STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
SOL BOOKKEEPING SERVICES, INC., **No. 16-13**
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0055470128

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on March 24, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Mr. Nicholas Pacheco, Auditor, also appeared on behalf of the Department. Ms. Evangeline Alderete, President of Sol Bookkeeping Services, Inc. (Taxpayer), appeared for the hearing with her attorney, Mr. Wayne Chew. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On October 23, 2015, the Department assessed the Taxpayer as a successor in business. The assessment was for tax of $5,488.19, penalty of $1,097.56, and interest of $512.47.
2. On December 7, 2015, the Taxpayer filed a formal protest letter.
3. On January 11, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On January 13, 2016, the Hearings Office issued a notice of hearing. The hearing date was set within ninety days of the protest.
5. On February 4, 2016, the Taxpayer requested a continuance of the hearing.

6. On February 5, 2016, the amended notice of hearing granting the request for continuance was sent, and the delay of the hearing was attributable to the Taxpayer.

7. On March 4, 2016, a telephonic scheduling hearing was conducted. The date for the hearing on the merits was selected and announced. The parties requested a fast setting.

8. On March 7, 2016, the scheduling order and notice of hearing was issued.

9. The Taxpayer began doing business in 2009. The Taxpayer was started and owned by Ms. Alderete and two other individuals.

10. The Taxpayer provides accounting and bookkeeping services to its clients. The Taxpayer primarily deals with small business owners.

11. The Taxpayer sends its employees to its clients' locations, provides help and support for general office bookkeeping, and trains its clients on how to do their bookkeeping themselves. The Taxpayer also assists its clients in their payroll and filing of gross receipts taxes.

12. The Taxpayer's business is almost purely service-oriented. It does not maintain a physical office, does not have inventory, and does not have supplies or equipment.

13. The Taxpayer uses a computer software program for its billing, but does not own the computer on which the software is located. The computer is owned by Ms. Alderete. The software program was also used by another business while it was operating at the same time as the Taxpayer.

14. In 2002, seven years prior to the Taxpayer's inception, Ms. Alderete started and wholly owned another business. That business was also engaged in providing accounting services. That business will be referred to throughout this decision as "the Firm".

15. The Firm's clients consisted mainly of corporate entities. The Firm's business consisted mainly of providing tax services to its clients. The Firm mostly reviewed and prepared corporate income tax returns for its clients.

16. The Firm operated out of Ms. Alderete's home, but did not have any property or supplies. The Firm also used the software program for billing that was located on Ms. Alderete's personal computer.

17. In 2004, Ms. Alderete was injured in a car accident. Ms. Alderete suffered complications for several years as a result of her injuries. Consequently, she was unable to manage the Firm for several years.

18. Ms. Alderete turned over the day-to-day operations to another person (the manager).

19. The manager failed to keep the Firm's gross receipts taxes current.

20. In 2010, the year after the Taxpayer's inception, Ms. Alderete was healthy enough to take a more active role in the Firm and discovered the tax issue.

21. Ms. Alderete worked with the Department and set up a payment plan for the Firm to get caught up on its taxes. The manager was still working for the Firm at that time. Ms. Alderete explained the payment plan to the manager and was assured that she understood and would comply.

22. Somewhere in this time frame, Ms. Alderete also granted a 25% ownership stake in the Firm to another individual because the Firm was unable to pay that person's wages.

23. In 2012, Ms. Alderete discovered that the manager had failed to make the Firm's gross receipts tax payments as required. The manager was indicating in the books that the payments were made and filing reports, but was diverting the funds to herself rather than sending them to the Department.

24. Further investigation by Ms. Alderete, the IRS, and the Department revealed that there might have been other embezzlement and that the Firm's books were a mess.

25. The Department's employee and the IRS's employee doubted that the manager's activities would be able to be sorted out and advised Ms. Alderete to shut down the Firm.

26. Ms. Alderete shut down the Firm, and it ceased all operations as of September 2012, approximately three years after the Taxpayer was in existence.

27. The shutdown of the Firm did not interrupt the Taxpayer's operations.

28. The Firm and the Taxpayer had very few employees, but most of the employees who worked for one have also worked for the other. Ms. Alderete explained that she frequently hires the same people in all of her businesses because she has gotten to know their skills and trusts in their abilities.

29. The Taxpayer's address on its business and tax registrations was also Ms. Alderete's home address and later a P.O. Box, but the Taxpayer was not operated out of Ms. Alderete's home. The Taxpayer was a mobile business that went to the clients' locations to perform its services.

30. Ms. Alderete maintained the Taxpayer and the Firm as completely separate entities. They kept separate records, did separate billing, had different clients, had separate bank accounts, had different billing practices and rates, and did different types of accounting work.

31. The Taxpayer and the Firm operated simultaneously, but separately, from the Taxpayer's inception in 2009 until the Firm's shutdown in 2012.

32. After the Firm ceased operations, only one of its clients approached the Taxpayer and requested that the Taxpayer file a corporate income tax return for the client that year.

The Taxpayer agreed to file that client's return in 2013 for the 2012 tax year even though it was not generally in the business of filing those types of returns.

33. The Taxpayer might currently have one or two clients who were also clients of the Firm.

34. The Taxpayer's gross receipts have increased and its deductions have decreased since the Firm stopped operating.

35. The Taxpayer did not take over all of the Firm's clients, did not take possession of its inventory or equipment, and did not assume its liabilities.

36. The Firm's goodwill transferred to the Taxpayer when some of the Firm's clients switched over to do business with the Taxpayer, and the Taxpayer provided at least one client with the same services as the Firm.

37. The Taxpayer continues to use the billing software that was also used by the Firm.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable under 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. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

Successor in Business Liability.

A successor in business is required to pay the tax for which the acquired business was liable. *See* NMSA 1978, § 7-1-61 (C) (1997). *See also* NMSA 1978, § 7-1-63 (1997). 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). 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 Firm and the Taxpayer. The Firm had no major materials, supplies, equipment, merchandise or inventory to transfer as it was largely a service business. However, there was one software program that the Firm used in its business that the Taxpayer is still using. The Taxpayer was also using the software program in its business for years prior to the Firm's cessation of operations. Nevertheless, 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. The Firm's interest in the software program was transferred to the Taxpayer when the Firm ceased its operations because the Taxpayer retained the program and continued to use it.

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 Firm's software program 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 Firm's business.

The third factor is whether "a substantial part of both equipment and inventories" was transferred. 3.1.10.16 (A) (3) NMAC. As there was no transfer of equipment and inventories, this element is not met.

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 Firm primarily prepared and filed corporate income tax returns for its clients. The Taxpayer primarily provides bookkeeping services, payroll services, training, and assistance with gross receipts taxes for its clients. The Taxpayer admitted that one former client of the Firm approached it and requested that the Taxpayer prepare and file its corporation income tax return in the year after the Firm ceased its operations, which the Taxpayer did that year. However, a one-time service does not constitute a substantial portion of the business conducted by the Taxpayer. The Taxpayer has not continued to conduct a substantial portion of the Firm's 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. The Taxpayer has retained many employees who were also working for the Firm. Although most of these employees were employed by both simultaneously, the reputations of the employees would necessarily be associated with both the Firm and the Taxpayer. The Taxpayer immediately engaged with at least one of the Firm's clients immediately after the Firm's shutdown. The Taxpayer performed the same service for that client that the Firm had performed. The Taxpayer has acquired a couple of other clients since then who were also originally clients of the Firm. Consequently, it does appear that the Firm'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. The Taxpayer did not assume or honor any obligations of the Firm.

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

Firm. 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 Firm.

It is possible for two businesses to be operated simultaneously, but completely separately, even while doing similar work, with the same owners, same employees, and same mailing address. Just because one of those businesses fails while the other succeeds does not automatically make the successful business a successor. There must evidence that the businesses changed hands. *See* NMSA 1978, § 7-1-61.

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. There is evidence that the software program and the goodwill of the Firm transferred to the Taxpayer. The Taxpayer retained the software program and continued to use the software in its business. The Taxpayer was hired by one of the Firm's clients to perform the same services, the Taxpayer has gained a couple of other clients that used to be served by the Firm, and the Taxpayer maintains the same employees who worked for the Firm. 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 Firm.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment issued under Letter ID number L0055470128, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Firm's goodwill transferred to the Taxpayer when it was hired by a few of the Firm's clients and performed some of the same services for at least one of those clients. The Taxpayer retained and continued to use a software program that was also used in the Firm's business. The Taxpayer maintained the same employees who worked for the Firm. Therefore, the Taxpayer was a successor in business to the Firm. *See* 3.1.10.16 NMAC. *See also* NMSA 1978, § 7-1-61. *See also Sterling Title*, 1973-NMCA-086.

C. 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: May 9, 2016.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
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