taxpayer was liable as a successor when it acquired all of Performance's assets from Mr. Furry and continued to operate the business in a substantially similar manner at the same physical location because the tax liability follows the tangible and intangible property of a business. While Regulation 3.1.10.16 (F) (2) NMAC may carve out an intermediary exception from successor liability for banks, financial institutions, and secured creditors protecting their collateral, there is no indication under that regulation that the end purchaser of the tangible and intangible property obtained in a commercially reasonable manner from the secured creditor escapes liability under Regulation 3.1.10.16 (F) (2) NMAC. As

Sterling Title Co., ¶23-29, makes clear, the structuring of the transaction is not generally a way to avoid successor tax liability because the tax liability follows the assets.

Factually, this is not a case of bank or a financial institution operating the business for a limited time until it can make a disinterested sale to a third party in commercially reasonable manner. Before Mr. Furry even seized the collateral under the promissory note he had with the Steiglemans, he had attempted to sell the promissory note directly to Mr. Thomas. Taxpayer did not acquire Performance Buick GMC, Inc. during a foreclosure sale. Taxpayer was not a bank or financial institution with a security interest it was trying to protect in this matter. Taxpayer was involved early in the process before even Ally Financial, Inc.'s Writ of Replevin forced Mr. Furry to protect his secured credit interests.

Taxpayer's argument also depends on the proposition that Mr. Furry was not subject to successor liability under Regulation 3.1.10.16 (F) (2) NMAC because his intervention was limited to protecting his collateral as a secured creditor. However, the evidence actually undercuts the assumption built into Taxpayer's argument. It is true that Mr. Furry, whom had security interest under the promissory note, may have been in a better position than Taxpayer to claim the protection of Regulation 3.1.10.16 (F) (2) NMAC[2]. Yet, as Mr. Furry addressed in testimony, as a successor in business his company BDF Acquisitions is paying off the tax liability of the Santa Fe dealership it acquired. BDF Acquisitions acquired the Santa Fe dealership after the Steiglemans default on the promissory note and Ally Financial, Inc.'s Writ of Replevin action, the same financial and legal circumstances that allowed Taxpayer to acquire Performance Buick Pontiac GMC Isuzu. If Mr. Furry, who had a security interest under the promissory note he sought to protect by taking possession of the three auto dealerships, did not

[2] However, Mr. Furry also was not the bank, the financial institution, or the disinterested third party that Regulation 3.1.10.16 (F) (2) NMAC appears to be contemplating.

claim that Regulation 3.1.10.16 (F) (2) NMAC excluded his business from the definition of a successor in business, then Taxpayer has even less grounds to do so. Regulation 3.1.10.16 (F) (2) NMAC does not exclude Taxpayer from the definition of a successor in business.

Interest and Penalty for a Successor in Business.

Taxpayer argued that the imposition of penalty and interest is not authorized by statute for a successor in business. Taxpayer's argument is premised on a close reading of NMSA 1978, Section 7-1-61 (A) (1997). For the purposes of the successor in business provisions of the TAA, Section 7-1-61 (A) defines "tax" to mean "the amount of tax due imposed by provisions of the taxes or the tax acts set forth in Subsection A and B of Section 7-1-2 NMSA 1978…" Further, NMSA 1978, Section 7-1-3 (X) (2013) defines tax to include penalty and interest "unless the context otherwise requires." The Department counters that Section 7-1-3 (X) defines tax to include penalty and interest for all purposes under the TAA. However, because NMSA 1978, Section 7-1-2 (A-B) (2007) does not list the applicable penalty or interest statutes or reference Section 7-1-3 (X)'s tax definition, Taxpayer argues that penalty and interest cannot be included in successor in business's tax liability under Section 7-1-61 (A)'s definition of tax.

Taxpayer's argument is novel and does not appear to ever have been directly considered by the Hearings Bureau or the Court of Appeals. While Taxpayer's statutory interpretation argument has some appeal, Taxpayer's argument also requires reading Section 7-1-61 (A) in isolation from the remaining subsections of Section 7-1-61 (B & C), which is a disfavored approach of statutory construction. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers,* 1998-NMSC-20, ¶28, 125 N.M. 401 (statutes are to be interpreted in a manner to give the entire statute effect and not render portions of the statute superfluous).

Section 7-1-61(B) (emphasis added) states that

> [t]he tangible and intangible property used in any business remains subject to liability for *payment of the tax due* on account of that business to the extent stated herein, even though the business changes hands.

Further, Section 7-1-61(C) (emphasis added) states that

> If any person liable for *any amount of tax from operating a business* transfers that business to a successor the successor shall place in a trust account sufficient money from the purchase price or other source to cover such amount of tax until the secretary or secretary's delegate issues a certificate stating that no amount is due, or the successor shall pay over the *amount due* to the department upon proper demand for, or assessment of, that *amount due* by the secretary.

Both subsections (B) & (C) emphasize the *tax due* of the previous company, which would include any assessed penalty and interest under the definition of Section 7-1-3 (X).

Judge Sutin's concurring opinion in *Sterling Title Co.*, ¶22 (emphasis added), explained how Section 7-1-61's similar predecessor statute worked:

> If *a tax was assessed* against [Company A] during the time [Company A] was engaged in business, its tangible and intangible property used in the business thereafter *remained subject to liability for payment of the tax* even though the tangible and intangible property used in the business changed hands by sale to [Company B].

In other words, the *assessed tax liability due* of the predecessor-owner follows the tangible and intangible property transferred to the successor in business. Judge Sutin emphasized that the primary purpose of the successor in business statue "was to make tangible and intangible property security for payment of the tax." *Sterling Title Co.*, ¶23. The critical moment for the purchaser-successor, who carries the burden, is "at the time of the purchase of the tangible and intangible property..." *Sterling Title Co.*, ¶28.

To read all three subsections of Section 7-1-61 in harmony, and in a manner consistent with Judge Sutin's concurring opinion in *Sterling Title Co.*, one must look to what tax liability was assessed and due to the predecessor business at the time of the transfer of the assets to the successor in business. If the predecessor business was assessed penalty and interest before the transfer, then the predecessor business' total outstanding assessed tax liability due included penalty and interest at the time of the transfer because under Section 7-1-3 (X), tax includes penalty and interest. In that situation, the transferred tangible and intangible property of the business continued to remain subject to that total outstanding tax liability due.

This is also consistent with the requirement of Section 7-1-61 (C) that the successor business set aside sufficient funds from the purchase to cover the tax liability. If the predecessor's business assessment included penalty and interest, then the successor business knew or should have known how much money needed to be set aside to cover the tax liability due as required under Section 7-1-61 (C). With knowledge of the predecessor's total tax liability, which included penalty and interest, the successor has no basis to escape the liability. *See Sterling Title Co.*, ¶21.

Taxpayer's novel statutory argument may be more persuasive in a situation where penalty and interest stemming from the predecessor business is assessed against the successor after the transfer of the tangible and intangible property to the successor has already occurred. But it is not necessary to reach any definitive conclusions on that point because under the facts of this case, Performance Buick Pontiac GMC Isuzu, as a result of its earlier self-assessment, had been assessed penalty and interest before the transfer of the tangible and intangible property to Taxpayer. Therefore, Taxpayer knew or should have known that Performance Buick Pontiac GMC Isuzu's outstanding tax liability due included the previously assessed penalty and interest,

which under Section 7-1-3 (X) was included in the definition of tax. Taxpayer was compelled under Section 7-1-61 (C) to aside sufficient funds to cover that total outstanding tax liability due. Since the total tax liability due as of the time of transfer follows the tangible and intangible property, Taxpayer remains liable for Performance Buick Pontiac GMC Isuzu's total assessed tax liability due, which included penalty and interest. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. The Department issued an effective successor in business assessment under Section 7-1-17 (B) (2) that described the nature of the tax owed as CRS taxes, which under Regulation 3.1.4.7 NMAC means gross receipts tax, withholding tax, and compensating tax. Taxpayer further had adequate notice that the successor in business liability was for gross receipts tax and withholding tax before the filing of its protest, and therefore had sufficient opportunity to challenge the Department's assessment. *See Albuquerque Bernalillo County Water Util. Auth.*, 2010-NMSC-013, ¶28, 148 N.M. 21.

B. After properly requesting and receiving an extension of time in which to file a protest under NMSA 1978, Section 7-1-24 (B) (2003), Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest.

C. Because the first seven of the eight factors articulated under Regulation 3.1.10.16 (A) NMAC were present, and because the transferred tangible and intangible property of Performance Buick Pontiac GMC Isuzu was critical to Taxpayer's continued operation of a Buick GMC franchise and dealership at the same location in Farmington, Taxpayer was a successor in business under Sections 7-1-61 through 63.

D. Taxpayer was not excluded from the definition of successor in business under Regulation 3.1.10.16 (C) (2) NMAC.

E. Because Performance Buick Pontiac GMC Isuzu's outstanding tax liability due at the time of the transfer of the tangible and intangible property included assessed penalty and interest, that total tax liability followed the transferred assets to Taxpayer and Taxpayer remains liable for the payment of that entire outstanding tax obligation. *See Sterling Title Co.*, ¶22-28.

For the foregoing reasons, Taxpayer's protest **IS DENIED.** Taxpayer owes the successor in business assessed CRS taxes liability.

DATED: June 2, 2014.

Brian VanDenzen, Esq.
Tax Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Hearing Bureau contemporaneous with the Court of Appeals filing so that the Hearing Bureau can begin to prepare the record proper.