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

IN THE MATTER OF THE PROTEST OF
CADWORKS HOME DESIGN & DRAFT **No. 09-01**
ID NO. 02-389935-002
ASSESSMENT NO. 2617876

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on November 18, 2008, before Sally Galanter, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Mr. Peter Breen, Special Assistant Attorney General. Mr. Shane Umphress d/b/a Cadworks Home Design & Draft represented his business and himself ("Taxpayer"). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Cadworks of Las Cruces, Inc. ("CLC") was incorporated in New Mexico on August 7, 1995. Prior to its incorporation CLC was operated as a sole proprietorship by Mr. Philip R. Stoes, a/k/a Mr. Rick Stoes, commencing business in 1988.

2. Mr. Philip R. Stoes, brother of Mr. Shane Umphress, served as President and a director of CLC. Mr. Shane Umphress served as Secretary and a director of CLC.

3. CLC was engaged in the business of computer aided drafting and design for homes.

4. CLC maintained a customer list which included local businesses in the Las Cruces area.

5. CLC maintained its offices at the bank tower with an address of 500 S. Main, Suite 304 Las Cruces NM 88001, signing a lease for the office rental space.

6. In late1998, due to a down turn in the economy, CLC closed its business. Taxpayer was aware of the gross receipts taxes owed by CLC at the time of the closing of business of CLC based on discussions between him and Mr. Rick Stoes at the time the decision was made to close CLC.

7. The lease term had not expired when CLC went out of business.

8. CLC left its office equipment including desks at its business location in the bank tower when it closed its offices and quit business. Mr. Philip R. Stoes took CLC's computers from the office upon CLC quitting business.

9. Taxpayer was employed by CLC for approximately five years designing and creating blue prints for residential homes and was so employed at the time of termination of CLC.

10. Taxpayer, knowing the business, started Cadworks Home Design & Drafting ("CHD&D"), as a sole proprietorship.

11. Taxpayer applied for a business Tax Identification Number on February 16, 1999 indicating principal offices for CHD&D listing an address of 500 S. Main, Suite 304, Las Cruces NM 88001. Department Exhibit H.

12. Taxpayer registered CHD&D with the Department and received a registration certificate with a business starting date of January 1, 1999 located at the address as requested by Taxpayer. Taxpayer Exhibit A. Taxpayer files monthly the CRS-1 report form with the Department in compliance with tax obligations for CHD&D. Taxpayer Exhibit B.

13. CHD&D is in the business of utilizing computer software to design residential homes and commercial buildings.

14. Taxpayer d/b/a/ CHD&D, in possession of the CLC's customer list, contacted individuals and entities on the CLC customer list, asking if they would come back to his company with some becoming customers of CHD&D.

15. Taxpayer d/b/a CHD&D set up business at the same location as had been used by CLC prior to its closing, assumed CLC's existing lease agreement and remained at the location for five years. CHD&D thereafter moved to a location for approximately a year and a half and subsequently moved to its present location, where it has remained for the past four years.

16. Taxpayer d/b/a/ CHD&D assumed responsibility and benefit for some of the existing jobs of CLC.

17. Taxpayer d/b/a CHD&D utilized CLC's office equipment including desks that remained in the offices subsequent to CLC's closure of business. Taxpayer d/b/a CHD&D purchased new computers and software for CHD&D as the software of CLC was outdated and not suitable for use by CHD&D.

18. A provisional assessment was made against CLC based on its non-filer status. Mr. Philip R. Stoes, representing CLC filed returns for the appropriate time period but did not pay the required gross receipt taxes.

19. On January 24, 2001 a provisional assessment was sent to Taxpayer d/b/a CHD&D based on unpaid gross receipts taxes owed by CLC and based on CHD&D being a mere continuation of business. The assessment included gross receipts taxes of $4,767.34, penalty of $476.76 and interest charges as of the date of assessment of $2,309.82 for a total due of $7,553.92. The principal owed was for the reporting periods between August 1996 and December 1998. Department Exhibit G.

20. The Department's conclusion that CHD&D was a mere continuation of CLC's business was based on documentation obtained from the Public Regulation Commission ("PRC"), Department Exhibit A, and information obtained from Taxpayer including the description of the work of both companies, that CHD&D took over existing jobs of CLC, that CHD&D assumed CLC's lease for the office space, and that CHD&D took ownership of the desks and office equipment left by CLC.

21. On February 19, 2001, Mr. Judd Moore, accountant for taxpayer d/b/a CHD&D, along with taxpayer completed and filed a formal written protest, with Mr. Moore signing the protest and indicating Mr. Moore as the contact person and noting a certain address for contact.

22. The protest maintained that gross receipts taxes owed by CLC should not be made the responsibility of CHD&D as the liability belonged to Mr. Rick Stoes, that CLC and CHD&D are two separate entities which should not be linked and that Mr. Rick Stoes will pay the gross receipts taxes when the reports are corrected by Mr. Moore and resubmitted within two weeks. Department Exhibit F and Taxpayer Exhibit C.

23. The formal protest, timely filed, states the correct assessment number, an issuing date of January 24, 2001 and the time period for which the gross receipts are owed being August 1996 through December 1998. Department Exhibit F.

24. On March 7, 2001 a letter acknowledging the protest was sent to Mr. Moore as he was listed as the contact person on the formal protest. This letter included the contact person for the Department, explaining the possibility of informal conference and formal hearing, and advising that, "interest on any amount of tax determined to be due at the conclusion of your protest will continue to accrue at a rate of 1.25% per month or partial month until such liability has been paid. Unless an absence of negligence is established penalty will be assessed at a rate of 2% per month (to a

maximum of 10%) on the principal amount of tax due until such tax is paid. You may make payment on a protested assessment to stop the accrual of interest. Upon resolution of the protest, you may claim a refund within the time limits set by Sec. 7-1-68 NMSA 1978." Department Exhibit E.

25. On March 26, 2001 Mr. Victor Vigil of the Protest Office sent a letter to Mr. Judd Moore in reference to the CHD&D assessment requesting information based on a lack of understanding and information to understand the basis of the protest, providing additional contact information. No response was received by the Department. Taxpayer did not receive a copy of this letter.

26. On July 13, 2001 Mr. Victor Vigil of the Protest Office sent another letter to Mr. Judd Moore again requesting the same information requested in the March 26, 2001 letter. No response was received by the Department. Taxpayer did not receive a copy of this letter.

27. On August 28, 2003 the Protest Office sent another letter to Mr. Moore wherein the taxpayer was given the option of accepting the assessment or requesting a hearing. All letters were sent to Mr. Moore as he was listed with a certain address as the contact person for taxpayer and CHD&D. Taxpayer did not receive a copy of this letter.

28. Mr. Moore has not been the accountant for taxpayer and CHD&D for many years. Taxpayer is unaware of Mr. Moore's location as he now has a different accountant.

29. Taxpayer claimed that he had no notice of any assessment, that this claim is approximately ten years old noting that its age prevents him from having any documentation as does the fact that Mr. Stoes was the principal of CLC and that notice should have been mailed to both himself and to Mr. Moore.

30. Taxpayer acknowledged that he has a copy of the formal protest which he assisted in completing and filed on his behalf, dated February 19, 2001.

31. Taxpayer did not make any attempt to research New Mexico tax law, tax regulations or contact personnel in the Taxation and Revenue Department to determine his tax liability.

32. On July 23, 2008, the department served a copy of Taxpayer Exhibit C, First Request for Admissions, and a copy of the Request for hearing, on taxpayer, by first class mail to his current business address in Las Cruces. The First Request for Admissions was answered by taxpayer and sent back to the Department. Taxpayer Exhibit C.

33. The Department calculated interest of $5,202.12 through the date of the hearing. Department Exhibit B.

34. The Department of Taxation and Revenue submitted a corrected penalty amount of $762.77 indicating that the correct amount of the negligence penalty to be applied to the non-payment of tax was greater than the 10%, pursuant to NMSA 1978, Section 7-1-69 (2007). Department Exhibit B.

35. In 2007, the legislature changed the maximum negligence penalty amount under NMSA 1978, Section 7-1-69 to a cap of no more than 20%. The effective date of this statutory change to the negligence penalty amount was January 1, 2008.

36. Prior to this change, the maximum negligence penalty that could be applied pursuant to Section 7-1-69 was capped at 10%.

37. On January 16, 2009, the hearing officer requested that both parties submit further analysis on "whether the application of the 20% negligence penalty (in this matter) is an impermissible retroactive application of Section 7-1-69." The request is admitted into the record as Department Exhibit I.

38. The Department responded to the Hearing Officer's request on Friday, February 13, 2009. The response is admitted into the record as Department Exhibit J.

39. Department Exhibit J states in pertinent part that "[t]he Department has abated the additional 10% penalty assessment that was made in this case pursuant to 2007 N.M. Laws (R.S.) ch.45 Sec.4."

40. The Taxpayer did not respond to the Hearing Officer's request.

DISCUSSION

The issues to be decided are as follows: whether Mr. Shane Umphress, d/b/a CHD&D, received proper notice of the assessment and subsequent actions by the department; Whether, if having received proper notice, whether CHD&D became a successor to CLC as a "mere continuation" upon CLC's closure and transfer to CHD&D; Whether, in the event CHD&D is a successor to CLD, DHD&D placed in a trust account sufficient money to cover the amount of tax CLC was liable for until such time as the secretary issues a certificate of no tax due, as required by NMSA 1978, Sec. 7-1-61 (C); whether CHD&D is liable for penalty; and whether CHD&D is liable for interest.

Burden of Proof. There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, § 7-1-17(C); *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491. 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 and Revenue Department,* 2003 NMCA 21, P. 13, 133 NM 217, 62 P.3d 308.

Addresses of Notice to Taxpayer.

NMSA 1978, Sec. 7-1-9 (A) (1978)states,

> Any notice required or authorized by the Tax Administration Act [7-1-1 NMSA 1978] to be given by mail is effective if mailed or served

> by the secretary or the secretary's delegate to the taxpayer or person at the last address shown on his registration certificate or other record of the department.

3.1.4.9 NMCA states,

> All notices, returns or applications required to be made by the taxpayer must include the correct mailing address of the taxpayer and the taxpayer must promptly advise the department in writing of any change in mailing address. If the department has prescribed a form or format for reporting a change of address, the form or format must be followed."

Here, Mr. Umphress and Mr. Moore completed the formal protest form listing Mr. Moore as the contact person and providing a Post Office box as a mailing address. The formal protest acknowledges the assessment number, the period for which the taxes are assessed and the protest of such taxes being assessed to taxpayer and Cadworks Home Design & Draft. The Department mailed all initial correspondence, including all letters from Mr. Victor Vigil, of the Protest Office, to the address listed on the formal protest. Taxpayer believed that the Department should have mailed all notices to both he and Mr. Moore. Taxpayer had the understanding that the Department had an obligation to notify both he and his representative as listed on the formal protest, to ensure he was made aware of the circumstances of the assessment. The statutory notice requirements do not impose such an obligation on the Department but rather necessitate that the Department send notice as is indicated on the "record of the department." The Department properly sent notice to the individual and to the address as was noted on the formal protest. The regulation placed the obligation on the taxpayer, who was made aware of a tax assessment, to promptly advise the department in writing of any change in address.

Taxpayer had first-hand knowledge of the assessment and his potential liability for New Mexico gross receipts taxes. Unfortunately, he failed to provide an updated address to the Department or to retrieve all his company documentation from Mr. Moore to properly pursue his protest or to be made aware of the Department's actions. Taxpayer also failed to review New Mexico

statutes and regulations in regard to notifying the Department of an updated address for notice. Had he done so or at a minimum contacted the Department, exercising the reasonable diligence that the circumstances of knowing of a potential tax liability would require, he would have put the Department on notice of the change in address and arguably received all notices sent by the Department in regard to his tax liability.

Timing of Assessment.

Taxpayer questioned why the Department took so long to notify CHD&D of the assessed tax liability in line with the lack of documentation being sent directly to taxpayer rather than Mr. Moore. Mr. Umphress testified that Mr. Stoes would probably have paid it (the taxes) noting that the interest now due is greater than the original tax due, believing that the Department is responsible for the interest that has accrued to the present. This argument is based on a misunderstanding of New Mexico's self-reporting tax system. It is the obligation of taxpayers—not the Department—to accurately determine their tax liabilities and report those liabilities to the state in a timely manner. *See*, NMSA 1978, § 7-1-13(B) (2000); *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, P.17, 558 P.2d 1155, 1156 (Ct. App. 1976), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977). In this case it was the obligation of taxpayer to pursue resolution of the assessment once being notified that the Department assessed CHD&D based on gross receipt taxes being due from CLC. The Department's assessment was issued on January 22, 2001 and was well within the statutory time frame set out in NMSA 1978, § 7-1-18 (1994), which gives the Department three years from the end of the calendar year in which a tax is due to issue an assessment. The Department's assessment was timely.

Successor Liability Under the Tax Administration Act.

Traditionally, a successor corporation, giving adequate consideration without notice of prior claims, will not be liable for the predecessor's debts in absence of a contractual provision assuming the obligations. *Southwest Distributing Co. V. Olympia Brewing Co.,* 90 NM 502, P.505, 565 P.2d 1019, P. 1022 (1977). This case also set out the four exceptions when liability may attach to include, "(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."

CHD&D's liability for CLC's gross receipts tax liability is based on NMSA 1978 Sec. 7-1-61 (C) (1997) and 7-1-63(C) (2) (1997)of New Mexico's Tax Administration Act. NMSA 1978 Sec.7-1-61(C),(1997) which provides,

> 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 and 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.

In *Garcia v. Coe Manufacturing Company,* 1997-NMSC-013 P.13, 123 NM 34, 933 P.2d 243, 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 sale of the assets; and (3) inadequate consideration for the sale of the assets…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 corporation.' *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."

Here there is overlapping of ownership between CLC and CHD&D as taxpayer was an employee of CLC, was the secretary of CLC and was one of the directors of CLC. Additionally, no consideration was given for the assumption of assets by CHD&D and taxpayer had prior notice of the tax claim being assessed. Therefore it would appear that CHD&D is a mere continuation of CLC and can be held liable for the full amount of CLC's gross receipts taxes under the exception set out in NMSA 1978 Sec. 7-1-63 (C)(2) (1997).

Mere Continuation Exception in NMSA 1978 Sec. 7-1-63 (C)(2) (1997). Additionally, NMSA 1978 Sec. 7-1-61(1997) and Sec. 7-1-63 (1997), generally hold a successor business liable for its predecessor's tax liability "up to the value of the assets transferred." However, the successor is liable for the full amount of the predecessor's tax liability if the successor falls within one of the exceptions set out in NMSA 1978 Sec. 7-1-63 (C)(1), (C)(2) or (C)(3) (1997). Sec. 7-1-63 (C)(2) (1997) states,

> The successor shall remain liable for the amount assessed, however, until the amount is paid if (2) the transfer of the business amounts to a de facto merger, consolidation or mere continuation of the transferor's business.

By way of explanation 3.1.10.16 NMAC (2001) explains the criteria for determination of whether a business is a successor in business stating:

> (A) "The following indicia are used by the secretary or secretary's delegate as factors 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 inventory 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 completing business to that which was transferred?

(B) If one or more the indicia mentioned above are present, the secretary or secretary's delegate may presume that ownership of a business enterprise has transferred to a successor in business.

(F) For the purposes of NMSA 1978 Sections 7-1-61 (1997) through 7-1-63 (1997) and Section 3.1.10.16 NMAC (2001):

(1) 'mere continuation' is determined by the 'substantial continuity test' …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. *B.F. Goodrich v. Betkoski,* 99 F.3d 505 (2nd Cir. 1996).

(2) 'successor' means any transferee of a business or property of a business ...any business that assumes the liabilities of the predecessor.

(3) 'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with the property of a business;

(4) 'used in any business' means reasonably necessary for the business's continued operations, whether or not the property is actually owned by the business.

The regulation gives three different examples of when the presumption of transference of ownership to a successor is valid including *Sterling Title Co. v. Commissioner of Revenue,* 85 NM 279, 511 P.2d 765 (Ct. App. 1973) noting that the successor, Sterling Title, fit the criteria as enumerated in Paragraphs (1), (2), (3) and (4) of Subsection A of 3.1.10.16 NMCA. *Sterling Title Co.* addresses the policy behind New Mexico's successor in business statutes. The facts reveal that Dona Ana Title Company, having closed its business, sold its tangible assets including its title plant, furniture, fixtures and equipment to Sterling Title. Sterling Title also assumed Dona Ana's lease and a note owed to a third party. Sterling challenged the Department's determination as to liability 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 the argument,

determining that Sterling was a successor in business for purposes of NMSA 1978 Sec. 7-1-61(1997) (then codified as Sec. 72-13-74 NMSA (1953) which provided that the "tangible and intangible property used in any business" remains subject to tax in the hands of a successor. The court confirmed other court's decisions stating,

> the taking over the assets of an insolvent or defunct business was sufficient to meet the statutory requirements. See *Knudsen Dairy Products Co. v. State Board of Equilization,* 12 Cal. App. 3d 47, 90 Cal. Rptr, 533 (1970); *Tri-Financial Corp. v. Department of Revenue,* 6 Wash. App. 637, 495 P.2d 690 (1972). Thus, the fact that Dona Ana may not have been actively engaged in business does not bar the application."

Here, CLC had closed its doors for business just prior to when CHD&D started business.

Mr. Shane Umphress testified that CLC and CHD&D are two separate businesses that he was solely an employee of CLC, that CHD&D is not a successor to CLC and that Mr. Rick Stoes, President of CLC, remains liable for the gross receipts taxes owed by CLC. The Department argued that CHD&D is liable for the full amount of CLC's unpaid gross receipts taxes relying on the "mere continuation" exception set out in Sec. 7-1-63(C)(2) (1997).

In this case, Mr. Shane Umphress, d/b/a CHD&D was secretary of CLC and was one of the two directors of CLC. Mr. Rick Stoes filed, representing CLC, initially a non-filer, ultimately filed tax returns for the appropriate time period but did not pay the tax due. Mr. Shane Umphress started CHD&D and assumed control over the rental premises formerly used by CLC, assumed the remaining term of CLC's rental premise lease, took control of CLC's office equipment excluding the computers and design software, assumed control of CLC's customer list and thereafter contacted customers attempting and requesting their allegiance to CHD&D. CHD&D did not place funds into a trust account sufficient to cover the gross receipts taxes originally owed by CLC. The department made a demand on taxpayer, d/b/a CHD&D, as successor to CLC, for payment of the gross receipts

taxes giving the amount of taxes owed and basis of the unpaid assessment tax, for which seller was liable in accordance with subsection A of NMSA 1978 Sec 7-1-63 (1997).

Given the continuity of directors and officers of CLC and CHD&D, the continued existence of only CHD&D, the lack of sale of the assets of CLC and the lack of consideration for the assets of CLC retained by CHD&D, CHD&D is a successor in business as defined by New Mexico statutory and case law. Additionally, evidence that CHD&D assumed control over CLC's rental premises, assumed the remaining lease term, took control of some of CLC's office equipment, and assumed control of CLC's customer list in addition to the continuity of identity between the officers and directors of the two entities, establishes that CHD&D is a "mere continuation of CLC and is liable fro the amount of CLC's unpaid tax liability in accordance with subsection A of NMSA 1978 Sec 7-1-63.

Penalty due for failure to pay tax.

NMSA 1978 Section 7-1-69 (2007) states in regard to the imposition of a penalty for failure to pay tax due and provides in pertinent part:

> A. in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there *shall be added* to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fractions of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid…(emphasis added).
> B.

NMSA 1978 Section 7-1-69 (2003), in effect prior to January 1, 2008 revisions states,

> A. Except as provided in Subsection C of this section, in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of t ax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:

> (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid.

NMSA 1978 Sec. 7-1-69 (2003), provides that when a taxpayer fails to pay taxes due to the state as a result of negligence or disregard of rules and regulations, a penalty "shall be added" to the amount of the underpayment. The term "negligence" as used in Sec. 7-1-69 is defined in Regulation 3.1.11.10 NMAC (2001) as:

> (A) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances; (B) inaction by taxpayers where action is required; (C) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

Here, taxpayer had notice of an assessment by the department that taxes were claimed as due. Taxpayer failed to pursue and his objections to the assessment with the ordinary care and prudence that a reasonable taxpayer would exercise under like circumstances of being notified that taxes were due. Taxpayer did not act to pursue resolution of the assessment when action was required. Taxpayer completed the formal protest (Department Exhibit F) knowing there was a claim for taxes based on non-payment of gross receipts of CLC knowing that Mr. Moore was listed as the contact and did not take action to ensure that the assessment was resolved or that the department had knowledge of his address when Mr. Moore was no longer his accountant. Taxpayer erroneously believed that he was not liable for tax based on the tax being assessed for gross receipts of CLC. This error meets the definition of negligence set out in Department regulations and in New Mexico case law. *See*, *C & D Trailer Sales v. Taxation and Revenue Dept*., 93 N.M. 697, 699, 604 P.2d 835, 837 (Ct. App. 1979) (a taxpayer's mere belief that he is not liable to pay taxes is tantamount to negligence within the meaning of the statute); *El Centro Villa Nursing Center v. Taxation & Revenue Department*, 108 N.M. 795, P.797,

779 P.2d 982, 984 (Ct. App. 1989) (§ 7-1-69 is designed specifically to penalize unintentional failure to pay tax.).

In the acknowledgment letter of March 7, 2001 from the Department to Mr. Judd Moore, representative of Mr. Shane Umphres/CAD Works Home Design & Draft, the Department notified CHD&D that penalty will be assessed at a rate of 2% per month (to a maximum of 10%) on the principal amount of tax due until such tax is pay. See Department Exhibit E. Taxpayer certainly, had sufficient notice that a penalty would be assessed due to non-payment of the principal tax due.

As the effective date of the legislative change as to the maximum penalty amount capped at 20%, under NMSA 1978, Sec. 7-1-69 (2007), was January 1, 2008 and as the Department Exhibit E notified Mr. Umphres/CHD&D that the maximum penalty would be 10%, the total amount of penalty assessed to taxpayer is determined to be 10% of the principal amount. This determination is based on *Phelps Dodge Corp. v. Revenue Division of the Taxation and Revenue Dept of the State of New Mexico,* 103 NM 20, 702 P.2d 10 (Ct. App. 1985), which following *Worman v. Echo Ridge Homes Cooperative, Inc.* 98 NM 237, 647 P.2d 870 (982) states, "new legislation must not alter the clear language of a prior statute if it is to be applied retroactively." Additionally, in *State v. Padilla,* 78 NM 702, 437 P.2d 163 (Ct. App. 1968), affirmed in *Psomas v. Psomas,* 99 NM 606, 661 P.2d 884 (1982), the court stated, "it is presumed that statutes will operate prospectively only, unless an intention on the part of the legislature is clearly apparent to give them retroactive affect." See also *Karpa v. Commission of Internal Revenue,* 909 F.2d 784 (1990) and *Bradbury Stamm Construction v. Bureau of Revenue,* 70 NM 226, 373 P.2d (1962). It is acknowledged that the Department has withdrawn their request to collect an additional 10% penalty.

Interest Due on Unpaid Principal.

NMSA 1978 Section 7-1-67 (2007) governs the imposition of interest on late payments of tax and provides, in pertinent part:

> A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

NMSA 1978, Sec.7-1-67(A) (2007). The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. *See*, NMSA 1978, § 7-1-13(E) (2007).

Interest must be assessed on tax that is due, and continues to accrue until the principal amount of tax is paid. In the acknowledgment letter of March 7, 2001 from the Department to Mr. Judd Moore, representative of Mr. Shane Umphres/CAD Works Home Design & Draft, the Department notified CHD&D that interest would continue to accrue on any unpaid balances of principal. See Department Exhibit E. The letter also informed CHD&D that it could pay the principal to stop the accrual of interest. Department Exhibit E. Mr. Umphres, certainly, had sufficient notice that interest would continue to accrue on any unpaid principal tax due. As the principal amount was not paid, interest on the tax is also due and owing.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessment No. 2617876, and jurisdiction lies over the parties and the subject matter of this protest.

B. Notice was properly sent by the Department to the individual and at the address requested by Taxpayer in his formal protest.

C. Mr. Shane Umphress, d/b/a CHD&D is a "mere continuation" of CLC pursuant to NMSA 1978 Sec. 7-1-63 (C) (2), and is liable for full amount of CLC's unpaid gross receipts tax liability totaling $4767.34.

D. Pursuant to NMSA 1978 Section 7-1-69 (2003), Taxpayer, due to negligence, is liable for the ten percent penalty assessed by the Department.

E. Pursuant to NMSA 1978 Section 7-1-67 (2007), having not paid the taxes due by the statutory due date, taxpayer is liable for the interest assessed by the Department.

For the foregoing reasons, the protest of Mr. Shane Umphress, d/b/a CHD&D IS DENIED.

Dated: March 30, 2009.