STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
AUTOGLASS TECHNOLOGIES, LLC, **No. 17-04**
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0540700720

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 3, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Ms. Veronica Galewaler, Auditor, also appeared on behalf of the Department. Ms. Tamara Jaramillo, owner of Autoglass Technologies, LLC (Taxpayer), appeared for the hearing with her attorney, Mr. M. David Chacon, and her accountant, Ms. Patricia Padilla. The Department's exhibits "A", "B", "C", "D", "H", "K", "M", "N", and "P" were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The Taxpayer objected to several of the Department's exhibits as hearsay and for lack of disclosure. The objections were overruled as the rules of evidence do not apply and opposed exhibits may be admitted for purposes of the record. *See* NMSA 1978, § 7-1B-6 (2015). *See also* 3.1.8.10 NMAC (2001). 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

Procedural history

1. On September 9, 2015, the Department assessed the Taxpayer as a successor in business. The assessment was for $264,378.41 tax, $52,613.80 penalty, and $25,724.06 interest.
2. On October 6, 2015, the Taxpayer filed a formal protest letter.

3. On January 5, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

4. The Department is required to file a request for hearing with the Administrative Hearings Office (AHO) within 45 days of the receipt of the protest, and the AHO is required to set a hearing within 90 days of the protest. NMSA 1978, § 7-1B-8 (A) (2015).

5. Forty-five days from October 6, 2015 was November 20, 2015. Ninety days from October 6, 2015 was January 4, 2016.

6. The Department filed a request for hearing with the AHO on January 5, 2016. Consequently, the AHO had no knowledge of the protest until January 5, 2016.

7. The Department's request was filed more than 90 days after the receipt of the protest.

8. On January 7, 2016, the AHO promptly issued a notice of hearing. The hearing was held by telephone on January 13, 2016, eight days after the AHO first received the request.

9. The Taxpayer objected to the hearing as it was set more than 90 days from the protest.

10. The objection was taken under advisement at that time. A scheduling order and notice was issued on January 15, 2016.

11. On April 20, 2016, Mr. Chacon entered his appearance for the Taxpayer.

12. On May 26, 2016, the Taxpayer filed motions regarding the tardiness of the hearing and regarding a lack of discovery.

13. On June 6, 2016, the Department filed its responses to the Taxpayer's motions.

14. The order denying dismissal for the tardiness of the hearing was issued on June 27, 2016.

15. The order to produce discovery was issued on June 27, 2016.

16. The Taxpayer's witness list was filed on July 8, 2016. The Department's witness list was filed on July 19, 2016.

17. On July 20, 2016, the Department filed a request for continuance of the hearing set on July 29, 2016.

18. The request for continuance was granted and amended notice was issued on July 21, 2016.

19. On October 28, 2016, the Taxpayer filed a motion to exclude.

20. On October 28, 2016, the Department filed its response.

21. At the hearing on November 3, 2016, the Taxpayer renewed its motions on the tardiness of the hearing and the Department's failure to produce discovery.

22. The Department admitted that it had not produced complete discovery to the Taxpayer in a timely manner. The Department explained that it did not have many of the items requested in time to make discovery. The Department sought to remedy this failure by asking its witness about certain exhibits, but did not request that the exhibits be admitted.

23. The parties were given until December 5, 2016 to submit written proposed findings of fact and closing arguments.

24. On November 30, 2016, Mr. Chacon filed a notice of withdrawal as counsel.

25. On December 2, 2016, the Chief Hearing Officer emailed the parties and conducted a telephonic hearing regarding the propriety of the notice under Rule 16-116.

26. Mr. Chacon provided information that satisfied Rule 16-116. Mr. Chacon requested that the Taxpayer be given additional time to obtain new counsel or to prepare its written closing itself. Mr. Chacon also advised that he might continue to represent the Taxpayer if certain issues were resolved.

27. The request was granted, and the deadline was extended to December 16, 2016. Mr. Chacon was also ordered to update the AHO on the status of his representation of the Taxpayer by December 9, 2016.

28. Mr. Chacon filed an update on December 9, 2016, and advised that the Taxpayer was well aware of its deadlines and obligations. The Department filed a response on December 9, 2016.

29. On December 16, 2016, the Department filed its written closing arguments and findings. Nothing was filed by the Taxpayer.

Substantive facts.

30. Ms. Jaramillo sought advice from Ms. Padilla (the accountant) in 2014 in regard to starting her own business doing glass repairs and windshield replacements on automobiles.

31. At that time, Ms. Jaramillo was working for another glass repair company (the former company), which was engaged in the exact same type of glass repairs and windshield replacements.

32. The former company was going out of business, and Ms. Jaramillo wanted to start her own business doing glass repair.

33. The accountant assisted Ms. Jaramillo in filing for business licenses and taxes.

34. Ms. Jaramillo began doing business as the Taxpayer, which is engaged in automobile glass repairs.

35. The Taxpayer was registered by Ms. Jaramillo with the Department for gross receipts tax purposes in December 2014.

36. The Taxpayer filed zero gross receipts taxes for December 2014.

37. The former company was owned by Ms. Jaramillo's step-father, and he assisted Ms. Jaramillo as she started her own business.

38. Ms. Jaramillo, her step-father, her mother, and several other employees worked for the former company, and subsequently worked for the Taxpayer.

39. Ms. Jaramillo started a checking account for the Taxpayer in late 2014.

40. Glass repairs require resin and a device known as a bridge. Other items might be used, such as razor blades, but the resin and bridge are crucial to glass repairs.

41. Bottles of resin cost approximately $225 to $336 per bottle, depending on its thickness, and one bottle of resin will last for approximately six months.

42. Ms. Jaramillo could not recall how she obtained the initial glass repair supplies for the Taxpayer. Ms. Jaramillo furnished the office with items that she already owned.

43. The Taxpayer was conducting business and receiving payments in December 2014, despite reporting zero gross receipts for that month.

44. The former company was still operating and receiving payments in December 2014.

45. Ms. Jaramillo could not recall how the Taxpayer received referrals in December 2014, and could not recall with whom the Taxpayer was doing business at that time.

46. During December 2014, the Taxpayer's business was conducted by Ms. Jaramillo's step-father as Ms. Jaramillo was occupied with obtaining licenses, getting leases, and other activities related to the start-up.

47. The Taxpayer and the former company provided services to some of the same customers in December 2014. The Taxpayer and the former company were paying some of the same employees in December 2014.

48. The Taxpayer's business office is located in the same complex as the former company's business offices were located, but Ms. Jaramillo obtained her own lease in a separate office suite.

49. The Taxpayer continued to do business with customers of the former company, including other glass companies and insurance providers, but did not have a formal agreement to assume any outstanding contracts.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable under the assessment as a successor in business to the former company.

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.

Timeliness of the hearing.

The Taxpayer renewed its arguments that the Department's violation of the statute necessitates that the protest be granted. The Taxpayer argues again that the requirement that the request be filed and the hearing be set are jurisdictional requirements. The Department renewed its arguments that the tardiness of the request and the hearing are not jurisdictional and are not grounds to grant the protest. The Department had also argued that the AHO has 90 days from its

receipt of the protest from the Department to hold a hearing or that the AHO has 135 from the Department's receipt of the protest, which would be the 45 days to request the hearing plus 90 days.

It is not clear whether the statutory requirement is intended to be jurisdictional as the statute does not provide any remedy or relief for a failure to comply. *See* NMSA 1978, § 7-1B-8. However, the statute does not provide 90 days from the request for hearing or even from when the hearing should have been requested, as the Department argues. *See id.* A hearing is required from the date of the "receipt of a protest filed pursuant to Section 1-7-24 NMSA 1978." *Id.* Since a protest is filed with the Department under Section 1-7-24, the hearing is required to be held within 90 days of that date. *See id. See also* NMSA 1978, § 7-1-24.

The Department was in violation of the statute by failing to refer the protest for hearing within 45 days. *See* NMSA 1978, § 7-1B-8. In fact, the Department did not refer the protest for hearing within 90 days. The Department did not offer any explanation for its tardiness. Due to the Department's actions, it was impossible for the AHO to set the Taxpayer's protest within 90 days. *See id.* Consequently, the Taxpayer's protest was not held within 90 days of the date that its protest was filed.

Another taxpayer previously argued that the Department denied it the statutory right to a prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13. The court found that the general rule is that the tardiness of public officer's is not a defense to an action by the state. *See id.* The court noted that the statute did not provide a consequence for failure to comply with the requirements of a prompt hearing. *See id.* Therefore, "[t]he general rule is applicable in these cases unless [the statute] makes it inapplicable." *Id.* Another taxpayer

argued that the failure of the hearing officer to render a decision in 30 days, as required by statute, divested the hearing officer of jurisdiction. *See also Kmart Properties, Inc. v. Taxation and Revenue Dep't.*, 2006-NMCA-026, ¶ 53, 139 N.M. 177. The court found that the tax statutory deadline was not jurisdictional because of the general tardiness rule and the heavy statutory presumption of correctness that favors the Department. *See id.* at ¶ 54. The court found that the statutory deadline did not affect the essential power to decide complex and time-consuming protests. *See id.* at ¶ 55. The same rationale would apply to the statutory deadline in which to hold a hearing.

Equitable estoppel may be found against the state where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't,* 1998-NMSC-011, ¶ 17, 125 N.M. 140. Equitable estoppel against the state is disfavored, especially in cases involving taxes. *See Taxation and Revenue Dep't v. Bien Mur Indian Market*, 1989-NMSC-015, ¶9-10, 108 N.M. 228. Equitable estoppel will not apply against the state when it would be contrary to the requirements of statute or law. *See Rainaldi v. Pub. Employees Ret. Bd.*, 1993-NMSC-028, ¶ 18-19, 115 N.M. 650. *See also In re Kilmer*, 2004-NMCA-122, ¶ 26, 136 N.M. 440. However, even if estoppel were to apply, the Hearing Officer could not grant it. *See AA Oilfield Serv. v. New Mexico SCC*, 1994-NMSC-085,118 N.M. 273 (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). Without a clear statutory provision to the contrary, there is no administrative remedy that can be granted. The Department's violation of the statutory time limits for requesting a hearing does not necessitate that the protest be granted.

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). 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). At the hearing, the Taxpayer argued that the assessment of interest and penalty was inappropriate under the *Hi-Country* case. The Department argued that a successor in business is also liable for the penalty and interest if the successor is a "mere continuation" of the previous business. However, a successor in business is liable only for the tax itself and is not liable for any penalty or interest. *See Hi-Country Buick GMC, Inc. v. Taxation and Revenue Dep't*, 2016-NMCA-027, ¶ 20 (holding that the definition of tax in the successor in business statute does not include penalty or interest), *cert. denied*, No. 35,647 (NMSC, March 15, 2016). The assessment of penalty and interest is abated.

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). "The tangible and intangible property used in any business remains subject to liability for payment of the tax…even though the business changes hands." NMSA 1978, § 7-1-61. "If, after any business is transferred to a successor, any tax…remains due, the successor shall pay the amount due". NMSA 1978, § 7-1-63.

There are 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 former company and the Taxpayer. The former company had supplies that allowed for its technicians to do glass repairs. The Taxpayer began doing glass repairs while the former company was still operating and used the same technicians. The Taxpayer did not establish how it came by its supplies during that time. The Department argues that it would be reasonable to infer that Ms. Jaramillo's step-father was providing the supplies and the business contacts from the former company. A transfer includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with the property of a business". 3.1.10.16 (F) (3) NMAC. Given the totality of the evidence, it is more likely than not that the former company's supplies were used by the Taxpayer during its start-up phase.

The second factor is whether there was a transfer that was not in the ordinary course of the transferor's business. *See* 3.1.10.16 (A) (2) NMAC. The former company's supplies and goodwill transferred to the Taxpayer. *See* NMSA 1978, § 7-1-61 (including all tangible and intangible property used in the business). These transfers were not in the ordinary course of the former company's business.

The third factor is whether "a substantial part of both equipment and inventories" was transferred. 3.1.10.16 (A) (3) NMAC. It is not known how much the former company's supplies were used, so it is not known if it was a substantial part.

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 former company and the Taxpayer were both engaged in glass repair on automobiles, and the work done by both is essentially identical. Several repair technicians who worked for the former company have also worked for the Taxpayer.

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 Taxpayer has retained many employees who were also working for the former company. The Taxpayer rented a location in the same building that the former company was using. The Taxpayer obtained customers who were also customers of the former company in December 2014 and has continued to serve those customers. Ms. Jaramillo's step-father was the point of contact for customers of both the former company and of the Taxpayer in December 2014 and for some time after. Consequently, it does appear that the former company's goodwill was transferred to the Taxpayer.

The sixth factor is whether the business obligations of the transferor were honored by the transferee. *See* 3.1.10.16 (A) (6) NMAC. There was no evidence that the Taxpayer formally assumed any obligations of the former company.

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 former company. 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 former company.

The statute indicates that when a business changes hands, it can involve the transfer of tangible and intangible property. *See* NMSA 1978, § 7-1-61. *See also Sterling Title*, 1973-NMCA-086, ¶ 23. Goodwill is an example of intangible property that could be transferred to a successor. The term "business changes hands" is meant to be a broad, all-inclusive expression and is used in the statute for the purpose of maintaining the personalty as security for the payment of tax. *See Sterling Title*, 1973-NMCA-086, ¶ 25. A transfer of any property used in the business, tangible or intangible, is sufficient to show that the business changed hands for purposes of the successor statute. *See* NMSA 1978, § 7-1-61. *See also* 3.1.10.16 NMAC. *See also Sterling Title*, 1973-NMCA-086, ¶ 25.

The Taxpayer failed to overcome the presumption of correctness as there was very little evidence to show how the Taxpayer began its operations. The Taxpayer was not conspicuously separate from the former company; in fact, the Taxpayer was using Ms. Jaramillo's step-father as the point of contact for customers while he was still doing business as the former company. The Taxpayer and the former company were doing work for the same customers during December 2014, despite the Taxpayer's lack of essential glass repair supplies and lack of means to draw its own independent customers. Consequently, there is sufficient evidence to conclude that the former company provided supplies to the Taxpayer, and that the goodwill of the former company transferred to the Taxpayer. If a single factor is present, there is a presumption that there is a successor in business. *See* 3.1.10.16 (B) NMAC. Therefore, the Taxpayer is presumed to be a successor in business to the former company.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Assessment issued under Letter ID number L0540700720, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Department's failure to comply with the statute and the tardiness of the hearing do not necessitate that the protest be granted. *See* NMSA 1978, § 7-1B-8. *See also Ranchers-Tufco*, 1983-NMCA-126, ¶ 12. *See also Kmart Properties, Inc.*, 2006-NMCA-026, ¶ 54.

C. There was sufficient evidence to conclude that the Taxpayer was using the former company's supplies when it commenced taking on customers in December 2014, and that its first and continuing customers were thanks to the goodwill of the former company. Therefore, the Taxpayer was a successor in business to the former company. *See* 3.1.10.16 NMAC. *See also* NMSA 1978, § 7-1-61. *See also Sterling Title*, 1973-NMCA-086.

D. Even though the Taxpayer is a successor in business, it is not liable for penalty and interest. *See Hi-Country Buick*, 2016-NMCA-027. The assessment for penalty and interest is HEREBY ABATED.

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

DATED: January 9, 2017.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.