

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

**IN THE MATTER OF THE PROTEST OF  
TVSLR, LLC  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L0810450480**

**v.**

**D&O No. 18-24**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

**DECISION AND ORDER**

A hearing in the above-captioned protest occurred on May 2, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Clinton W. Marrs, Esq. (Marrs, Griebel Law, L.T.D.) appeared representing TVSLR, LLC (hereinafter “Taxpayer”) and was accompanied by Mr. Keith Baird, Ms. Kimberly Baird, and Mr. Michael Baird, all of whom testified on Taxpayer’s behalf. Ms. Cordelia Friedman, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (hereinafter “Department”) and was accompanied by Mr. Nicholas Pacheco, protest auditor, who also testified on behalf of the Department.

Taxpayer Exhibits 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31 and 34 and Department Exhibits A, B, C, D and F were admitted into the evidentiary record. The Department also proffered Exhibit E which was excluded from the evidentiary record but retained for the record of the hearing. All exhibits are described in the Administrative Exhibit Log. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

**FINDINGS OF FACT**

Procedural History

1. On September 28, 2016, the Department assessed Taxpayer, as a successor in business to Vernon's Hidden Valley Steakhouse/Prime for \$164,054.01 in tax, \$39,003.56 in penalty, and \$5,809.60 for the tax periods from December 31, 2014 through July 31, 2016. The assessment was issued under Letter ID No. L0810450480. [See Administrative File; Taxpayer Exhibit 1].

2. On December 19, 2016, Taxpayer, by and through its counsel of record, executed a formal protest that was subsequently received in the Department's Protest Office on December 23, 2016. [See Administrative File; Taxpayer Exhibit 2].

3. On January 12, 2017, the Department acknowledged receipt of Taxpayer's protest under Letter ID No. L1047415088. [See Administrative File; Taxpayer Exhibit 3].

4. On February 27, 2017, the Department filed a Hearing Request requesting a hearing at which the parties could address scheduling matters relevant to Taxpayer's protest. [See Administrative File].

5. On February 27, 2017, the Administrative Hearings Office issued a notice of telephonic scheduling hearing setting a scheduling hearing for March 15, 2017. [See Administrative File].

6. A scheduling hearing occurred on March 15, 2017 which was within 90 days of Taxpayer's protest. Among other deadlines, a hearing on the merits of the protest was set to begin on October 30, 2017 and proceed through November 1, 2017, if necessary. [See Administrative File].

7. On May 16, 2017, Taxpayer filed Taxpayer's Preliminary Exhibit List and Taxpayer's Preliminary Witness List. [See Administrative File].

8. On May 16, 2017, the Department filed a Certificate of Service indicating that it had served its preliminary witness and exhibit lists on Taxpayer's counsel of record. [*See Administrative File*].

9. On June 15, 2017, the Department filed a Certificate of Service indicating that it had served New Mexico Taxation and Revenue Department's Responses to Protestant's First Set of Interrogatories and Requests for Production of Documents on Taxpayer's counsel of record. [*See Administrative File*].

10. On October 6, 2017, the Administrative Hearings Office issued, upon request of Taxpayer, an Administrative Subpoena to the Records Custodian of the Bernalillo County Assessor. [*See Administrative File*].

11. On October 10, 2017, the Taxpayer filed a copy of the Administrative Subpoena together with a completed Attestation of Service indicating that the same was served on the Records Custodian of the Bernalillo County Assessor on October 6, 2017. [*See Administrative File*].

12. On October 16, 2017, Taxpayer filed Protestant's Exhibit List. [*See Administrative File*].

13. On October 23, 2017, the parties filed their Joint Prehearing Statement. [*See Administrative File*].

14. On October 27, 2017, the Department filed a Motion for Continuance, Request to Vacate Scheduled Hearing and Request for Scheduling Conference. [*See Administrative File*].

15. On October 27, 2017, Taxpayer filed TVSLR's Opposition to Motion for Continuance. [*See Administrative File*].

16. A telephonic hearing occurred on October 27, 2017 at which time the parties addressed the Motion for Continuance, Request to Vacate Scheduled Hearing and Request for Scheduling Conference. [*See* Administrative Hearing; Record of Hearing (10/27/2017)].

17. On October 31, 2017, the Administrative Hearings Office entered a Continuance Order and Amended Notice of Administrative Hearing that continued the hearing on the merits of Taxpayer's protest to May 2, 2018 and proceeding through May 3, 2018, if necessary. [*See* Administrative File].

18. On December 1, 2017, the Department filed Department's Prehearing Statement. [*See* Administrative File].

19. On May 2, 2018, the parties appearing through their respective counsel, presented evidence and legal argument addressing the merits of Taxpayer's protest. [*See* Administrative File; Record of Hearing (5/2/2018)].

20. On May 3, 2018, the Administrative Hearings Office entered a Post-Hearing Scheduling Order. [*See* Administrative File].

21. On May 9, 2018, the Department filed Department's Objections to Post-Hearing Scheduling Order and Request for [that] Order to be Rescinded. [*See* Administrative File].

22. On May 14, 2018, the Administrative Hearings Office entered an Amended Post-Hearing Scheduling Order and Order Addressing Department's Objections to Post-Hearing Scheduling Order and Request for [that] Order to be Rescinded. [*See* Administrative File].

23. On May 15, 2018, the Administrative Hearings Office entered a Corrected Amended Post-Hearing Scheduling Order and Order Addressing Department's Objections to Post-Hearing Scheduling Order and Request for [that] Order to be Rescinded. The correction was to a

statutory citation which had been incorrectly identified in the previous order entered on May 14, 2018. [See Administrative File].

24. On May 30, 2018, Taxpayer filed Protestant's Post-Hearing Memorandum. [See Administrative File].

25. On July 2, 2018, the Department filed an Unopposed Motion for Enlargement of Time within which to File Post-Hearing Brief. [See Administrative File].

26. On July 5, 2018, the Administrative Hearings Office entered an Order Extending Deadline to File Post Hearing Brief. [See Administrative File].

27. On July 6, 2018, the Department filed Department's Post Hearing Memorandum. [See Administrative File].

Acquisition of the Property and History of Vernon's Steakhouse

28. Mr. Keith Baird is 84 year of age. He has four children, the youngest of whom is Mr. Michael Baird. [Testimony of Mr. Keith Baird].

29. Keith Baird is a graduate of the University of Wyoming with a degree in mechanical engineering. He retired from the United States Air Force with the rank of Lieutenant Colonel after more than 20 years of service. [Testimony of Mr. Keith Baird].

30. After retirement, Keith Baird returned to New Mexico. Among a variety of post-retirement activities, he established an antique store located on 4<sup>th</sup> Street in Albuquerque, New Mexico. [Testimony of Mr. Keith Baird].

31. The location of Keith Baird's antique store presented several problems which required him to seek a new location. [Testimony of Mr. Keith Baird].

32. Keith Baird became aware of a building on 1.5 acres of real property, similarly located on 4<sup>th</sup> Street in Albuquerque, New Mexico. The building was being operated as a discount liquor store. [Testimony of Mr. Keith Baird].

33. Keith Baird purchased the building and real property. Title to the real property transferred by Warranty Deed on July 6, 2005 from Fresquez Concessions, Inc., Sal Fresquez, and Theresa Fresquez to Taxpayer, a New Mexico limited liability company. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 8].

34. Taxpayer also acquired Liquor License No. 0137 which remains current and valid as of the date of the hearing. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 9].

35. Taxpayer had been organized by Mr. Keith Baird on May 25, 2005. The organization initially had two members. [Testimony of Mr. Keith Baird; Testimony of Mr. Michael Baird; *See* Taxpayer Exhibit 7; Department Exhibit B].

36. Taxpayer's Operating Agreement identified its members as Mr. Keith Baird, in his capacity as Trustee of the Baird Living Trust, and Mr. Michael Baird. [Testimony of Mr. Keith Baird; Testimony of Mr. Michael Baird; *See* Taxpayer Exhibit 6].

37. The physical address of Taxpayer's principal place of business was provided as 6855 4<sup>th</sup> Street NW, Los Ranchos de Albuquerque, New Mexico 87107. [*See* Taxpayer Exhibit 7; Department Exhibit B].

38. Michael Baird is Keith Baird's son. He is 47 years of age and has employment experience in various fields including construction and auto sales. [Testimony of Michael Baird].

39. Michael Baird's membership in Taxpayer was conditioned upon the understanding that he would provide consideration in exchange for his interest. Michael Baird never made

payment or otherwise satisfied that condition of membership. [Testimony of Mr. Keith Baird; Testimony of Mr. Michael Baird].

40. Having acquired the building, surrounding property, and the liquor license, Keith Baird began to develop the property into a shopping center with a restaurant. Mr. Keith Baird recalled construction costs exceeding \$2,000,000.00. [Testimony of Mr. Keith Baird].

41. Michael Baird did not have any actual involvement in the establishment or operation of Taxpayer, although he was occasionally employed by Taxpayer as a building contractor during the construction phase of the shopping center and for other subsequent improvements, prior to venturing into the operation of restaurants. [Testimony of Mr. Michael Baird].

42. Eventually, the center would develop nine commercial leasehold suites, including Mr. Baird's antique store, a flower shop, a women's salon, and restaurants. [Testimony of Mr. Keith Baird].

43. The center would eventually be known as Village Shops at Los Ranchos and was located at 6855 4<sup>th</sup> Street in Albuquerque, New Mexico. [Testimony of Mr. Keith Baird].

44. The restaurants were intended to serve as anchor tenants to the entire center. Therefore, their success was imperative to the success of the shopping center. [Testimony of Mr. Keith Baird].

45. The restaurant spaces were initially leased to Calico Cafe, LLC which operated restaurants under the names "Calico Cafe" and "Vernon's Steakhouse". The name "Vernon" was a reference to Vernon Garcia, a member of Calico Cafe, LLC, and one of the individuals operating the restaurants. The restaurants had different hours of operation, but shared a common kitchen. [Testimony of Mr. Keith Baird].

46. By 2007, Taxpayer acquired an ownership interest of 20 percent in Calico Cafe, LLC after it failed to repay a loan to Taxpayer in the amount of \$100,000. As a result, Taxpayer and Calico Cafe, LLC initiated a partnership. [Testimony of Mr. Baird; *See* Taxpayer Exhibit 10-A].

47. By 2009, Calico Cafe, LLC struggled to realize a profit and continued to fall behind on its obligations to Taxpayer. Ultimately, Taxpayer evicted Calico Cafe, LLC and in doing so, Taxpayer acquired full ownership and interest in Calico Cafe, LLC's equipment, furniture, fixtures, and intangible property, including the names under which the restaurants were operating, "Calico Cantina" and "Vernon's Steakhouse". [Testimony of Mr. Keith Baird].

48. Since the restaurants were essential for the success of the shopping center, it was critical for Taxpayer to see that the restaurants continued to operate with as little disruption as possible. [Testimony of Mr. Keith Baird].

49. Keith Baird sought interest from potential tenants, who might be interested in leasing the space and operating the restaurants, but no one expressed any interest. The general consensus from potential tenants was that the space was undesirable for various reasons. [Testimony of Mr. Keith Baird].

50. After Taxpayer exhausted available options for obtaining a new tenant for the restaurant space, Mr. Michael Baird offered to enter into a lease and operate the restaurants. [Testimony of Mr. Keith Baird].

51. Michael Baird did not have any restaurant experience. [Testimony of Mr. Michael Baird].

#### VSH, LLC Commences Operation of Restaurants



52. On March 1, 2009, Taxpayer entered into Leases with Michael Baird, doing business as VSH, LLC to operate the “Calico Cantina” and “Vernon’s Steakhouse”. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 13; Taxpayer Exhibit 14].

53. VSH, LLC was a limited liability company organized by Michael Baird. He was the sole member. [Testimony of Mr. Michael Baird; *See* Taxpayer Exhibit 12].

54. The lease for Vernon’s Steakhouse had a term of five years in which \$234,600 was to be paid at a rate of \$3,910.00 per month. The lease was renewed on March 1, 2014, which with the addition of extra square footage, increased the amount paid to \$693,576.00 payable in the amount of \$11,526.67 per month. [*See* Taxpayer Exhibit 13; Taxpayer Exhibit 18].

55. The lease for Calico Cantina had a term of ten years in which \$914,000 was to be paid at a rate of \$7,616.67 per month. [*See* Taxpayer Exhibit 14].

56. At all relevant times, ownership of the space, furniture, fixtures, and intangible property, including the names, “Calico Cantina” and “Vernon’s Steakhouse” remained with Taxpayer. [Testimony of Mr. Keith Baird].

57. On March 1, 2009, Taxpayer and VSH, LLC entered into an agreement recognizing that Taxpayer was the owner of all equipment and furnishings on the premises and that VSH, LLC would be permitted to use the equipment at no additional charge. [*See* Taxpayer Exhibit 15].

58. On March 1, 2009, Taxpayer and VSH, LLC entered into a Liquor License Lease Agreement providing for VSH, LLC to lease Taxpayer’s liquor license for use at “Calico Cantina” and “Vernon’s Steakhouse”. The term of the lease was 10 years payable in monthly payments of \$2,700.00. [*See* Taxpayer Exhibit 16].

59. VSH, LLC would also eventually, on January 1, 2014, enter into a lease for office space with Taxpayer. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 17].

60. Except as landlord, Taxpayer had no obligations, responsibilities, or relationship to VSH, LLC. [Testimony of Mr. Keith Baird].

61. VSH, LLC retained all profits from the restaurants. Its only obligation to Taxpayer was the payment of rent, and compliance with the terms and conditions of its various leases. [Testimony of Mr. Michael Baird].

62. Despite his membership in Taxpayer, and his relationship to Keith Baird, Michael Baird perceived his status as no more than a tenant of Taxpayer in reliance on its property for conducting business on the premises, including equipment, furniture, fixtures, and the names of the establishments. [Testimony of Mr. Michael Baird].

63. During the time VSH, LLC operated the restaurants, it acquired tangible property, fixtures, and equipment for use in the restaurants. It purchased: a piano for \$9,754.76; a double-stack convection oven for \$5,560.79; chairs for \$4,547.00; an espresso machine for \$6,431.25; tableware for \$2,346.65, and tables for \$1,851.54. The total sum of its acquisitions was \$30,491.89. [Testimony of Mr. Michael Baird; Testimony of Ms. Kimberly Baird; *See* Taxpayer Exhibit 26; Taxpayer Exhibit 27].

64. Restaurant equipment is expected to fully depreciate in value over the course of seven years. Based on comparables, Kimberly Baird estimated that the value of the property purchased by VSH, LLC had depreciated from purchase price of \$30,491.89 to \$12,400.00. [Testimony of Ms. Kimberly Baird; *See* Taxpayer Exhibit 27].

65. From March 1, 2009 through August 1, 2016, VSH, LLC's restaurants at the shopping center failed to achieve or sustain the profitability that VSH, LLC had desired. It began to default on lease payments, tax payments, and other obligations. [Testimony of Mr. Michael Baird].

66. Michael Baird approached various individuals to assume VSH, LLC's obligations under the lease, and even explored other business ventures which might provide opportunities to increase profitability of the restaurants at the center. [Testimony of Mr. Michael Baird].

67. Since VSH, LLC had become delinquent on CRS tax payments, the Department levied on Taxpayer funds in third-party possession in the amount of \$24,262.93. Those funds were credited against VSH, LLC's outstanding liability. [Testimony of Mr. Michael Baird; Testimony of Mr. Pacheco].

68. At some point prior to April 1, 2016, VSH, LLC became delinquent for its lease payments to Taxpayer. Despite demands for payment, it failed to cure its default. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 19; Taxpayer Exhibit 20; Taxpayer Exhibit 21].

69. On August 1, 2016, Taxpayer evicted VSH, LLC and provided notice that it intended to assume operation of the restaurants. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 22].

#### Taxpayer Assumes Operation of Restaurants

70. Taxpayer posted notices on the premises informing the public that the restaurant was temporarily closed. [Testimony of Ms. Kimberly Baird]

71. On August 1, 2016, in addition to asserting its rights to re-enter the premises, Taxpayer and VSH, LLC executed a Mutual Termination of Lease in reference to the lease of Taxpayer's liquor license. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 23].

72. On or about August 1, 2016, Keith Baird requested that Kimberly Baird manage the operation of the restaurants under a contract with Taxpayer. She agreed to do so and continues in that capacity as of the present date. [Testimony of Ms. Kimberly Baird].

73. Kimberly Baird is Michael Baird's spouse and Keith Baird's daughter-in-law. [Testimony of Ms. Kimberly Baird]

74. Kimberly Baird has experience in a variety of business fields. [Testimony of Ms. Kimberly Baird].

75. Prior to August 1, 2016, Kimberly Baird had no involvement with Taxpayer or with VSH, LLC. [Testimony of Ms. Kimberly Baird].

76. On August 2, 2016, Kimberly Baird assumed her management functions for Taxpayer. [Testimony of Ms. Kimberly Baird].

77. Taxpayer retained nearly all employees that were previously employed by VHS, LLC. [Testimony of Ms. Kimberly Baird].

78. VHS, LLC's reputation among its vendors and suppliers had deteriorated to the point that Taxpayer, in order to conduct business with those vendors, was required to comply with restrictions that they had imposed on VSH, LLC. For example, Taxpayer was required to pay various vendors and suppliers by cashier's check as opposed to personal check or credit. [Testimony of Ms. Kimberly Baird].

79. Nevertheless, Taxpayer maintained relationships with some previous vendors and suppliers to VSH, LLC. [Testimony of Ms. Kimberly Baird; *See* Department Exhibit A].

80. On August 2, 2016, Kimberly Baird ordered an inventory of food products remaining on the premises as of that date. The inventory concluded that Taxpayer had assumed possession of perishable and non-perishable food items purchased by VSH, LLC for \$9,166.21. [Testimony of Ms. Kimberly Baird; *See* Taxpayer Exhibit 24].

81. On August 2, 2016, Kimberly Baird ordered an inventory of liquor products remaining on the premises as of that date. The inventory concluded that Taxpayer had assumed

possession of liquor purchased by VSH, LLC for \$11,202.65. [Testimony of Ms. Kimberly Baird; *See* Testimony of Taxpayer Exhibit 25].

82. On October 20, 2016, Mr. Keith Baird executed an amendment to Taxpayer's Articles of Organization which terminated Mr. Michael Baird as a member of the organization. The amendment was filed with the New Mexico Secretary of State's Office on December 16, 2016. [Testimony of Mr. Keith Baird; *See* Taxpayer Exhibit 11].

83. Michael Baird was terminated as a member of Taxpayer because he had not made any financial contribution or otherwise satisfied the conditions of membership. [Testimony of Mr. Michael Baird; Testimony of Mr. Keith Baird].

84. Michael Baird had no further involvement with the restaurants after Taxpayer evicted VSH, LLC. [Testimony of Mr. Keith Baird; Testimony of Ms. Kimberly Baird; Testimony of Mr. Michael Baird].

85. Relations between Keith Baird and Michael Baird continued to be strained as a result of the events giving rise to the protest. [Testimony of Ms. Kimberly Baird].

86. Michael Baird filed for bankruptcy in 2017. [Testimony of Ms. Kimberly Baird].

87. Although the Tax Records of the Treasurer of Bernalillo County indicate that the Full Value of Business Equipment or Livestock is \$183,036 from 2009 through 2017, the source of those amounts is unknown and do not appear to reflect any adjustments over the years for depreciation. [Testimony of Mr. Keith Baird; Testimony of Ms. Kimberly Baird; *See* Taxpayer Exhibit 30; Department Exhibit D].

88. Notices of Value for years 2014 and 2017 indicate that the value of business equipment in use at the restaurant is zero, but provide that may be attributable to failing "to submit a personal property business equipment report[.]" [Taxpayer Exhibit 31].

### The Department's Evaluation

89. Mr. Pacheco did not know the source of the information underlying the Full Value of Business Equipment or Livestock in the amount of \$183,036 from 2009 through 2017 as indicated in the records of Bernalillo County. [Testimony of Mr. Pacheco; *See* Taxpayer Exhibit 30].

90. Mr. Pacheco agreed that personal property, including restaurant equipment, is expected to depreciate. [Testimony of Mr. Pacheco].

91. Mr. Pacheco agreed that he was not prepared to explain why the value of personal property on record with Bernalillo County apparently reflected no adjustments consistent with depreciation between 2009 and 2017. [Testimony of Mr. Pacheco; *See* Taxpayer Exhibit 30].

92. Although Mr. Pacheco observed that the value of property had not been apparently modified in a manner consistent with what might be expected from depreciation, he relied on the records without further inquiry. [Testimony of Mr. Pacheco; *See* Taxpayer Exhibit 30].

93. A review of gross receipts reported immediately after Taxpayer assumed operation of the restaurant indicated that there had not been any substantial drop-off in business in comparison to the months immediately preceding termination of VSH, LLC's operations and its eviction from the premises. [Testimony of Mr. Pacheco].

94. The Department valued VSH, LLC's goodwill based solely on the amount of gross receipts reported on average per month for a specific period of time. It considered no other factors. [Testimony of Mr. Pacheco; *See* Taxpayer Exhibit 34].

95. On or about December 11, 2009, Michael Baird signed a Mortgage securing payment of a loan to VSH, LLC with Taxpayer property comprising the shopping center. [Testimony of Mr. Pacheco; *See* Department Exhibit C].

96. Keith Baird's signature, in his capacity as Manager or otherwise, does not appear on the Mortgage. [See Department Exhibit C].

97. On April 19, 2018, the Department abated penalty and interest under the assessment. The amount of tax remaining due as of that date was \$164,054.01. [Stipulation of Counsel; See Department Exhibit F].

## **DISCUSSION**

The issues presented in this protest concern the extent to which a tenant's state-tax liability transfers to its landlord when, after default and eviction, the landlord proceeds with the business activities representing the purpose of the terminated lease. The questions presented are governed by NMSA 1978, Section 7-1-61 to -63 and Regulation 3.1.10.16 NMAC addressing the tax responsibilities of a successor in business.

### **Presumption of Correctness.**

Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this protest is presumed correct. Therefore, Taxpayer has the burden to overcome the assessment. See *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. For that reason, it is Taxpayer's burden to present some countervailing evidence or legal argument to show that it is entitled to abatement, in full or in part, of the assessment issued against it. See *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. "Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness." See *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; See also Regulation 3.1.6.12 NMAC. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the Department to show that the assessment is correct. See *MPC Ltd.*, 2003-NMCA-021, ¶13.

### **Limited Liability Companies.**

Perhaps not essential to the ensuing discussion, the Hearing Officer nevertheless finds it helpful to address as a introductory topic the legal significance of the business structures at issue in the present protest. Taxpayer and VSH, LLC were both organized as limited liability companies under the Limited Liability Company Act, NMSA 1978 Sections 53-19-1 to -74 (hereinafter “LLC Act”).

This is noteworthy because “[p]roperty transferred to or otherwise acquired by a limited liability company is property of the limited liability company and not of the members. *A member has no interest in an item of limited liability company property.*” See NMSA 1978, Section 53-19-29 (A) (Emphasis Added). Moreover, a limited liability company “may acquire any estate in real or personal property in the name of the limited liability company, and title to any estate so acquired shall vest in the limited liability company rather than in the members.” See NMSA 1978, Section 53-19-29 (B).

This brief acknowledgement is useful when ascertaining the actual owner of various properties relevant to the facts of this protest, and sidestepping potential confusion that could arise in a scenario where two separate and distinct limited liability companies have one or more members in common. At various times during the hearing, the Department emphasized the undisputed fact that Mr. Michael Baird was a simultaneous member of Taxpayer and VSH, LLC, and referred to him as “owner” of property owned by Taxpayer. However, the Hearing Officer recognizes the limited liability companies at issue in the manner prescribed by law, as separate and distinct entities apart from their members.

Ignoring this fact by attributing ownership of property to the *members* of a limited liability company, rather than to the entities, would fundamentally pierce the corporate veil exceeding the



authority of this tribunal. “New Mexico decisions have held that piercing the corporate veil is an equitable remedy.” *See Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶7, 107 N.M. 118, 753 P.2d 897. However, it is questionable whether equitable remedies are typically within the “quasi-judicial” powers of administrative agencies. *See AA Oilfield Serv. v. N.M. State Corp. Comm’n*, 1994-NMSC-085, ¶18, 118 N.M. 273, 881 P.2d 18.

On the other hand, the Hearing Officer is also mindful that the question of whether entities have common members is an issue that our Courts have found relevant in considering whether one entity is a mere continuation of another. *See Garcia v. Coe Mfg. Co.*, 1997-NMSC-013, ¶13, 123 N.M. 34, 933 P.2d 243. The significance of that issue in this protest will be addressed in more detail below.

### **Successor in Business.**

NMSA 1978, Section 7-1-61 (B) (1997) establishes that 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.” Section 7-1-61 (C) goes on to require that a successor deposit into trust a sufficient amount of money to pay an outstanding tax liability until the Department either issues a clearance certificate or makes a demand or assessment for the outstanding liability. Under Section 7-1-63 (C), subject to some exceptions, the successor can “discharge as assessment made . . . by paying to the department the full value of the transferred tangible and intangible property.”

Regulation 3.1.10.16 NMAC (1/15/01) addresses what constitutes a successor in business for the purposes of the Tax Administration Act. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Regulation

3.1.10.16 (A) NMAC establishes eight factors to evaluate in determining whether a business is a successor. Those factors are:

- (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 inventories 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 competing business to that which was transferred?

If any of the eight indicia are present, even if it is only one, then the Department “may presume that ownership of a business enterprise has transferred to a successor in business.” *See* Regulation 3.1.10.16 (B) NMAC. Accordingly, the Hearing Officer will evaluate the facts of this case against the eight factors.

**Evaluation of the Eight Factors.**

The first factor probes whether “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.”

It is evident that neither a sale nor purchase occurred between VSH, LLC and Taxpayer in this case. Taxpayer already owned a majority of the property available on the premises for use by VSH, LLC, including equipment, fixtures, furniture, and the trademarks. Title to that property never changed hands by sale, purchase, or otherwise.

Other property, meaning property that Taxpayer did not already own, but which it acquired by virtue of VSH, LLC’s eviction, did not “constitute a major part of the materials, supplies, equipment, merchandise or other inventory of a business enterprise.” Ms. Kimberly Baird credibly testified that the value of the property retained by Taxpayer after VSH, LLC’s eviction was \$32,768.86, comprised of \$12,400.00 in furniture and equipment, and no more than \$20,368.86 in alcoholic beverages and perishable and non-perishable food products, the latter reflecting the purchase price of those food and beverage items.

Ms. Baird credibly testified that the food and beverage products had negligible re-sale value due to their perishable nature, and restrictions on the bulk sale of liquor, and the best method to realize a financial return on those items was to sell them in the ordinary course of operating the restaurant. Nevertheless, the value Ms. Baird attributed to food and beverages reflected the actual amounts VSH, LLC paid for them, and not necessarily their fair market re-sale value which she credibly testified would be far less. This factor weighs in favor of Taxpayer.

The second factor considers whether the transfer was not in the ordinary course of VSH, LLC’s business. Since Taxpayer already owned a substantial portion of the property on the premises, this inquiry is directed only to the property that VSH, LLC surrendered to Taxpayer,

meaning the property that Taxpayer did not already own immediately preceding VSH, LLC's eviction. The term transfer does not necessarily require a sale or purchase, as discussed in addressing the first factor. Abandonment or surrender may also result in a transfer. Because such transfer is not in the ordinary course of operating a restaurant, this factor weighs in favor of the Department.

The third factor to consider is whether a substantial part of VSH, LLC's equipment and inventory transferred. The Hearing Officer refers back to the discussion of the first two factors and reiterates that Taxpayer was already the owner of a substantial part of equipment relied upon in conducting VSH, LLC's business. The value of property not already owned by Taxpayer, and that transferred to Taxpayer's ownership upon VSH, LLC's eviction consisted of \$12,400.00 in equipment and \$20,368.86 in food and alcoholic beverages. This factor weighs slightly in favor of the Department, since food and beverages represented all of VSH, LLC's inventory. In contrast, the equipment that transferred did not represent a substantial part of equipment when compared to the equipment that Taxpayer already owned and made available on the premises for its tenant's use.

The fourth consideration is whether "a substantial portion of the business enterprise that had been conducted by the transferor continued by the transferee." This factor weighs in favor of the Department with the following qualification. VSH, LLC's business was a continuation of the business established by Taxpayer's former tenant, Calico Cafe, LLC, in which Taxpayer was partner. Taxpayer, not intending to directly operate the restaurant, leased the restaurant containing its equipment, furniture, fixtures, and trademarks to VSH, LLC with the intention that it continue where Calico Cafe, LLC left off. Thereafter, VSH, LLC operated the business until it faltered, shifting responsibility for the operation back to Taxpayer. In other words, a substantial portion of

the business enterprise that had been conducted by VSH, LLC was continued by Taxpayer. However, that business enterprise came full circle because it also originated with Taxpayer.

The fifth inquiry concerns whether by express or implied agreement, VSH, LLC's goodwill followed the transfer of the business properties. This element weighs in favor of Taxpayer. There is simply no reliable evidence to establish what, if any goodwill VSH, LLC accumulated, or whether it transferred to Taxpayer. To the extent customers continued to patronize the restaurant based on its trademark or the location, those items were already owned by Taxpayer, having been acquired through Taxpayer's partnership with Calico Cafe, LLC, and leased to VSH, LLC.

There was also insufficient evidence to establish whether VSH, LLC developed any goodwill on its own accord, or if it contributed value to the goodwill Taxpayer retained from its partnership with Calico Cafe, LLC. In contrast, the circumstances under which VSH, LLC's operation failed suggested that it had no goodwill of its own accord, and perhaps even caused Taxpayer's goodwill to diminish.

The sixth question addresses whether uncompleted sales, service or lease contracts of the transferor were honored by the transferee. The evidence in this regard slightly favors the Department because although Taxpayer opened new credit accounts with vendors and suppliers, the evidence also suggests that it relied on the prior history of VSH, LLC in representing that it had 11-years prior experience in the operation of restaurants, and it made efforts to maintain relationships with VSH, LLC's vendors and suppliers. However, the evidence also established that there are a limited number of vendors and suppliers to choose from, so it would be expected that some vendors and suppliers would remain the same.

There was also evidence that VSH, LLC borrowed money from a lender which acquired a mortgage on real property owned by Taxpayer. The Department suggested the reasonableness of

an inference to establish that Taxpayer satisfied the loan rather than VSH, LLC. However, such inference would be based more on speculation than the contents of the evidentiary record. Nevertheless, it is apparent that the loan encumbered Taxpayer's property which would, in turn, encourage Taxpayer's interest in protecting its investment in the property.<sup>1</sup>

The seventh issue is whether Taxpayer satisfied indebtedness to suppliers, utility companies, service contractors, landlords or employees of VSH, LLC. This factor weighs slightly in favor of the Department because Taxpayer, as a condition of purchasing supplies, was required to adhere to conditions for payment that had been imposed on VSH, LLC. Taxpayer was required to pay various vendors and suppliers by cashier's check as opposed to personal check or credit, based solely on VSH, LLC's poor reputation.

Although the evidentiary record does not necessarily establish that Taxpayer satisfied any indebtedness to VSH, LLC's employees, the record does establish that the majority of its employees transitioned to employment with Taxpayer. This may suggest the possibility that Taxpayer retained various conditions of employment as incentive for those employees to transition to Taxpayer, but inferring additional facts would be speculative based on the record.

The final inquiry probes whether there was an agreement precluding VSH, LLC from engaging in a competing business to that which was transferred. This issue weighs in favor of Taxpayer because VSH, LLC ceased operations meaning that there was no agreement for the transfer of property, and therefore no agreement prohibiting competition by VSH, LLC.

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<sup>1</sup> The Hearing Officer noted that the mortgage is executed by Mr. Michael Baird on Taxpayer's behalf. However, the source of Mr. Baird's authority to encumber property on Taxpayer's behalf was left unresolved. The Hearing Officer observed that nothing contained within the Articles of Organization or Operating Agreement expressly provided such authority. Instead, that authority was expressly reserved for the manager, Mr. Keith Baird. *See* Taxpayer Exhibit 6, Paras. 4 and 5.

### **Limits on Successor in Business Liability.**

Consequently, at least six of the factors under Regulation 3.1.10.16 (B) NMAC weigh in the Department's favor. According to Regulation 3.1.10.16 (B), NMAC, "[i]f one or more of the indicia mentioned above are present, the [Department] may presume that ownership of a business enterprise has transferred to a successor in business." Therefore, the Department has established that Taxpayer has incurred liability for the tax obligations of VSH, LLC as its successor in business.

However, the scope of that liability may be limited. "A successor may discharge an assessment made . . . by paying to the department the full value of the transferred tangible and intangible property." *See* NMSA 1978, Section 7-1-63 (C). Yet, Taxpayer remains liable for the amount assessed if the "transfer of the business amount[s] to a . . . mere continuation of the transferor's business." *See* NMSA 1978, Section 7-1-63 (C) (2). For that reason, the Hearing Officer will next consider whether Taxpayer's operation amounted to a mere continuation of VSH, LLC's business.

It is well-settled that an entity which acquires the assets of another entity does not inevitably acquire the liabilities or obligations of that entity 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. *See Sw. Distrib. Co. v. Olympia Brewing Co.*, 1977-NMSC-050, ¶12, 90 N.M. 502, 565 P.2d 1019; *See also Pankey v. Hot Springs Nat. Bank*, 1941-NMSC-060, ¶13, 46 N.M. 10, 119 P.2d 636 (adopting the general rule of non-liability 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 Sections 7-1-61 to -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 recognized exceptions. Since "mere continuation" is the only exception potentially applicable to the facts of this protest, that is where the focus of this discussion will reside.

"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." *See Garcia*, 1997-NMSC-013, ¶13. "The 'key element of a "continuation" is a common identity of officers, directors and stockholders in the selling and purchasing corporations." *Id. quoting 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." *Id. quoting Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 201 (Iowa 1996) (Emphasis Added).

Although there was undisputed evidence that Mr. Michael Baird and Mr. Keith Baird were members of Taxpayer's limited liability company, the evidence was also decisive that Michael Baird was a member in name alone. He had not made any contribution to the Taxpayer's limited liability company, and contrary to the Department's written arguments, was not a manager of the limited liability company. [*See Taxpayer Exhibits 7 (Paragraph 4) and 8 (Article 4)*].

Most persuasive was the extremely credible testimony of Mr. Keith Baird. As Taxpayer's manager, he took a strict approach to engaging in business, even with his own family. No better example exists than the relationship that developed between Taxpayer and VSH, LLC. As



manager, Mr. Keith Baird could have opted for an informal arrangement with his son, consummated by a father-son handshake. Surely, casual business arrangements are not uncommon among family.

In contrast, Mr. Michael Baird organized VSH, LLC, served as its sole member and manager, and executed formal leases with Taxpayer. Meanwhile, Mr. Keith Baird was neither a member nor manager of VSH, LLC, and its relationship to VSH, LLC, from that time forward, was equivalent to that of any other commercial landlord and tenant.

VSH, LLC was responsible for more than one million dollars in cumulative lease payments over the duration of the relevant agreements [*See* Taxpayer Exhibits 13, 14, 17, 18, and 19], and when VSH, LLC became delinquent, business interests prevailed over family relationships, and Taxpayer evicted VSH, LLC.

Within months thereafter, Taxpayer also terminated Mr. Michael Baird's membership in Taxpayer's limited liability company because he had failed to satisfy the conditions upon which his membership was granted. The timing of the termination, perhaps signifying some desire to insulate Taxpayer from VSH, LLC's tax liability, which the Department seemed to suggest, also indicates Mr. Keith Baird's extreme displeasure with the overall state of affairs between Taxpayer and VSH, LLC, and perhaps the underlying father-son relationship, as well. Mr. Keith Baird and Mr. Michael Baird both credibly testified that Michael was supposed to make contributions to Taxpayer in exchange for his membership, but he never satisfied his end of the bargain. According to Ms. Kimberly Baird, she observed significant damage to the father-son relationship as a result of these events, and it has not improved in the many months that have since elapsed.

It is undisputed fact that Taxpayer and VSH, LLC had one common member during the events giving rise to the protest. However, the Hearing Officer is not persuaded that is sufficient

in light of the entire evidentiary record to establish a “continuity” of directors, officers, and shareholders as addressed in *Garcia*. With respect to management, Mr. Michael Baird was never Taxpayer’s manager, and Mr. Keith Baird was never affiliated with VSH, LLC in any capacity.

For these reasons, there is insufficient evidence of continuity and management of the limited liability companies. Since the mere continuation exception has no application without proof of continuity of management *and* ownership, the exception provided in NMSA 1978, Section 7-1-63 (C) (2) does not apply and Taxpayer liability may be capped by an amount equivalent to the full value of the transferred tangible and intangible property.

The next question centers on determining the extent of Taxpayer’s liability under NMSA , Section 7-1-63 (C). In considering this issue, it is necessary to keep in mind that the primary purpose of the successor in business statute is “to make tangible and intangible property security for payment of the tax.” *See Sterling Title Co. v. Comm’r of Revenue*, 1973-NMCA-086, ¶23, 85 N.M. 279, 511 P.2d 765. Judge Sutin’s special concurrence in *Sterling* explained that the Legislature’s purpose in enacting the successor in business statute was to protect the Department and the public from successors who did not withhold an amount sufficient to pay a tax owed by a delinquent, predecessor-in-business taxpayer, which might be inclined to declare its business operations terminated and thereafter transfer its property to a successor in business which would proceed free of liability. *Id.* Judge Sutin recognized there, as the Hearing Officer recognizes now, that the law intended for “tangible and intangible property to be security.” *Id.* In other words, the tax liability of the predecessor in business follows the tangible and intangible assets to the successor business.

For that reason it is essential to survey the assets at issue and determine what, if any, tangible and intangible assets were transferred. The Hearing Officer will first note that the only

assets capable of transfer are those assets that were not previously owned by Taxpayer. The evidence in that regard is clear. The only assets that transferred are contained in Taxpayer Exhibits 24 through 28, consisting of perishable and non-perishable food items, alcoholic beverages, a piano, furnishings, and equipment having a cumulative value of \$32,768.86.<sup>2</sup> According to *Sterling*, these items, and nothing more, represent the State's security for payment and the Hearing Officer was persuaded that the Taxpayer's methods of valuing the property were reliable and trustworthy. *See State v. Archuleta*, 2012-NMCA-007, ¶17, 269 P.3d 924 (it is well settled that an owner of personal property may testify concerning the value of the property). The methods of appraising the value of the property will be addressed in more detail in the following section.

### **The Burden Shifted.**

Taxpayer rebutted the presumption of correctness with respect to the entire assessment, except for \$32,768.86 and the burden shifted to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*, 2003-NMCA-021, ¶13.

In contrast to the amount set forth by Taxpayer, the Department asserted that the value of tangible and intangible property Taxpayer acquired from VSH, LLC exceeded the amount due under the assessment. It asserted goodwill valued at \$169,797.65 and other tangible property in the amount of \$183,036.00. However, the evidence underlying those amounts is entirely unreliable.

### **Goodwill.**

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<sup>2</sup> Although Taxpayer disputes the entirety of the assessment in this protest, it does not contest this amount in the event it were held liable for the value of transferred tangible and intangible property under Section 7-1-63 (C). *See Protestant's Post-Hearing Memorandum*, Page 19.

With regard for the Department's evaluation of goodwill, there is simply no authority for appraising goodwill based *solely* on the amount of gross receipts tax a business reports or pays. Our Courts have taken a more complex approach, at least with concern for professional goodwill, which would likely serve as a template for calculating goodwill in other settings.

“Professional goodwill’ is basically defined as the difference between the total value of the professional association or corporation and the aggregate value of its separable resources and property rights, less liabilities.” See *Hertz v. Hertz*, 1983-NMSC-004, 99 N.M. 320, 657 P.2d 1169 citing *Levy v. Levy*, 164 N.J.Super. 542, 397 A.2d 374 (1978). At a minimum, even if the facts at issue do not involve “professional goodwill,” *Hertz* suggests that evaluating goodwill is more complex than merely totaling the gross receipts tax liability of a business without regard for expenses, debts, liabilities, earning potential, or other intangible assets, just to name a few possible considerations.

Moreover, as previously discussed, there is no evidence to establish that VSH, LLC increased the value of Taxpayer's goodwill, or transferred any goodwill of its own production. If anything, the evidence supports a conclusion that VSH, LLC may have caused Taxpayer's goodwill to diminish in value.

Therefore, the evidence proffered to establish the value of goodwill that may have potentially transferred to Taxpayer was inadequate, unreliable, and must be afforded no weight.

### **Tangible Property.**

With concern for the value of other tangible property, the Department's reliance on various records of Bernalillo County to re-establish the correctness of the assessment, without additional evidence is insufficient for those records to be reliable. It was undisputed among all witnesses broaching the subject of depreciation that restaurant equipment and furnishings are expected to

depreciate in value. In fact, the Property Tax Code specifically acknowledges depreciation as a factor necessary for calculating the value of items of property subject to valuation. *See* NMSA 1978, Section 7-36-33 (C) (2). Ms. Kimberly Baird credibly testified that the full depreciation will be realized over a period of seven years. However, the county records suggest that the value of the property at issue has remained unchanged in the slightest amount from 2009 through 2017, an observation that the Department could not explain. *See* Taxpayer Exhibit 30.

Nevertheless, the Department asserted in Department's Post Hearing Memorandum, filed on July 6, 2018, that Taxpayer should be bound to the valuation reflected in Taxpayer's Exhibit 30 because the Taxpayer could have, but did not protest the valuations contained therein. The Hearing Officer is unpersuaded. First, it is critical to recognize that the documents are printouts from the Bernalillo County website. This is significant because the printouts do not represent the formal notices that any taxpayer would expect to receive, which among other information would contain formal notification of the right to dispute the valuation by filing a protest. In fact, Taxpayer Exhibit 30 does not even indicate who would have received a formal notice if one was ever sent. Mr. Keith Baird credibly testified that he had never seen that information before and that he did not know the source of the information contained in it.

Taxpayer Exhibit 31, in contrast, does provide notice of the right to protest, but that document also values the business equipment at *zero*. The Hearing Officer is reluctant to fault a taxpayer for failing to protest a Notice of Valuation that does not result in property tax liability. However, the Hearing Officer recognizes as the Department points out in Taxpayer Exhibit 31, that a value of zero on the Notice of Valuation may indicate that a taxpayer failed to submit a personal property business equipment report. This is equally unpersuasive in the absence of evidence that might establish that as fact, as opposed to a mere possibility. That is not to say that

the value of property is *zero* because equipment would presumably retain some salvage value, but there is no evidence to establish what the correct amount should be.

For the reasons previously discussed, Taxpayer convincingly relied on the Bernalillo County website information and records to illustrate a defect in the Department's methods of establishing the value of various items of tangible property, and the Hearing Officer was persuaded that the more reliable method was that applied by Taxpayer. The Department could not, and did not, re-establish the correctness of its assessment by referring back to the same evidence that the Hearing Officer found to be unreliable. Re-establishing the correctness of the assessment required something more.

For the reasons stated herein, Taxpayer is a successor in business to VSH, LLC, but its liability as successor may be discharged by paying the full value of the transferred tangible and intangible property. The evidence in this case established that the full value of the transferred tangible and intangible property was \$32,768.86.

**Taxpayer's Request for Costs and Fees.**

NMSA 1978, Section 7-1-29.1 (2003) 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 attorney's fees. A 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. However, the taxpayer will not be regarded 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." *See* NMSA 1978, Section 7-1-29.1 (C) (2).

In this case, Taxpayer did not prevail on the primary issue, which was whether it incurred responsibility for VSH, LLC's tax liability under NMSA 1978, Section 7-1-61. However, it did succeed on its alternative request for relief, which was to cap its potential liability to the value of the property that transferred from VSH, LLC. In this regard, the Hearing Officer's finding on Taxpayer's alternative request for relief reduced Taxpayer's liability by slightly more than 80 percent of the original tax assessed. This indicates that Taxpayer has substantially prevailed with respect to the amount in controversy.

Nevertheless, the Hearing Officer, having fully considered the facts and law is persuaded that the Department's position was based on a reasonable application of the law to the facts. Wherefore, Taxpayer's request for attorney's fees and costs is denied under Section 7-1-29.1 (C) (2).

Therefore, Taxpayer's protest should be denied in part, and granted in part.

### **CONCLUSIONS OF LAW**

A. Taxpayer filed a timely, written protest to the Department's assessment, and jurisdiction lies over the parties and the subject matter of this protest.

B. The hearing was timely set and held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).

C. Because one or more factors enumerated in Regulation 3.1.10.16 (A) NMAC weighed in favor of the Department, it is presumed that Taxpayer was a successor in business under NMSA 1978, Sections 7-1-61 through -63.

D. The liability of a business follows the tangible and intangible assets transferred to a different business. *Sterling Title Co. v. Comm'r of Revenue*, 1973-NMCA-086, ¶23, 85 N.M. 279.

E. Taxpayer's liability was limited to the full value of the transferred property because it was not a mere continuation of the transferor's business. *See* NMSA 1978, Section 7-1-63 (C) (2).

F. Taxpayer did not overcome the presumption of correctness under the assessment as it pertained to the value of tangible and intangible assets transferred from VSH, LLC to Taxpayer. The Taxpayer did overcome the presumption correctness with regard for the remainder of the assessment. *See* NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

G. The Department did not re-establish the correctness of that portion of the assessment that was incorrect. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308.

H. The Department's position was based on a reasonable application of the law to the facts under Section 7-1-29.1 (C) (2).

For the foregoing reasons, the Taxpayer's protest **IS PARTIALLY GRANTED AND PARTIALLY DENIED. IT IS ORDERED** that the Department abate all assessed tax except for \$32,768.86, and that Taxpayer be liable for such amount.

DATED: August 1, 2018



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Chris Romero  
Hearing Officer  
Administrative Hearings Office  
P.O. Box 6400  
Santa Fe, NM 87502



## **NOTICE OF RIGHT TO APPEAL**

Pursuant to NMSA 1978, Section 7-1-25 (2015), 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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

**CERTIFICATE OF SERVICE**

On August 1, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

*First Class Mail*

*Interdepartmental Mail*

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