

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

**IN THE MATTER OF THE PROTEST OF  
TYLER D. CARTER  
THE RED ONION  
TO THE ASSESSMENT ISSUED UNDER  
LETTER ID NO. L1862703920**

*v.*

**AHO Case No. 18.04-091A, D&O No. 18-25**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on July 20, 2018 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. Kenneth Fladager, Staff Attorney. Mr. Nicholas Pacheco, Auditor, also appeared on behalf of the Department. Mr. Tyler Carter, owner of the Red Onion (Taxpayer), appeared for the hearing with his father, who was present for the hearing based upon the Taxpayer's request. Mr. Carter and Mr. Pacheco testified. The Hearing Officer took notice of all documents in the administrative file. The Department's exhibits A, B, and C were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet.

Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

## **FINDINGS OF FACT**

1. On February 5, 2018, the Department assessed the Taxpayer as a successor in business for tax, penalty, and interest. The assessment was for \$15,355.18 tax, \$3,247.85 penalty, and \$1,925.08 interest, for a total of \$20,528.11.
2. On February 26, 2018, the Taxpayer filed a formal protest letter.
3. On April 23, 2018, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On April 23, 2018, the Administrative Hearings Office issued a notice of telephonic scheduling hearing.
5. On May 9, 2018, a telephonic scheduling hearing was conducted. The hearing was held within ninety days of the protest.
6. On May 11, 2018, the scheduling order and notice of hearing was issued.
7. On June 20, 2018, the Taxpayer filed a letter that was treated as its prehearing statement.
8. On June 29, 2018, the Department filed its prehearing statement.
9. Mr. Carter is the owner of the Taxpayer. The Taxpayer purchased a restaurant business from the previous owner. [Testimony of Mr. Carter and Exhibit A]
10. The Taxpayer and the previous owner entered into a contract on July 17, 2017, which enabled the Taxpayer to purchase "the restaurant business". [Exhibit A]
11. Pursuant to the purchase of the business, the contract included the transfer of several pieces of furniture and equipment. [Exhibit A and Testimony of Mr. Carter]
12. The Taxpayer purchased the restaurant business for \$25,000.00. [Testimony of Mr. Carter and Exhibit A]

13. The Taxpayer continued operating the restaurant business in the same location, with a very similar name. However, the Taxpayer hired new employees, developed its own menu, and obtained its own tax identification. [Testimony of Mr. Carter and prehearing statement]

14. The Taxpayer discovered that some of the equipment sold to it in the contract did not actually belong to the previous business. The equipment was repossessed by its owners when the Taxpayer's order volume dropped below an obligatory amount. [Testimony of Mr. Carter and prehearing statement]

15. The Taxpayer feels that the value of the restaurant business that it purchased is actually substantially less than the \$25,000.00 purchase price because of the fraudulent representations about the equipment. [Testimony of Mr. Carter and prehearing statement]

### **DISCUSSION**

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

#### **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. *See also* NMSA 1978, § 7-1-61 (A) (2017) (including penalty and interest against successors in business). 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.

### **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.

Several factors are used in determining a successor in business. *See* 3.1.10.16 (A) NMAC. If a single one of these factors is 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. The Taxpayer agreed to purchase “the restaurant business” for \$25,000.00, and the contract included several items of equipment and furniture. *See* Exhibit A. This factor weighs in favor of finding that the Taxpayer is a successor in business.

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. Selling off the business and its equipment was not in the ordinary course of operating a restaurant. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The third factor is whether “a substantial part of both equipment and inventories” was transferred. 3.1.10.16 (A) (3) NMAC. The Taxpayer purchased several items of furniture and equipment. This factor weighs in favor of finding that the Taxpayer is a successor in business.

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 Taxpayer is operating a restaurant business, as was the seller of the business. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The fifth factor is whether “the transferor’s goodwill follow[ed] the transfer of the business properties”. 3.1.10.16 (A) (5) NMAC. Although goodwill was not mentioned in the purchase contract, the Taxpayer continues to use a substantially similar name and operate in the same location. Therefore, the goodwill followed the transfer of the business to the Taxpayer. This factor weighs in favor of finding that the Taxpayer was a successor in 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. There was no evidence that the Taxpayer satisfied any business obligations of the seller. This factor weighs in favor of finding that the Taxpayer is not a successor in business.

The seventh factor is whether unpaid debts of the transferor were paid by the transferee. *See* 3.1.10.16 (A) (7) NMAC. There was no evidence that the Taxpayer assumed any unpaid debts of the seller. This factor weighs in favor of finding that the Taxpayer is a not successor in business.

The final factor is whether there was an agreement precluding competition. *See* 3.1.10.16 (A) (8) NMAC. There was no such agreement in the contract. This factor weighs in favor of finding that the Taxpayer is not a successor in business.

The Taxpayer acknowledges that many of the criteria for finding a successor in business are present in its case. However, the Taxpayer argues that the statute is too broad because it imposes liability on someone who only purchases the property of another business.

When a business changes hands, its tangible and intangible property remain subject to liability for the payment of tax, and the successor may be assessed and liable for the tax of a business that it takes over. *See* NMSA 1978, § 7-1-61. *See also Sterling Title, 1973-NMCA-086, ¶ 23.* The statute is broad and imposes liability on successors even when they do not know or understand that they are successors. *See* NMSA 1978, § 7-1-61. 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.* If a single factor is present, there is a presumption that there is a successor in business. *See 3.1.10.16 (B) NMAC.* In this case, numerous factors were present. The Taxpayer failed to overcome the presumption of correctness and failed to overcome the presumption that it was a successor in business.

The Taxpayer argues that its liability should be limited to the value of the equipment that was transferred that was not subsequently repossessed by another party. The Taxpayer argues that the transfer was fraudulent because the equipment was not actually owned by the restaurant, but was represented in the contract as if it were. A successor’s liability may be satisfied once it pays “the full value of the transferred tangible and intangible property.” NMSA 1978, § 7-1-63. However, property used in the business includes anything transferred that is “reasonably

necessary for the business's continued operations, whether or not the property is actually owned by the business." 3.1.10.16 (F) (4) NMAC. Although several tangible pieces of furniture and equipment were included in the purchase, they were not assigned any individual values in the contract. *See* Exhibit A. There was not sufficient evidence to establish what equipment had been repossessed or what its value was. Moreover, the contract was for the purchase of "the restaurant business" for \$25,000.00. The purchase of "the restaurant business" includes an element of intangible property and goodwill, which is also not valued in the contract. Without other evidence, the purchase price of the contract will be presumed to be the value of the tangible and intangible property transferred to the Taxpayer. Therefore, the Taxpayer's liability is limited to the \$25,000.00 purchase price in the contract. However, the amount assessed was less than \$25,000.00.

The Taxpayer argues that the previous business owner should be liable for the tax. The Taxpayer argues that the Department has refused to enter into a payment plan and to accept payments from the previous business owner. The Taxpayer has no standing to object to the Department's treatment of another taxpayer. Moreover, the previous business owner's concurrent liability for the tax does not preclude the Department from assessing a successor in business. *See* NMSA 1978, § 7-1-61. To find otherwise would render the statute useless, as previous owners always remain liable for outstanding tax. *See id.* *See also* NMSA 1978, § 7-1-16 and § 7-1-17. *See also* 3.1.6.10 NMAC (2001).

### **CONCLUSIONS OF LAW**

A. The Taxpayer filed a timely written protest to the assessment issued under Letter ID number L1862703920, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer is a successor in business. *See* NMSA 1978, § 7-1-61 and § 7-1-63. *See also* 3.1.10.16 NMAC. *See also Sterling Title*, 1973-NMCA-086.

C. The Taxpayer failed to overcome the presumption that the assessment of tax was correct. *See* NMSA 1978, § 7-1-17.

For the foregoing reasons, the Taxpayer's protest is **DENIED**.

DATED: August 2, 2018.

*Dee Dee Hoxie*

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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.

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed the foregoing Order to the parties listed below this \_\_\_\_\_ day of \_\_\_\_\_, 2018 in the following manner:

*First Class Mail*

*Interoffice Mail*

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