STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
HIGH DESERT RECOVERY, LLC **D&O No. 18-41**
AS A SUCCESSOR IN BUSINESS TO WEST ROCK, INC.
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0883777840

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On September 20, 2018, Hearing Officer Dee Dee Hoxie, Esq. conducted a hearing on the merits of the protest to the assessment. 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. High Desert Recovery, LLC (Taxpayer) was represented by its attorney, Mr. Benjamin Roybal and his assistant, Ms. Laura Spitz. Mr. Daniel Brown, owner of the Taxpayer, also appeared for the hearing. Mr. Brown and Mr. Pacheco testified. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer's exhibits #1, #2, #3, #4, #7, #8, #9, #10, #11, #12, #13, #14, #17, #21, and #22 were admitted. The Department's exhibits A, B, C, E, F, G, H, I, J, K, L, O, P, S, and T were admitted. Another Department exhibit, Exhibit N, was admitted during the hearing, but was withdrawn by the Department in its post-hearing pleadings. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The parties requested to provide written closing arguments. The request was granted, and October 22, 2018 was given as the deadline for submission of written closing arguments. The Taxpayer was also given until

October 1, 2018 to provide documentation on the amount of administrative costs and fees that the Taxpayer was requesting. The Department was also given until October 1, 2018 to provide additional documentation on its Exhibit N.

The main issue to be decided is whether the Taxpayer is a successor in business, and, if so, to what extent the Taxpayer is liable. A secondary issue is whether the Taxpayer is the prevailing party and entitled to administrative costs and fees based on the Department's pre-hearing abatement of interest. The Hearing Officer considered all of the evidence and arguments presented by both parties. The Hearing Officer finds in favor of the Department on both issues. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On November 28, 2016, the Department assessed the Taxpayer as a successor in business to West Rock, Inc. (WRI). The assessment was for $127,764.92 tax, and $143,594.85 interest.

2. On December 8, 2016, the Taxpayer filed a formal protest letter.

3. On February 8, 2017, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

4. The telephonic scheduling hearing was conducted on February 23, 2017. The hearing was held within ninety days of the protest.

5. A second telephonic scheduling hearing was conducted on May 15, 2017.

6. A third telephonic scheduling hearing was conducted on June 26, 2017.

7. On June 29, 2017, a scheduling order and notice of hearing was issued.

8. On October 12, 2017, the Taxpayer filed a motion for partial summary judgment.

9. On October 22, 2017, the Taxpayer filed a motion requesting that its motion for partial summary judgment be granted because the Department failed to file a response.

10. On October 27, 2017, the Department filed its timely response to the motion for partial summary judgment.

11. On January 10, 2018, the order denying the motion for partial summary judgment was issued. The order indicated that the arguments presented by both sides on this issue would be considered as part of their closing arguments.

12. On September 5, 2018, the parties filed the joint prehearing statement. The Taxpayer attached a written objection to some of the Department's proposed exhibits.

13. Prior to the hearing, the Department abated the assessment of the interest.

14. Mr. Brown owns the Taxpayer, which is a business that performs services doing automobile recovery (repossessions). Mr. Brown is the sole member of the Taxpayer's LLC and manages its daily operations. [Testimony of Mr. Brown and Exhibit E]

15. Prior to creating the Taxpayer, Mr. Brown was the President of WRI. Mr. Brown was a member of WRI's board of directors and managed its daily operations. WRI was also a business that performed repossessions. Mr. Brown was not a shareholder of WRI. [Testimony of Mr. Brown, Exhibit A, and Exhibit 10]

16. Mr. Brown's responsibilities in managing the daily operations of the Taxpayer are essentially identical to his responsibilities in managing the daily operations of WRI. Some of those responsibilities include overseeing employees, customer service, payroll, and taxes. [Testimony of Mr. Brown]

17. The Taxpayer requires employees, some office equipment, storage space, and vehicles to perform repossessions. The same was true of WRI. [Testimony of Mr. Brown]

18. WRI was formed in March 1995. [Exhibit A and Testimony of Mr. Brown]

19. Mr. Brown was a member of the board of directors of WRI since its inception. [Testimony of Mr. Brown and Exhibit A]

20. WRI sometimes did business as Mile High Recovery. [Testimony of Mr. Brown and Exhibit B]

21. In 2006, WRI was audited by the Department. [Testimony of Mr. Brown]

22. The Department assessed WRI in 2008. [Exhibit C]

23. WRI protested the assessment, and an order denying the protest was issued on April 30, 2013. *See In the Matter of the Protest of West Rock, Inc. d/b/a Mile High Recovery*, Decision and Order 13-10 (N.M. Taxation and Revenue Hearing Office[1]) (non-precedential).

24. On May 31, 2013, Mr. Brown created the Taxpayer. [Exhibit E]

25. On October 16 and 17, 2013, the Taxpayer bought two new vehicles. [Exhibits K and L]

26. On October 25, 2013, the Taxpayer filed a warrant application that would allow it to perform repossessions. [Exhibit F]

27. In the warrant application, the Taxpayer listed a physical address on Cherry Hills Road. [Exhibit F]

28. In the warrant application, the Taxpayer listed ownership of a single vehicle. [Exhibit F]

29. In the warrant application, the Taxpayer indicated two employees, Mr. Brown, and a driver. [Exhibit F]

[1] The Administrative Hearings Office became an agency independent of the Department in 2015. *See* NMSA 1978, § 7-1B-1, et seq.

30. The driver was actually employed with WRI at the time of the warrant application. [Testimony of Mr. Brown and Exhibit G]

31. On November 20, 2013, the Taxpayer bought a vehicle for $700.00 from WRI. [Testimony of Mr. Brown and Exhibit J]

32. The fair market value of the vehicle bought from WRI was determined to be $14,720.00 for excise tax purposes. [Exhibit J]

33. Sometime after the Taxpayer purchased the vehicle from WRI, the Department filed a lien against WRI. [Testimony of Mr. Brown]

34. Mr. Brown owns the property on Franciscan where WRI was located. [Testimony of Mr. Brown]

35. On March 1, 2014, Mr. Brown issued a Notice to Quit, which terminated WRI's lease because WRI was unable to pay its rent on the property. [Testimony of Mr. Brown and Exhibit 12]

36. On or about March 31, 2014, WRI made a resolution to dissolve. [Testimony of Mr. Brown and Exhibit 13]

37. On May 5, 2014, the Taxpayer filed a change of address with the Transportation Division, indicating that it would be operating out of the property on Franciscan. [Exhibit P]

38. Two months later, on July 14, 2014, the Taxpayer leased the property on Franciscan from Mr. Brown. [Testimony of Mr. Brown and Exhibit 11]

39. WRI continued operating out of the property on Franciscan until the end of September 2014. [Testimony of Mr. Brown]

40. The Taxpayer began operating toward the end of 2014, but its official start date was January 1, 2015. [Testimony of Mr. Brown]

41. The Taxpayer continues to employ several of the same employees that WRI employed. [Testimony of Mr. Brown and Exhibit G]

42. The Taxpayer continues to operate the same business performing repossessions out of the same location that WRI did. [Testimony of Mr. Brown, Exhibit 11, and Exhibit F]

43. The Taxpayer continues to perform repossessions for several of the same clients that WRI did, although WRI's contracts were not transferrable. [Testimony of Mr. Brown, Exhibit T, Exhibit 9, and Exhibit 17]

44. On its final tax return, for tax year 2014, WRI noted depreciable assets worth $347,279.00, intangible assets worth $204,000.00, and other assets worth $32,463.00. It also listed its total liabilities as $71,446.00. [Exhibit 14]

45. The Taxpayer remains in possession of all of WRI's tangible assets. [Testimony of Mr. Brown]

46. The Taxpayer has not been using WRI's tangible assets, but has kept them in storage. [Testimony of Mr. Brown and Exhibit 8]

47. The Taxpayer offered to let the Department take possession of WRI's tangible assets, but the Department has not done so. [Testimony of Mr. Brown and Exhibit 4]

48. Both WRI and the Taxpayer's reputations with their customers were inextricably tied to Mr. Brown's personal reputation with those customers. [Testimony of Mr. Brown]

DISCUSSION

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). Moreover, "tangible and intangible property used in any business remains subject to liability for payment of the tax due" even when the business is transferred to a new owner. NMSA 1978, § 7-1-61 (B). 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).

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) (emphasis added). There are also 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. One sale of a vehicle occurred from WRI to the Taxpayer. A lien was then filed against WRI's assets. However, the Taxpayer has retained the equipment that belonged to WRI. The equipment remains in the Taxpayer's possession in storage at its business location. Therefore, all of WRI's equipment was transferred to the Taxpayer.

The Taxpayer argues that there was no transfer of the business or the property except for the one vehicle that the Taxpayer bought before the lien was issued. The Taxpayer argues that a transfer "requires an affirmative act" that did not occur between WRI and the Taxpayer regarding WRI's remaining tangible assets. *See* Taxpayer's closing argument. WRI's dissolution plan required that all of its assets be liquidated, and assets with no value would be donated or abandoned. *See* Exhibit 13. The list of assets were not attached to Exhibit 13, although the document claimed to have such an attachment. *See* Exhibit 13. Mr. Brown, as President of WRI and as the one in control of all of its practical operations, allowed the Taxpayer to take possession of WRI's tangible property when WRI ceased doing business in 2014. WRI apparently abandoned its property rather than liquidating or donating it, and the Taxpayer took possession of it. The Taxpayer acknowledged its control of WRI's tangible property and even asked for instructions from the Department on what it should do with those items. *See* Exhibit 4. WRI was dissolved, its assets to be liquidated, donated, or abandoned, and it was noticed to quit the premises on Franciscan. WRI's tangible assets remained on site on Franciscan, and the Taxpayer took control of those assets, kept them in storage, and offered them to the Department. Although there was not a formal sale and purchase, there was clearly a transfer of tangible

property when the property was retained at the Taxpayer's business and put at the Taxpayer's disposal. *See Black's Law Dictionary*, page 1636 (9th ed. 2009) (defining a transfer as any method, direct or indirect, of disposing of or parting with property or parting with an interest in property). *See also* 3.1.10.16 (F) (3) (defining transfer as every method, direct or indirect, conditional or absolute, and voluntary or involuntary of disposing of or parting with the property of a business). This factor weighs 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. WRI was not in the business of transferring its equipment, so the transfer was not done in the ordinary course of its 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. All of WRI's remaining tangible assets were transferred to the Taxpayer. This factor weighs 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. WRI was in the business of performing repossessions. The Taxpayer is also in the business of performing repossessions. This factor weighs 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 continues to employ the same employees as WRI, operates from the same location, and performs the same services for many of

the same customers. Consequently, WRI's goodwill was also transferred to the Taxpayer. This factor weighs in favor of finding that the Taxpayer is 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. The Taxpayer did not assume any business obligations of WRI. The contracts for service that WRI possessed were not exclusive or transferrable. This factor weighs in favor of finding that the Taxpayer is not a successor.

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 WRI. This factor weighs in favor of finding that the Taxpayer is not a successor.

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 WRI. This factor weighs in favor of finding that the Taxpayer is not a successor.

The first five factors weigh in favor of finding that the Taxpayer is a successor to WRI. The remaining three factors weigh in favor of finding that the Taxpayer was not a successor in business. However, 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. Therefore, the Taxpayer is a successor in business to WRI.

The Taxpayer argued that it should not be successor since it did not purchase the business of WRI. The Taxpayer argued that a purchase of one vehicle is not a transfer of a business. A purchase or transfer of any property of a business makes one a successor. *See* 3.1.10.16 (F) (2) NMAC. The statute indicates that 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 acquired all of WRI's tangible property and continued providing essentially the same services to several of the same customers with the same employees at the same location. The Taxpayer failed to overcome the presumption of correctness and failed to overcome the presumption that it was a successor in business to WRI.

Extent of liability.

"A successor may discharge an assessment made pursuant to this section by paying to the department the full value of the transferred tangible and intangible property." NMSA 1978, § 7-1-63 (C). The successor may be liable for the full amount of the assessment if the transfer was done to avoid tax, if the transfer amounted "to a de facto merger, consolidation, or mere continuation of the transferor's business", or if the successor agreed to assume the liability. *Id.* A successor in business might be a "mere continuation" of the previous business if they share the same directors, officers, or shareholders. *See Garcia v. Coe Mfg.Co.*, 1997-NMSC-013, ¶ 12-14, 123 N.M. 34 (indicating that a common identity of directors and shareholders as well as a substantial continuity in the business done before and after the assets were acquired is a continuation of the original business). *See also Pankey v. Hot Springs Nat'l Bank*, 1941-NMSC-

060, ¶ 13, 46 N.M. 10. A continuity of management and ownership is a strong indicator that a successor is a "mere continuation" of the previous business. *See Garcia*, 1997-NMSC-013, ¶ 12-14.

The Taxpayer argued that "there is no common identity of the directors, officers and shareholders", so there is not a mere continuation. *See* Taxpayer's closing argument. The Taxpayer argued that it was not a mere continuation of WRI because WRI had shareholders and two officers who are not involved with the Taxpayer's business. The Taxpayer argued that Mr. Brown created the business after WRI's business dropped off significantly in 2014.

Mr. Brown was in charge of the daily operations of WRI and remains in charge of the daily operations of the Taxpayer. Mr. Brown was an officer, director, and manager of WRI. Mr. Brown is the officer, director, and manager of the Taxpayer. WRI and the Taxpayer share several common customers, they share the same employees, they share the same operating location, and they both engage in repossessions. The Department correctly pointed out that WRI was notified to quit the premises in March 2014, the Taxpayer changed its business address to WRI's location in May 2014, and the Taxpayer executed its lease on the premises in July 2014. However, WRI continued to conduct its business on the premises until at least the end of September 2014. These facts tend to show that WRI and the Taxpayer were operating simultaneously and conjointly from the same location for at least the months from May to September 2014.

Although the Taxpayer has only one director in common with WRI, that person was the one who was responsible for all of the daily operations of both. Mr. Brown controlled the payroll, overseeing employees, customer service, taxes, and all other practical functions of both the Taxpayer and WRI. Mr. Brown indicated that WRI intended to remain open after the protest

was denied, intended to pay its taxes, and was trying to reach a satisfactory payment plan for several months thereafter. Mr. Brown described his decision to create the Taxpayer as a response to WRI's difficulty meeting its tax repayments, its reduced sales, and its seemingly imminent failure after the lien was filed, which occurred sometime after the vehicle transfer in November 2013. However, he actually began the process the month after WRI's protest was denied in April 2013. Mr. Brown filed the certificate of organization for the Taxpayer in May 2013. Mr. Brown also began acquiring equipment for the Taxpayer prior to WRI's decision to dissolve, including the purchase of one vehicle from WRI before the lien was filed. The sale was reported at $700.00, but the value of the vehicle was found to be $14,720.00. *See* NMSA 1978, § 7-14-4 (1988) (applying the excise tax to the purchase price or to the reasonable value if the purchase price does not represent the reasonable value). *See also* 3.11.4.14 NMAC (requiring the Department to presume the reasonable value of a vehicle based on average reported dealer guides for comparable vehicles). After the lien was filed and WRI decided to dissolve, there is no evidence that Mr. Brown attempted to liquidate WRI's tangible property. Instead, the Taxpayer took possession of the tangible property, and remains in possession of it, although Mr. Brown reported that it is in storage and has not been used. Based upon the totality of the evidence, there is sufficient evidence to conclude by preponderance that WRI's assets were transferred to the Taxpayer in an effort avoid paying the taxes. Moreover, if the hallmark of "mere continuation" is control by the same person or persons, then the Taxpayer is also a mere continuation of WRI since both are effectively under the control of Mr. Brown. However, this issue is ultimately moot.

The Taxpayer argued that the total value of WRI's property that was transferred to the Taxpayer is $700.00, which was the purchase price of the vehicle. The Taxpayer also argued

that the total value of WRI's other property in the Taxpayer's possession is only a few thousand dollars. The value of the vehicle was previously determined to be $14,720.00. *See* Exhibit J. Moreover, WRI valued its tangible and intangible property at the time that it ceased doing business in its final tax return in excess of $500,000.00. *See* Exhibit 14.5. Just the tangible property in the form of buildings and depreciable assets was valued at more than $300,000.00. *See id.* The Taxpayer acknowledged that WRI's property was so valuated on its final return, but argued that the return did not take into consideration WRI's tax debts. The Taxpayer argued that WRI would have negative equity if the tax debt was factored into the return at that time. Equity is not the same thing as value. Equity is the amount of an item's value that exceeds the amount of secured claims or liens against that item. *See Black's Law Dictionary,* page 619 (9th ed. 2009). Value is the worth or price of an item, and fair market value is the price that an item can garner in an open market in an arm's-length transaction. *See id.* at pages 1690-1691. "Full value" is not defined in the statute. *See* NMSA 1978, § 7-1-63. When WRI ceased doing business and its property was transferred to the Taxpayer, WRI valued its tangible depreciable property in excess of $300,000.00 in its final tax return. *See* Exhibit 14.5. Therefore, the tangible property transferred to the Taxpayer had a value of more than $300,000.00. The Taxpayer's current assertion that the total value is only a few thousand dollars is not sufficient evidence to overcome the previous assertion made on a tax return. Even if the Taxpayer is entitled to limit its successor liability to the value of the transferred tangible and intangible property, the value of the tangible property exceeds the tax liability. So, the Taxpayer is still liable for the full amount of tax assessed.

Administrative costs and fees.

The Taxpayer argued that it became the prevailing party under the statute when the Department abated the interest prior to the hearing on the merits because the interest consisted of more than half of the total amount assessed. The Taxpayer moved for an award of administrative costs and fees as the prevailing party. The Taxpayer provided an affidavit to show that it incurred $43,879.53 in costs and fees related to its pursuit of the protest.

The Department argued that the Taxpayer is not the prevailing party because the interest was abated by the Department rather than by order of the Administrative Hearings Office. The statute does not require that a decision on the merits be issued by the hearing officer before a taxpayer is considered to be a prevailing party. *See* NMSA 1978, § 7-1-29.1 (2015). The determination of whether a taxpayer is a prevailing party and the amount of reasonable costs and fees can be made by agreement of the parties. NMSA 1978, § 7-1-29.1 (C) (4). If the parties do not agree, then the hearing officer shall make the determination "in the case where the final determination with respect to the tax, interest or penalty is made in an administrative proceeding". *Id.* Administrative proceedings include "any procedure or other action before the department or the administrative hearings office". NMSA 1978, § 7-1-29.1 (B). The protest is clearly an administrative proceeding, and it is within the purview of the Hearing Officer to make a determination. *See id.*

The statute provides that "the taxpayer is the prevailing party if the taxpayer has: (a) substantially prevailed with respect to the amount in controversy; or (b) substantially prevailed with respect to most of the issues involved in the case or the most significant issue or set of issues involved in the case". NMSA 1978, § 7-1-29.1 (C) (1). The Taxpayer became the prevailing party when the Department conceded the issue and abated the interest, which accounted for more than half of the assessment amount.

However, a taxpayer who has substantially prevailed with respect to the amount or issues may still be denied an award of administrative costs. *See* NMSA 1978, § 7-1-29.1 (C) (2). Abating all or part of an assessment does not create a presumption that the Department's position at the time the assessment was made was unreasonable. *See* NMSA 1978, § 7-1-17 (presuming assessments are correct). Rather, "the taxpayer *shall not be treated* as the prevailing party if…the department establishes or…the hearing officer finds that the position of the department in the proceeding was based upon a reasonable application of law to the facts of the case." *Id.* Most arguments on this issue were contained in the Taxpayer's motion for summary judgment and the Department's response to the motion.

The Taxpayer argued that the Department's assessment of interest was unreasonable in light of the holding in the *Hi-Country* case. *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) (holding that the definition of tax in the successor statute did not include penalty or interest). The Department argued that the statute has been amended to include penalty and interest since the *Hi-Country* case was decided. *See* NMSA 1978, § 7-1-61 (2017). The Department argued that the new statute should be given retroactive effect. The Department argued that the amendment was made by the legislature in order to clarify a previous ambiguity. The Department also argued that the Taxpayer was a "mere continuation" of WRI, and, in effect, the same taxpayer. Although ultimately incorrect and eventually conceded, the Department's position was not unreasonable. Therefore, the Taxpayer will not be treated as the prevailing party. *See* NMSA 1978, § 7-1-29.1. As such, the Taxpayer's request for administrative costs and fees is denied.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to assessment issued under Letter ID number L0883777840, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer is a successor in business to WRI. *See* NMSA 1978, § 7-1-61. *See also* 3.1.10.16 NMAC. *See also Sterling Title,* 1973-NMCA-086, ¶ 25.

C. The value of the property transferred to the Taxpayer exceeds the tax liability, so the Taxpayer is liable for the full amount of the tax assessed, which was $127,764.92. *See* NMSA 1978, § 7-1-63.

D. The Taxpayer failed to overcome the presumption that the assessment of tax was correct. *See* NMSA 1978, § 7-1-17.

E. The Taxpayer is the prevailing party as a substantial amount of the assessment was abated. *See* NMSA 1978, § 7-1-29.1.

F. The Taxpayer will not be treated as the prevailing party and is not entitled to an award of administrative costs and fees because the Department's position was not an unreasonable application of the law to the facts. *See id.*

For the foregoing reasons, the Taxpayer's protest **is DENIED**.

DATED: November 30, 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 4th day of December, 2018 in the following manner:

First Class Mail ***Interoffice Mail***

INTENTIONALLY BLANK

_____

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