STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
HMX CONSTRUCTION, **D&O No. 18-19**
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L1709616688

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on April 19, 2018 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. David Mittle, Staff Attorney. Mr. Nicholas Pacheco, Auditor, and Mr. Ken Fladager, Staff Attorney, also appeared on behalf of the Department. Mr. Keegan Clay, CEO for HMX Construction (Taxpayer), appeared for the hearing with Mr. Tom Smidt, Attorney, and his legal assistant, Ms. Vanessa Griego. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer's exhibits 1 through 5 were attached to the prehearing statement. The Department's exhibits A, B, C, D, E, F, G, H, I, K, L, M, P, Q and R were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet.

The parties requested additional time to confer on the issue of liability amount so that they could confirm what, if any, other tribal sales had been included in the assessment. The parties were given until May 19, 2018 to provide an update. However, since May 19, 2018 fell on a weekend, the deadline was moved to May 21, 2018, which was the following business day.

The Department filed an updated statement on May 18, 2018. The parties were also given two weeks after the update deadline to file any written closing arguments. Therefore, the deadline for closing arguments was June 4, 2018. After the deadline, the Taxpayer filed its closing argument on June 6, 2018. The Taxpayer's final argument is essentially a reiteration of the arguments previously made. The Department did not file a written closing argument. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 14, 2016, the Department assessed the Taxpayer as a successor in business for tax, penalty, and interest for the tax periods from March 31, 2009 through August 31, 2015. The assessment was for $820,913.87 tax, $166,254.95 penalty, and $101,284.29 interest.
2. On December 12, 2016, the Taxpayer filed a formal protest letter.
3. On February 6, 2017, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On February 6, 2017, the Administrative Hearings Office issued a notice of telephonic scheduling hearing.
5. On February 13, 2017, the Taxpayer filed a request to continue the telephonic scheduling hearing. The Taxpayer also waived the 90-day requirement.
6. On February 23, 2017, the request was granted and an amended notice was issued.
7. The telephonic scheduling hearing was conducted on March 10, 2017. The hearing was held within ninety days of the protest.
8. On March 13, 2017, the scheduling order and notice of hearing was issued.
9. On April 4, 2018, the parties filed their joint prehearing statement.

10. Mr. Clay is the owner and CEO of the Taxpayer. The Taxpayer is a construction company.

11. Mr. Clay was also the owner of another construction company (the first company), which is the business for which the Taxpayer was assessed as a successor.

12. The first company primarily built tract homes on tribal lands. The first company also did some commercial building on tribal lands because the tribes did not require a special license.

13. The first company did not own any property or inventory. The first company contracted with other parties to do the construction and to provide the materials. The first company's records were kept on Mr. Clay's personal computer.

14. The first company began experiencing financial difficulty due to payment issues with the tribes.

15. Mr. Clay wanted to bid on a contract for a commercial building, a retirement facility. Since the commercial building was not on tribal land, a special license was required. Mr. Clay created the Taxpayer, got the special license, and bid on the project.

16. The Department mailed the first company an audit selection letter on September 5, 2014.

17. On September 29, 2014, the Taxpayer was created.

18. The Taxpayer primarily builds custom homes.

19. Like the first company, the Taxpayer does not own property or inventory, and its business records are kept on Mr. Clay's personal computer.

20. The first company was sued by several of its suppliers and subcontractors. The first company was enjoined from doing business in an agreement with the Department as of March 7, 2016.

21. The Taxpayer has advertised on its website that it has been in business for a period of time and on projects that encompass the first company's business ventures. Mr. Clay explained that the business accomplishments are attributable to him personally as the owner and driving force behind both the first company and the Taxpayer.

22. During the course of at least one lawsuit, the Taxpayer attempted to pay part of the liability owed by the first company.

23. The Department's updated statement indicates that the tax principal owed is the same as the amount assessed. However, penalty was reduced slightly to $166,249.74, and interest increased to $154,830.53. Interest continues to accrue on any unpaid tax principal.

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. 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 (emphasis added). "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 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 first company did not have any inventory or supplies, but the first company's record-keeping system was also used for the Taxpayer, although they were both apparently on Mr. Clay's personal computer without remuneration to him. This factor weighs slightly 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. Providing use of the record-keeping computer and system was not in the ordinary course of the first company's business. 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. Again, the Taxpayer did not have inventory, and its only

equipment was arguably the record-keeping system on Mr. Clay's computer. This factor weighs slightly 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 argues that the change in focus from tract homes to custom homes means that the Taxpayer was not conducting a substantial portion of the same business as the first company. The Taxpayer also argues that its expansion into solar consulting and architectural rendering is sufficiently divergent from the first company's business. Nevertheless, the Taxpayer and the first company were both engaged primarily in building homes. Therefore, the Taxpayer continued to conduct a substantial portion of the same business as the first company. This factor weighs heavily 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. The Taxpayer argues that there was no goodwill to transfer since many of the first company's creditors actually sued the first company. However, the Taxpayer continues to treat the first company's achievements as its own on its website, clearly soliciting business based on the reputation of the first company as well as its owner. Mr. Clay in his testimony also repeatedly confused the first company and its business with the Taxpayer and its business. Consequently, it does appear that whatever goodwill the first company had was transferred 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

contract for construction of the first company. 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. The Taxpayer denied assuming any liability of the first company. However, Exhibit I shows that a check was drawn on the Taxpayer's account to satisfy part of the liability owed by the first company. Even though the check was returned for insufficient funds, this clearly demonstrates that the Taxpayer did assume liability for at least some of the first company's unpaid debts. This factor weighs in favor of finding that the Taxpayer is a 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 between the Taxpayer and the first company. No such agreement was necessary since the first company was enjoined from doing business. Nevertheless, this factor weighs in favor of finding that the Taxpayer is not a successor in 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 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 used the first company's record-keeping system, assumed part of the first company's liability in at least one lawsuit, and the Taxpayer continues to laud the first company's achievements as its own. The Taxpayer failed to overcome the presumption of correctness and failed to overcome the presumption that it was a successor in business to the first company.

Penalty and Interest.

The Taxpayer specified in its protest that it was protesting the "entire amount" of the assessment, "including all penalties and interest." *See* Protest letter. Neither party further addressed the issue of penalty and interest. However, a hearing officer is required to decide cases based on the facts and the law, but is not limited to a word-for-word consideration of the parties' arguments. *See TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2000-NMCA-083, ¶ 19, 129 N.M. 539, 10 P.3d 863, *rev'd on other grounds TPL, Inc. v. N.M. Taxation and Revenue Dep't.*, 2003-NMSC-007, 133 N.M. 447, 64 P.2d 474 (filed December 19, 2002).

A statute is presumed to operate prospectively, but may be applied retroactively if an amendment serves to clarify the law that was in existence at the time if the amendment does not contravene previous constructions of the law. *See Swink v. Fingado*, 1993-NMSC-013, ¶ 35, 115 N.M. 275. An amendment may only serve to clarify the law if the original statute was unclear or ambiguous. *See N.M. Real Estate Comm'n v. Barger*, 2012-NMCA-081, ¶ 18. A clarification does not operate to effect a change; rather it is to clarify what was previously implicit in the law. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 25, 149 N.M. 455.

The statute under which the Taxpayer was assessed was not ambiguous. *See* NMSA 1978, § 7-1-61 (1997). The statute provided a specific definition of "tax" that did not include

penalty and interest. *See Hi-Country Buick GMC, Inc. v. Taxation and Revenue Dep't*, 2016-NMCA-027, ¶ 20, *cert. denied*, No. 35,647 (NMSC, March 15, 2016). The decision noted that the legislature could have easily stated in the statute that a successor in business was also liable for penalty and interest, but had more narrowly defined tax in that statute. *See id.* at ¶ 22. The definition of tax in regards to a successor in business now includes penalty and interest. *See* NMSA 1978, § 7-1-61 (2017). Nothing in the amended statute indicates that it should be given a retroactive effect. *See id.* Absent a clear indication otherwise, changes in the law should be given only a prospective effect. *See Swink*, 1993-NMSC-013, ¶ 28. Moreover, the time of the assessment locks in what statute's version of the penalty applies. *See Gea Integrated Cooling Tech. v. State Taxation and Revenue Dep't*, 2012-NMCA-010. Penalty is added to the amount assessed by the Department, and "assessment is the specific point in time that the statutory penalty is triggered and thereby applied." *Id.* at ¶ 9. The statute was amended in June 2017. *See* NMSA 1978, § 7-1-61 (2017). The Taxpayer was assessed in September 2016. Therefore, the previous version of the statute applied to the Taxpayer's assessment. *See* NMSA 1978, § 7-1-61 (1997). *See also Gea Integrated Cooling Tech.*, 2012-NMCA-010. Accordingly, the assessment of penalty and interest was inappropriate, as the statutory definition of tax did not include penalty and interest at that time. *See Hi-Country*, 2016-NMCA-027.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to assessment issued under Letter ID number L1709616688, 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 is not liable for penalty and interest assessed. *See* NMSA 1978, § 7-1-61 (1997). *See Hi-Country*, 2016-NMCA-027.

D. 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 IN PART and GRANTED IN PART**.

DATED: June 29, 2018.

Dee Dee Hoxie

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

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal **with the New Mexico Court of Appeals** within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

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: