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

IN THE MATTER OF THE PROTEST OF
CORROSION SERVICES CORPORATION **No. 07-16**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOS. 4138713-4138716, 4138718, 4138719,
4138721-4138723, 4138725-4138743, 4138746-4138778

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 23, 2007, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Jeffrey W. Loubet, Special Assistant Attorney General. Corrosion Services Corporation was represented by Clinton W. Marrs, with the law firm of Vogel Campbell & Blueher, P.C. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Corrosion Services, Inc. ("CSI") was incorporated in New Mexico in 1976.

2. The officers, directors and shareholders of CSI were Paskell and Barbara Vaughn. Some time during the corporation's existence, David Romero also served as a director.

3. Initially, CSI was engaged in the business of corrosion control services, which involved installing cathodic protection systems to protect metallic structures and water tanks.

4. After Paskell Vaughn obtained a contractor's license, the business expanded into pipeline installations, which came to represent about 70 percent of CSI's business, with the remaining 30 percent being corrosion services.

5. Brett Vaughn was 15 when his parents formed CSI, and he went to work for the company as a teenager after graduating from high school.

6. Brett started out as a laborer and later became a cathodic protective technician working in the area of corrosion control.

7. Brett did not have a contractor's license, but worked on CSI's construction projects as an operator of the backhoes and ditching machines used to dig trenches for the pipeline installations.

8. Brett was never an officer, director or shareholder of CSI, nor did he ever work as a supervisor or manager.

9. Brett's younger sister Joy and her husband, Joe Durant, also worked for CSI as employees, but were never supervisors, managers, officers, directors or shareholders of the company.

10. From about 1980 through 2001, CSI maintained a yard of heavy construction equipment and performed pipeline installations throughout the state, including projects in Las Cruces, White Sands, Carlsbad, Ft. Sumner, and Vaughn.

11. CSI had between 15 to 20 employees at any one time, including laborers, machine operators, pipefitters, and plumbers, as well as cathodic protective technicians who worked in the corrosion services side of the business.

12. In the late 1990s, CSI bid on and was awarded a large pipeline job for the federal government at White Sands.

13. CSI found that it had miscalculated the cost of performing the White Sands job and the company began to lose money.

14. By 2001, CSI was in serious financial trouble, and Paskell Vaughn decided to close the business and retire.

15. When CSI went out of business, Brett Vaughn and Joy and Joe Durant were laid off and had to find other employment.

16. They decided to go into business for themselves performing corrosion control services, which was Brett's primary trade.

17. In July 2002, Joy and Joe Durant formed Corrosion Services Corporation ("CSC") d/b/a JBJ Enterprises. The Durants were the sole officers, directors and shareholders of CSC.

18. The Durants hired Brett to work for CSC as a corrosion control technician, and the three of them were the only full-time employees of the company. They later hired another former employee of CSI on a part-time basis.

19. Paskell and Barbara Vaughn, the owners of CSI, were never officers, directors, shareholders or employees of CSC.

20. CSC hired Barbara Head, a Las Cruces CPA, to assist them with the company's record keeping and tax reporting. Ms. Head never performed any services for CSI.

21. At the time it was incorporated in 2002, CSC acquired various corrosion control tools and equipment from CSI. The full replacement value of this used equipment is $3,765.

22. CSC also acquired a 2001 Dodge Truck from CSI and assumed liability for the remaining installment payments due on the vehicle. The net value of the truck at the time of acquisition was $1,000.

23. CSC purchased additional equipment and an office software program from third-party vendors. In addition, Brett Vaughn used his personal tools in performing services for CSC.

24. CSC did not acquire any of the construction equipment owned or leased by CSI and has never engaged in the construction work that made up 70 percent of CSI's business; CSC's business has always been limited to corrosion control services.

25. On July 29, 2003, the Department sent a letter to Joy Durant, as president of CSC, stating, in part:

> Pursuant to section 7-1-63 NMSA 1978 demand is made upon you, as successor in business to Corrosion Services, Inc., for the payment of $165,627.70.
>
> If you do not make payment pursuant to this request within ten (10) days after receipt of this letter, the Department shall assess the successor the amount due for the full value of the transferred tangible or intangible property, for the taxes due pursuant to Section 7-1-61 NMSA 1978.

26. The Department's conclusion that CSC was a successor in business to CSI was based, at least in part, on a letter the Department obtained during an audit of CSI. The letter, dated March 17, 2003, was signed by Joy Durant and states: "We have changed our name at Corrosion Service, Inc. Our new name is Corrosion Service Corp. dba JBJ Enterprises...."

27. After receiving the Department's demand letter, Joy and Joe Durant decided to transfer their interest in CSC to Brett Vaughn, who became CSC's sole officer, director and shareholder. Joy then obtained a teaching position and Joe went to work for his father. Neither of the Durants currently works for or has any ownership interest in CSC.

28. On September 22, 2003, the Department issued 61 "CRS-1 Provisional Assessments" to CSC, assessing CSC for CSI's unpaid gross receipts and compensating taxes, plus interest and penalty, for reporting periods between January 1995 and November 2002. The last assessment showing tax due is for the May 2001 reporting period.

29. The assessments were characterized as "provisional assessments" because the Department was not sure of CSC's status as a successor in business to CSI, but had not received an adequate response to its inquiries.

30. On October 17, 2003, CSC's attorney filed a written protest to the Department's assessments, maintaining that CSC was not a successor in business to CSI or, alternatively, that CSC's liability for the assessments was limited to CSC's net realizable equity in the assets it acquired from CSI.

31. CSC's protest specifically addressed the issue of whether CSC could be considered a "mere continuation" of CSI, setting out facts establishing the lack of common management and ownership and providing case citations to New Mexico law.

32. CSC's protest also requested an award of its reasonable costs, including attorney's fees, pursuant to the provisions of NMSA 1978, § 7-1-29.1.

33. On June 19, 2007, the Department's attorney filed a request for hearing on CSC's protest, which was subsequently scheduled for August 23, 2007.

34. At the August 23, 2007 hearing, CSC acknowledged that it had acquired tools and equipment from CSI with a replacement value of $4,765 and offered to pay this amount to discharge its liability for the Department's assessments pursuant to the provisions of NMSA 1978, § 7-1-63(C).

DISCUSSION

The primary issue to be decided is whether CSC's liability for CSI's unpaid taxes is limited to the value of the assets CSC acquired from CSI or whether CSC is liable for the total amount of CSI's taxes because the new business is a "mere continuation" of the old business. A

secondary issue is whether CSC is entitled to an award of administrative costs pursuant to the provisions of NMSA 1978, § 7-1-29.1.

Burden of Proof. NMSA 1978, § 7-1-17(C) provides that any assessment of tax made by the Department is presumed to be correct. Once the presumption of correctness is rebutted, however, the burden shifts to the Department to show the correctness of the assessed tax. *MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003 NMCA 21, ¶ 13, 133 N.M. 217, 62 P.3d 308.

Successor Liability Under the Tax Administration Act. CSC's liability for CSI's gross receipts and compensating tax liability is based on NMSA 1978, §§ 7-1-61(B) and 7-1-63(C) of New Mexico's Tax Administration Act, which state as follows:

> § 7-1-61(B): 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.
>
> § 7-1-63(C): 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. The successor shall remain liable for the amount assessed, however, until the amount is paid if:
>
> (1) the business has been transferred to evade or defeat tax;
>
> (2) the transfer of the business amounts to a de facto merger, consolidation or mere continuation of the transferor's business; or
>
> (3) the successor has assumed its liability.

These statutes set out a limited exception to the following general rule of law:

> In American jurisdictions it is well settled that a corporation which purchases the assets of another corporation does not automatically acquire the liabilities or obligations of the transferor corporation except (1) where there is an agreement to assume those obligations; (2) where the transfer results in a consolidation or merger; (3) where there is a continuation of the transferor corporation; or (4) where the transfer is for the purpose of fraudulently avoiding liability.

Southwest Distributing Co. v. Olympia Brewing Co., 90 N.M. 502, 505, 565 P.2d 1019, 1022 (1977); *See also*, *Pankey v. Hot Springs National Bank*, 46 N.M. 10, 16, 119 P.2d 636, 640 (1941) (adopting the general rule of nonliability and its four exceptions); *Garcia v. Coe Manufacturing Company*, 1997-NMSC-013, ¶ 12, 123 N.M. 34, 933 P.2d 243 (confirming the continued viability of that rule).

In contradiction to the general rule of successor liability, the statutory exception created by §§ 7-1-61 and 7-1-63 holds a successor business liable for its predecessor's tax liability, *up to the value of the assets transferred*. In order to hold the successor liable for the full amount of the predecessor's liability, the successor must fall within one of the traditional exceptions set out in New Mexico case law and restated in § 7-1-63(C)(1) through (C)(3).

Mere Continuation Exception in § 7-1-63(C)(2). In its opening statement at the administrative hearing, CSC acknowledged that it had acquired $4,765 of tools and equipment from CSI and offered to pay this amount pursuant to the requirements of § 7-1-61(B) and 7-1-63(C). The Department argued that CSC is liable for the full amount of CSI's unpaid taxes, which are in excess of $165,000, relying on the "mere continuation" exception set out in § 7-1-63(C)(2). In *Garcia, supra,* at ¶ 13, the New Mexico Supreme Court defined this exception to successor liability as follows:

> Generally, a continuation of the transferor corporation occurs where there is (1) a continuity of directors, officers, and shareholders; (2) continued existence of only one corporation after the sale of the assets; and (3) inadequate consideration for the sale of the assets.

Of these three factors, the key element to a finding of continuation is the first:

> The "key element of a 'continuation' is a common identity of officers, directors and stockholders in the selling and purchasing corporations." *Leannais v. Cincinnati, Inc.,* 565 F.2d 437, 440 (7th Cir.1977). Thus, the mere continuation

> exception "has no application without proof of continuity of management and ownership between the predecessor and successor corporations." *Pancratz v. Monsanto Co.,* 547 N.W.2d 198, 201 (Iowa 1996). In this case, WIW and Coe did not share directors, officers or stockholders; therefore, Coe is not liable to Garcia under the mere continuation exception.

Id. The holding in *Garcia* is consistent with the supreme court's earlier decision in *Pankey, supra*, which denied a creditor's attempt to enforce a judgment against a newly chartered bank to which assets of the debtor bank had been transferred. Focusing on the absence of common ownership, the court rejected the creditor's argument that the new bank was a mere continuation of the old:

> The appellee was not a mere continuation of the First National Bank. The trial court held that it was "a new entity" and this is not contested in this court, and indeed could not be. The appellee was organized under the banking laws of the United States and only seven shares of its two hundred and fifty shares of stock were owned by stockholders of the First National Bank. They were in no sense identical, notwithstanding that at the time of the sale and purchase of the assets of the First National Bank their respective officers were identical. The third exception does not apply.

Id., 46 N.M. at 16, 119 P.2d at 640.

In this case, there is no overlapping ownership between CSC and CSI. Although Brett Vaughn and Joy and Joe Durant were employees of CSI, they were not directors, officers or shareholders, nor did they hold managerial positions with the old business. Conversely, none of the managers, officers, directors or shareholders of CSI are employed by or have any ownership interest in CSC. Based on New Mexico case law, CSC is not a mere continuation of CSI and cannot be held liable for the full amount of CSI's taxes under the exception set out in NMSA 1978, § 7-1-63(C)(2).

Despite the apparent clarity of New Mexico law on this issue, the Department argues that it is not bound by the mere continuation test adopted by the New Mexico Supreme Court in

Pankey and *Garcia*. Instead, the Department seeks to apply what it sees as the "more enlightened" test of substantial continuity set out in Subsection F(1) of Department Regulation 3.1.10.16 NMAC:

> F. For the purposes of Section 7-1-61 through 7-1-63 NMSA 1978 and Section 3.1.10.16 NMAC:
>
> (1) "mere continuation" is determined by the "substantial continuity test" used in other contexts where the government is seeking to impose successor liability and is determined by addressing whether 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. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2nd Cir. 1996).

The Department's attempt to apply the substantial continuity test to CSC is problematic for several reasons. First, this test has not been recognized in New Mexico and, as discussed above, is in direct conflict with the traditional definition of "mere continuation" adopted by the New Mexico Supreme Court. Second, application of the substantial continuity test (also known as the "continuing enterprise" or "continuity of enterprise" test) is generally limited to the areas of labor law and products liability. *See, e.g., Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987) (discussing the evolution of the "substantial continuity" test in the context of labor relations); *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873 (Mich. 1976) (adopting the "continuity of enterprise" test in the field of products liability).

In *B. F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), which is the cited basis for the Department's regulation, the Second Circuit Court of Appeals expanded application of the substantial continuity test to hold a successor corporation liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Seven years later, the court reversed its position. Relying on the United States Supreme Court's decision in *United*

States v. Bestfoods, 524 U.S. 51 (1998), the Second Circuit found that CERCLA's failure to clearly state Congress's intent to depart from established common law rules precluded the court's deviation from those rules:

> Because the substantial continuity test adopted in *Betkoski* departs from the common law rules of successor liability, *Betkoski* is no longer good law.
>
> As we described in *Betkoski,* the "traditional common law rule states that a corporation acquiring the assets of another corporation only takes on its liabilities if any of the following apply: the successor expressly or impliedly agrees to assume them; the transaction may be viewed as a de facto merger or consolidation; the successor is the 'mere continuation' of the predecessor; or the transaction is fraudulent." 99 F.3d at 519 (quoting *United States v. Carolina Transformer Co.,* 978 F.2d 832, 838 (4th Cir.1992)); *see also* Fletcher, Cyclopedia of the Law of Private Corporations § 4892.75.....
>
> Noting that the substantial continuity test (sometimes referred to as the "continuity of enterprise" approach) had been followed by the Supreme Court in the labor law context, in *Betkoski* we contrasted that doctrine with the mere continuation rule. Rather than considering ownership, the substantial continuity test focuses on the continuity of the business: Whether the "successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers." *Id.*
>
> .... In *Betkoski* we were not applying general common law principles of corporate law but rather adopting a special rule for use in CERCLA cases that departed from those principles.

New York v. National Services Industries, Inc., 352 F.3d 682, 685-686 (2d Cir. 2003).

Here, too, the Department is attempting to depart from accepted principles of common law to fashion a special successor liability rule for use in tax cases. There is no legal basis for the Department's position. While regulations enacted by an agency are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes, *N.M. Mining Association v. N.M. Water Quality Control Commission*, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d 991, an administrative agency's discretion may not justify altering, modifying or extending the reach of a

law created by the Legislature, *State ex rel. Taylor v. Johnson*, 1998-NMCA-015, ¶ 22, 125 N.M. 343, 961 P.2d 768; *Rainbo Baking Co. v. Commissioner of Revenue,* 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct.App.1972). In this case, the language of § 7-1-63(C) mirrors the language of the common law rule on successor liability set out in New Mexico case law. There is no indication that the Legislature intended the Department to apply a different, broader test to determine when a business qualifies as a mere continuation of its predecessor. Had the Legislature wanted something other than the traditional common law test to apply, it could have directed the use of such a test in the statute itself.

In *Garcia, supra*, at ¶ 15, the New Mexico Supreme Court explained that the rationale underlying the substantial continuity or continuing enterprise exception to successor liability "is the necessity of protecting an injured person who may be left without a remedy if the predecessor has dissolved, is defunct, or is otherwise unavailable to respond in damages."[1] These policy considerations do not apply in other areas of the law. In *New York v. National Service Industries, Inc.*, 380 F.Supp.2d 122, 132-133 (E.D.N.Y. 2005), *aff'd* 460 F.3d 201 (2d Cir. 2006) (on remand from the Second Circuit's decision repudiating its expansion of the substantial continuity test in *Betkoski*), the federal district court rejected the use of a relaxed continuity of ownership test under New York state law, noting that:

> The courts that pioneered the exception in *Turner v. Bituminous Casualty Co.,* 397 Mich. 406, 244 N.W.2d 873, 877-82 (1976), and *Ray v. Alad,* 19 Cal.3d 22, 31, 136 Cal.Rptr. 574, 560 P.2d 3, 8 (1977), did so to address the special policy concerns raised by manufacturing defect cases, which include the virtual destruction of a plaintiff's remedies caused by the successor's acquisition of the business, the successor's superior ability, when compared to the innocent

[1] After examining the continuing enterprise exception, the court chose to adopt an alternative "product-line" exception, which holds a successor corporation liable for injuries resulting from a predecessor's defective products when there is a substantial continuity in the products resulting from the pretransaction and postransaction use of the predecessor's assets. The continuing enterprise exception has not been adopted in New Mexico.

> consumer, to assume the original manufacturer's risk-spreading role and to improve the product's safety, and the fairness of requiring the successor to bear responsibility for injuries stemming from a defective product that it continues to manufacture as concomitant to the goodwill it obtains by holding itself out as a continuation of its predecessor.
> ....
> [T]he State has presented no authority, and this Court has found none, which elevates the desire to reimburse the State for money expended in cleaning up hazardous waste sites to the same level of importance as the need to protect victims injured by defective products from being left without a remedy.

See also, *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 47-48 (2d Cir. 2003) (the relaxed test for continuity of ownership "has never been applied, in this state or elsewhere, outside of the products-liability context. This apparently reflects its use, specific to that area of law, to maintain strict liability for products despite the transfer of the assets that were used to produce them.")

The only case addressing the policy behind New Mexico's successor in business statutes is *Sterling Title Company of Taos v. Commissioner of Revenue*, 85 N.M. 279, 511 P.2d 765 (Ct. App. 1973). There, Dona Ana Title Company sold its title plant, furniture, fixtures and equipment to Sterling, which also assumed Dona Ana's lease and a note owed to third parties. Sterling challenged the Department's determination that Sterling was liable for Dona Ana's unpaid gross receipts taxes as a successor in business, arguing that Dona Ana was not actively engaged in business at the time the assets were transferred. The court rejected this argument, holding that Sterling was a successor in business for purposes of NMSA 1978, § 7-1-61 (then codified as NMSA 1953, § 72-13-74), which provided that the "tangible and intangible property used in any business" remains subject to tax in the hands of a successor. In his specially concurring opinion, Judge Sutin noted that:

> *[T]he primary purpose of the statute was to make tangible and intangible property security for payment of the tax*. The legislature intended this to protect the Bureau and the public against successors who did not withhold an amount sufficient to pay the tax owed by delinquent taxpayers. The legislature did not intend a delinquent taxpayer like Dona Ana to declare its normal business operation ended prior to September 13, 1967, then sell all its personalty to Sterling so that Sterling would be free of liability for the tax. It intended each of the parties to be liable. *It intended tangible and intangible property to be security*. (emphasis added).

Id., 85 N.M. at 282, 511 P.2d at 768. In this case, the policy behind the successor in business statutes is satisfied by CSC's offer to pay the $4,765 value of the tools and equipment it acquired from CSI. Given the complete lack of identity between the officers, directors and shareholders of the two corporations, CSC is not a "mere continuation" of CSI and is not liable for the remaining balance of CSI's unpaid tax liability.

Award of Costs and Attorneys' Fees. NMSA 1978, § 7-1-29.1 provides that when a taxpayer is the prevailing party in an administrative proceeding before the Department, the taxpayer shall be awarded reasonable administrative costs, including attorneys fees. The taxpayer is a "prevailing party" if it has substantially prevailed with respect to (a) the amount in controversy or (b) most of the issues involved in the case or the most significant issue or set of issues involved in the case. § 7-1-29.1(C)(1). But the taxpayer will not be treated as a prevailing party if the Department "establishes that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case." § 7-1-29.1(C)(2).

CSC is the prevailing party in this proceeding. Although CSC conceded its liability for CSI's taxes up to the $4,765 value of the assets transferred from CSI, this figure is less than three percent of the amount assessed by the Department. CSC prevailed with respect to the primary issue by presenting evidence and legal authority to show that it is not a "mere continuation" of

CSI and cannot be held liable for the full amount of CSI's tax liability. The next step is to determine whether the Department's contrary position on this issue was based upon a reasonable application of the law to the facts.

In July 2003, the Department sent a demand letter to CSC, as successor in business to CSI, advising the company that:

> If you do not make payment pursuant to this request within ten (10) days after receipt of this letter, the Department *shall assess the successor the amount due for the full value of the transferred tangible or intangible property*, for the taxes due pursuant to Section 7-1-61 NMSA 1978. (emphasis added).

This demand, and the subsequent assessments issued against CSC upon its failure to timely respond, were reasonable actions taken to enforce the provisions of NMSA 1978, §§ 7-1-61(B) and 7-1-63(C). The Department's letter conformed to the statutory directive that the tangible and intangible property used in any business remains subject to liability for payment of taxes, and that a successor may discharge an assessment by paying the full value of the transferred tangible and intangible property.

It is not clear when the Department determined that CSC was actually a "mere continuation" of CSI and expanded its demand for payment beyond the value of the transferred assets. It appears that this determination was based, at least in part, on a letter the Department obtained during an audit of CSI. The letter, dated March 17, 2003, was signed by Joy Durant and states: "We have changed our name at Corrosion Service, Inc. Our new name is Corrosion Service Corp. dba JBJ Enterprises...." Unfortunately, the Department did not present any evidence to explain the circumstances under which the letter was written or to whom it was sent. Neither Joy Durant nor the recipient of the letter was called as a witness. Instead, the Department's protest auditor testified that he was told by a collector in the Las Cruces office that

the collector was told by the field auditor that she obtained the letter from a customer of CSI. On cross-examination, the protest auditor conceded that he did not know the identity of the customer and did not have any first-hand information concerning the letter. Although hearsay is admissible in an administrative proceeding, it usually carries less weight than evidence based on a witness's own knowledge. Here, the attenuated nature of the protest auditor's testimony and the complete absence of any information concerning the genesis of Joy Durant's March 17, 2003 letter reduces its evidentiary value close to zero.

In the final analysis, however, the letter has no value because it sets out an incorrect statement of the facts of this case. Joy Durant is not an attorney, and her statement that Corrosion Services, Inc. had changed its name to Corrosion Services Corporation is clearly wrong. In its October 17, 2003 protest, CSC provided information establishing the lack of common ownership between the two companies. The Department did not present any evidence to dispute the information contained in CSC's protest letter. To the contrary, the Department introduced print screens from the New Mexico Public Regulation Commission's web site which confirm that CSC is a separate legal entity that does not have any officers, directors or shareholders in common with CSI.

The New Mexico Supreme Court has held that the mere continuation exception "has no application without proof of continuity of management and ownership between the predecessor and successor corporations." *Garcia, supra*, at ¶ 13 (quoting *Pancratz v. Monsanto Co.,* 547 N.W.2d 198, 201 (Iowa 1996)). As discussed in the previous section, the Department regulation equating "mere continuation" with the broader "substantial continuity" test conflicts with the supreme court's decision in *Garcia* and was based on a federal case that has since been

discredited. The Department's insistence that this regulation represents a more enlightened view of the issue and should be applied to the facts of this case is not reasonable. Nor does it seem particularly "enlightened" for the Department hold CSC—a small three-person (now one-person) business—responsible for the entire tax liability of its much larger predecessor, particularly when 70 percent of that liability is attributable to pipeline construction, a line of work unrelated to CSC's corrosion services.

In summary, the Department had sufficient grounds to assess CSC for the full value of the tangible and intangible property it acquired from CSI. Once CSC filed its protest, however, and provided facts and legal authority to establish that it did not share common ownership with CSI, the Department's continued pursuit of CSC to recover the full amount of CSI's tax liability was unreasonable. For this reason, CSC is entitled to the administrative costs, including attorneys fees, that it incurred after October 17, 2003, the date its protest was filed with the Department.

CONCLUSIONS OF LAW

A. CSC filed a timely, written protest to the assessment issued under Letter ID Nos. 4138713-4138716, 4138718, 4138719, 4138721-4138723, 4138725-4138743, 4138746-4138778, and jurisdiction lies over the parties and the subject matter of this protest.

B. CSC's liability for CSI's unpaid gross receipts and compensating taxes is limited to the $4,765 value of the assets CSC acquired from CSI.

C. CSC is not a "mere continuation" of CSI pursuant to NMSA 1978, § 7-1-63(C)(2), and is not liable for the balance of CSI's unpaid tax liability.

D. CSC is entitled to its administrative costs, as defined in NMSA 1978, § 7-1-29.1(B)(3), incurred after October 17, 2003.

IT IS THEREFORE ORDERED:

That CSC pay the Department the $4,765 value of assets it acquired from CSI in full discharge of its liability for the Department's assessments;

That the Department abate the balance of the assessments issued to CSC;

That CSC file its statement of reasonable administrative costs with the Hearing Officer on or before September 24, 2007, and serve a copy on the Department;

That the Department file any objections to the statement of costs on or before October 9, 2007, at which time the Hearing Officer will either enter an order approving the statement or schedule a hearing on the Department's objections.