

**STATE OF NEW MEXICO  
ADMINISTRATIVE HEARINGS OFFICE  
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF  
BRENT'S HVAC & PLUMBING,  
TO THE ASSESSMENT ISSUED UNDER  
LETTER ID NO. L0824453440**

**No. 15-33**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on September 18, 2015, before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Elena Morgan, Staff Attorney. Mr. Tom Dillon, Auditor, and Mr. Charles Ritz, Bankruptcy Unit, also appeared on behalf of the Department. Mr. Brent Heisch, owner of Brent's HVAC & Plumbing (Taxpayer), appeared for the hearing with his attorney, Mr. Walter Reardon. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On March 23, 2012, the Department assessed the Taxpayer as a successor in business for gross receipts tax, penalty, and interest for the tax periods from February 28, 2010 through March 31, 2011. The assessment was for \$7,672.91 tax, \$1,541.41 penalty, and \$476.15 interest.
2. On April 20, 2012, the Taxpayer filed a formal protest letter.
3. On March 31, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On May 6, 2015, the Hearings Office issued a notice of hearing.
5. On June 8, 2015, the Hearings Office sent amended notices of hearing.

6. Mr. Heisch started doing business as a corporation in 1998. The business was focused on installing air conditioning units and ductwork in new construction projects (the A/C Business). The A/C Business also did some air conditioning maintenance work.
7. The corporation for the A/C Business was initially owned and operated by Mr. Heisch and a partner.
8. After the partner left the A/C Business, Mr. Heisch ran the A/C Business on his own for a short time. Mr. Heisch's wife then became president of the A/C Business and helped run its operations.
9. The A/C Business typically did its work and acquired its materials using various lines of credit. Mr. Heisch personally guaranteed those lines of credit.
10. The A/C Business was run out Mr. Heisch's home and shop. The A/C Business had an advertisement in the yellow pages and a phone number for customers to call. The A/C Business at its peak had approximately 12 employees.
11. The employees provided their own tools, and the Heisches lent their personal vans to the A/C Business for use on jobs.
12. The A/C Business acquired three large pieces of equipment (collectively, "the equipment"). One piece was used to bend sheet metal, one was used to cut sheet metal, and one was used to make a special bend to allow for connections of ductwork. All three pieces were used for fabricating and installing ductwork.
13. The A/C Business had contracts with various builders and construction companies for installation of new units and ductwork. The A/C Business had no direct dealings with any of the ultimate owners or custodians of the individual buildings.

14. One of the builders also contracted with the A/C Business to provide air conditioning maintenance on one of his buildings. This accounted for about 25% or less of the work done by the A/C Business.
15. As new construction began to slow, the A/C Business began to suffer and eventually became impossible to sustain.
16. The A/C Business ceased operations in late 2010. The official close of business date was March 31, 2011. At that time, the equipment was worth approximately \$4,000.00.
17. Around the time that the A/C Business closed, Mr. Heisch filed for bankruptcy. Mr. Heisch listed all of the A/C Business's debts in his bankruptcy and included the Department as a potential creditor.
18. Mr. Heisch's bankruptcy was discharged on September 12, 2011, but did not include the A/C Business's gross receipts tax liability. Even if the A/C Business had filed bankruptcy, the state tax liability in question would have been in the three-year priority period and would not have been discharged by the bankruptcy.
19. Mr. Heisch paid for the A/C Business's state withholding tax liability prior to the completion of the bankruptcy.
20. During the course of the bankruptcy, Mr. Heisch attempted to sell the equipment. No one was interested in purchasing the equipment because it was used and because there were few new construction projects.
21. Mr. Heisch's home and shop, where the A/C Business had been conducted, were foreclosed upon by the bank. Several vehicles were also repossessed. All of the A/C Business's materials that were not sold were left on the premises and were taken by the

- bank, with the exception of the equipment and a computer that crashed. The equipment was moved into storage.
22. The Taxpayer acknowledged that the Department was entitled to the value of the equipment and expressed its willingness to turn the equipment over to the Department.
  23. When the A/C Business shut down, its outstanding contracts were abandoned, the telephone number was disconnected, and there were no attempts to maintain goodwill or client lists. Mr. Heisch's wife took a job in a different business, and Mr. Heisch began looking for employment.
  24. A friend knew Mr. Heisch was trained as a plumber and asked Mr. Heisch to take a look at a plumbing problem for him. The friend recommended Mr. Heisch as a plumber to others, and Mr. Heisch decided to begin a new business.
  25. Mr. Heisch became the sole proprietor of the Taxpayer. The Taxpayer deals directly with individual homeowners and provides primarily plumbing services. The Taxpayer also occasionally does air conditioning maintenance when a homeowner requests it.
  26. The equipment was moved to the Taxpayer's shop, but has not been used since the Taxpayer is not installing new units or doing any ductwork.
  27. The Taxpayer's business is approximately 75-80% plumbing services and 10-15% air conditioning maintenance.
  28. The Taxpayer has one customer in common with the A/C Business, but that customer is a personal friend of Mr. Heisch and would do business with him regardless of what company he worked for or what business he did.
  29. The Taxpayer is owned by Mr. Heisch, as was the A/C Business. The Taxpayer has one employee. That employee was also employed by the A/C Business at one time. That

employee is the son of a friend of Mr. Heisch. Mr. Heisch was also aware that the employee was a convicted felon and had trouble finding work, so he gave the employee a job when asked to do so.

## **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable as a successor in business for gross receipts tax, penalty, and interest under the assessment.

### **Burden of Proof.**

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, “the amount of any interest or civil penalty relating thereto.” NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer’s burden to present evidence and legal argument to show that it is entitled to an abatement.

### **Successor in Business Liability.**

A successor in business is required to pay the tax for which the acquired business was liable. *See* NMSA 1978, § 7-1-61 (C) (1997). *See also* NMSA 1978, § 7-1-63 (1997). Moreover, “tangible and intangible property used in any business remains subject to liability for payment of the tax due” even when the business is transferred to a new owner. NMSA 1978, § 7-1-61 (B). A successor in business is charged with certain responsibilities in discerning what tax is owed when the business or its assets are acquired. *See* NMSA 1978, § 7-1-61 (requiring the successor to set aside an amount in trust for payment of tax) and § 7-1-62 (1997) (allowing the successor to apply for a certificate from the Department).

### **Determination of a successor.**

A successor in business is “any transferee of a business or *property* of a business, except to the extent it would be materially inconsistent with the rights of secured creditors”. 3.1.10.16 (F) (2) NMAC (2001) (emphasis added). There are also several factors to be used in determining a successor in business. *See* 3.1.10.16 (A) NMAC. If a single one of these factors are present, there is a presumption that there is a successor in business. *See* 3.1.10.16 (B) NMAC. Purchasing tangible assets, assuming a lease, keeping one part-time employee, and assuming a note are sufficient to establish one as a successor in business, even when the prior business was defunct. *See Sterling Title Co. of Taos v. Comm’r of Revenue*, 1973-NMCA-086, ¶ 9-11, 85 N.M. 279.

The first factor in determining whether there is a successor in business is whether there was “a sale and purchase of a major part of the materials, supplies, equipment, merchandise or inventory...in a single or limited number of transactions”. 3.1.10.16 (A) (1) NMAC. There was no sale and purchase between the A/C Business and the Taxpayer. Rather, the A/C Business’s owner retained the equipment and transferred it without sale or purchase to the Taxpayer.

The second factor is whether the transfer was not in the ordinary course of the transferor’s business. *See* 3.1.10.16 (A) (2) NMAC. The A/C Business was not in the business of transferring equipment, so the transfer was not done in the ordinary course of its business.

The third factor is whether “a substantial part of both equipment and inventories” was transferred. 3.1.10.16 (A) (3) NMAC. The equipment was essentially all of the equipment owned by the A/C Business that was not repossessed by the bank. The A/C Business had basically no inventory, except some scrap metal that was also taken by the bank. The Department argued that the vehicles were also property transferred from the A/C Business to the

Taxpayer. However, Mr. Heisch testified that the vehicles were his and his wife's personal vehicles, which they loaned to the businesses for use. There was no evidence that the vehicles were not titled to Mr. and Mrs. Heisch or were not their personal vehicles.

The fourth factor is whether a substantial portion of the business conducted by the transferor continued to be conducted by the transferee. *See* 3.1.10.16 (A) (4) NMAC. The A/C Business conducted primarily installation of new air conditioning systems in new construction. The Taxpayer conducts primarily plumbing services. However, both businesses include a small portion of air conditioning maintenance.

The fifth factor is whether "the transferor's goodwill follow[ed] the transfer of the business properties". 3.1.10.16 (A) (5) NMAC. The equipment was the only business property that was transferred. The equipment has not been used by the Taxpayer because there have been no jobs that would require its use. The Department argued that the Taxpayer retained the A/C Business's goodwill because they have one customer in common. That customer is a personal friend of Mr. Heisch. Any goodwill that the Taxpayer enjoys seems to have come from Mr. Heisch, not from the A/C Business.

The sixth factor is whether the business obligations of the transferor were honored by the transferee. *See* 3.1.10.16 (A) (6) NMAC. The Taxpayer did not assume or honor any obligations of the A/C Business. Any outstanding contract or work taken by the A/C Business was abandoned when it ceased to operate.

The seventh factor is whether unpaid debts of the transferor were paid by the transferee. *See* 3.1.10.16 (A) (7) NMAC. The Taxpayer did not assume or pay any unpaid debts of the A/C Business. Most of the A/C Business's debts were personally secured by Mr. Heisch and had been discharged in his bankruptcy action.

The final factor is whether there was an agreement precluding competition. *See* 3.1.10.16 (A) (8) NMAC. There was no such agreement between the Taxpayer and the A/C Business.

The first three factors weigh in favor of finding that the Taxpayer is a successor in business to the A/C Business. Although there was not a formal sale and purchase, there was clearly a transfer of assets when the equipment was placed in the Taxpayer's shop and put at the Taxpayer's disposal. *See Black's Law Dictionary*, page 1636 (9<sup>th</sup> ed. 2009) (defining a transfer as any method, direct or indirect, of disposing of or parting with property or parting with an interest in property). The equipment was essentially all of the A/C Business's tangible property that was not repossessed by the bank. The transfer of the equipment was not conducted as an ordinary part of the A/C Business. The remaining five factors weigh in favor of finding that the Taxpayer was not a successor in business. However, if a single one of these factors are present, there is a presumption that there is a successor in business. *See* 3.1.10.16 (B) NMAC. Therefore, the Taxpayer is a successor in business to the A/C Business.

**Extent of liability.**

“A successor may discharge an assessment made pursuant to this section by paying to the department the full value of the transferred tangible and intangible property.” NMSA 1978, § 7-1-63 (C). The successor may be liable for the full amount of the assessment if the transfer was done to avoid tax, if the transfer amounted “to a de facto merger, consolidation, or mere continuation of the transferor's business”, or if the successor agreed to assume the liability. *Id.* There was no evidence in this case that the transfer occurred to avoid tax, as part of a merger or consolidation, or that the Taxpayer agreed to assume the liability. The arguments in the case focused on whether the Taxpayer's business was a “mere continuation” of the A/C Business.

A successor in business is a “mere continuation” of the previous business if “the successor maintains the same business with the same employees doing the same jobs under the same supervisors, work conditions and production process and produces the same product for the same customers.” 3.1.10.16 (F) NMAC. *See also Garcia v. Coe Mfg. Co.*, 1997-NMSC-013, ¶ 12-14, 123 N.M. 34 (indicating that a common identity of directors and shareholders as well as a substantial continuity in the business done before and after the assets were acquired is a continuation of the original business). *See also Pankey v. Hot Springs Nat’l Bank*, 1941-NMSC-060, ¶ 13, 46 N.M. 10.

The Department argued that the Taxpayer was a mere continuation of the A/C Business because the owner is the same, they share a common customer, they share a common employee, and they both engage in some air conditioning maintenance work. The Department also argued that the Taxpayer clearly intended to be engaged in the air conditioning business since the Taxpayer included “HVAC” as part of its name. The Taxpayer argued that a sole customer and a sole employee are not sufficient to establish continuity. The Taxpayer also argued that the use of “HVAC” in its name is not dispositive. The Taxpayer argued that the key factor should be in the substance of its work. The Taxpayer’s business is primarily plumbing and the majority of the A/C Business was installing new units in new construction. The Taxpayer argued that a slight overlap in a small portion of each business was not sufficient to establish that the Taxpayer was a “mere continuation” of the A/C Business. The Taxpayer’s argument is persuasive.

Given the substantial change in the business service provided, the Taxpayer is not a “mere continuation” of the A/C Business. The Taxpayer is a business that provides plumbing services. The A/C Business was a business that installed new units and ductworks in newly constructed buildings. A small portion of similar work, air conditioning maintenance, between

the two businesses is not sufficient to establish a “mere continuation”. Therefore, the Taxpayer may discharge the assessment by paying the Department the full value of the equipment. The only evidence presented was that the equipment was worth approximately \$4,000.00. The value will be deemed to be \$4,000.00 for purposes of this decision.

### **CONCLUSIONS OF LAW**

A. The Taxpayer filed a timely written protest to the Notice of Assessment as a successor in business for gross receipts taxes, penalty, and interest on the tax periods from February 28, 2010 through March 31, 2011 issued under Letter ID number L0824453440, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was a successor in business and is liable under the assessment. *See* 3.1.10.16 NMAC and NMSA 1978, § 7-1-61.

C. The Taxpayer is not a “mere continuation” of the prior business, so the Taxpayer may discharge the assessment by paying to the Department the full value of the equipment transferred, which is \$4,000.00. *See* NMSA 1978, § 7-1-63.

For the foregoing reasons, the Taxpayer's protest is **DENIED IN PART AND GRANTED IN PART.**

DATED: October 9, 2015.

*Dee Dee Hoxie*  
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DEE DEE HOXIE  
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