STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
POTTER ENDUSTRIES, INC. DBA AMERICAN CAR & TRUCK CARE
TO THE ASSESSMENT ISSUED UNDER
LETTER ID NO. L0596711728

v. **D&O No. 19-18**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On June 20, 2019, 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 Kenneth Fladager, Staff Attorney. Nicholas Pacheco, Auditor, also appeared on behalf of the Department. Potter Endustries, Inc. DBA American Car and Truck Care (Taxpayer) was represented by its attorney, Thomas Rice. David Gill, owner of the Taxpayer, also appeared for the hearing. Mr. Gill and Mr. Pacheco testified. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer's exhibits #1 (lease), #2 (affidavit), #3 (application), #6 (contract), and #7 (email) were admitted. The Department's exhibits A (organization), B (contract), C (deed), D (amendment) E (articles of incorporation), H (report), I (homepage), K (payment), L (workforce record), M (workforce record), N (NV record), O (photo), P (NM record), Q (notice), R (officers), T (injunction), U (W-2 comparison), V (WY record), and W (updated liability) were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet.

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. The Hearing Officer considered all of the evidence and

arguments presented by both parties. The Hearing Officer finds in favor of the Department. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 3, 2017, the Department assessed the Taxpayer as a successor in business to American Car and Truck Care. The assessment was for $379,844.35 in tax, $78,586.91 in penalty, and $99,812.10 in interest, for a total liability of $558,243.36. [L0596711728]

2. On March 27, 2017, the Taxpayer filed a formal protest letter. [Protest]

3. On May 18, 2017, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing. [Request for Hearing]

4. The Taxpayer requested a continuance of the initial setting, which was granted. [Administrative file]

5. The telephonic scheduling hearing was conducted on June 23, 2017. The first hearing was held within 90 days of the protest. [Administrative file]

6. On June 27, 2017, a scheduling order and notice of hearing was issued. [Administrative file]

7. On June 20, 2018, the Taxpayer filed a motion for continuance of the hearing. [Administrative file]

8. On July 2, 2018, the parties filed the joint prehearing statement. [Joint Prehearing Statement]

9. On July 2, 2018, the Taxpayer's motion was granted, and an amended scheduling order and notice of hearing was issued. [Administrative file]

10. On May 30, 2019, the Department filed its prehearing statement. [Department's Prehearing Statement]

11. On June 10, 2019, the Taxpayer filed its prehearing statement. [Taxpayer's Prehearing Statement]

12. Mr. Gill owns the Taxpayer, which is a business that performs automotive maintenance and repair. [Testimony of Mr. Gill]

13. Mr. Gill incorporated the Taxpayer on January 19, 2017. [Testimony of Mr. Gill, Testimony of Mr. Pacheco, and Exhibit E]

14. Mr. Gill is the only person listed on the board of directors, as the incorporator, and as the registered agent of the Taxpayer. [Exhibit E]

15. Prior to creating the Taxpayer, Mr. Gill spoke to his friend Wesley Brown about Mr. Brown's business, which was American Car and Truck Care, LLC (the LLC). [Testimony of Mr. Gill, and Exhibit A]

16. The LLC was a business that performed automotive maintenance and repair. [Testimony of Mr. Gill, Testimony of Mr. Pacheco, and Exhibit A]

17. The LLC was going out of business, and Mr. Brown knew Mr. Gill was looking for a small business opportunity. [Testimony of Mr. Gill]

18. Mr. Gill created the Taxpayer to take advantage of this business opportunity. [Testimony of Mr. Gill]

19. Mr. Gill went to the Department's local office to fill out the paperwork to obtain a tax number for the Taxpayer. [Testimony of Mr. Gill]

20. Mr. Gill told the Department's employee that he was starting a new business where the old business was, and that he was keeping the same name to save on expenses. [Testimony of Mr. Gill]

21. The employee answered his questions about the form, was familiar with American Care and Truck Care, did not think keeping the same name would be a problem, and did not think that the Taxpayer needed to provide information on the form about the former owner. [Testimony of Mr. Gill, and Exhibit #3]

22. The LLC and the Taxpayer did not enter into a formal purchase agreement for the business. [Testimony of Mr. Gill]

23. The Taxpayer paid the LLC $3700.00 for the right to the LLC's accounts receivable. [Joint Prehearing Statement, and Testimony of Mr. Gill]

24. The building and equipment used in the Taxpayer's business are located at 1606 E. 20th St. in Farmington, NM. [Testimony of Mr. Gill, and Exhibit #1].

25. The building and equipment used in the LLC's business were located at 1606 E. 20th St. in Farmington, NM. [Testimony of Mr. Gill, and Exhibit A]

26. The building and equipment located at 1606 E. 20th St in Farmington, NM are currently owned by Nygren Investments. [Testimony of Mr. Gill, and Exhibit #2]

27. The building and equipment used in the Taxpayer's business are the same as the building and equipment used in the LLC's business. [Testimony of Mr. Gill]

28. The Taxpayer leased the building and equipment for the business from the Furlong Corporation on February 1, 2017. [Testimony of Mr. Gill, and Exhibit #1]

29. The Taxpayer agreed to pay $7500.00 per month for the use of the business's building and equipment for two years. [Testimony of Mr. Gill, and Exhibit #1]

30. The value of the lease agreement based on the monthly payments required for two years is $180,000.00. [Exhibit #1]

31. The building and equipment's purpose was to run an automotive maintenance and repair shop, and the building and equipment are only suitable for that type of business. [Exhibit #2]

32. Wesley Brown's wife is Julie Brown. Mrs. Brown is the daughter of Mr. Gill's lady friend, who lives with him. [Testimony of Mr. Gill]

33. Julie Brown is the only person listed as the president/director, secretary, treasurer, and vice president for the Furlong Corporation. [Exhibit V]

34. The Furlong Corporation was created, ostensibly by Julie Brown, on January 18, 2017, approximately two weeks before it entered the lease with the Taxpayer and one day before Mr. Gill created the Taxpayer. [Exhibit V, Exhibit #1, and Exhibit E]

35. Apparently, Furlong Corporation has the authority to control the building and equipment because Nygren Investment's representative told Mr. Gill that he would have to talk to Furlong Corporation about a lease, and payments under the lease are all made to Furlong Corporation. [Testimony of Mr. Gill and Exhibit #1]

36. Julie Brown was also the registered agent for the LLC. [Exhibit A]

37. Mr. Gill has a close personal relationship with the Browns, has known them for several years, and the Browns previously used Mr. Gill's home address for another business. [Testimony of Mr. Gill, Exhibit Q, and Exhibit R]

38. In 2010, the Browns, through their family trust, purchased the building and equipment at 1606 E. 20th St. in Farmington, New Mexico, a business known as American Car and Truck Care. They bought the business from Nygren Investments. [Exhibit B]

39. The purchase price was $800,000.00. [Exhibit B]

40. In 2016, they amended the sales contract for the business and amended the terms of payment. [Exhibit D]

41. On February 1, 2017, the same date that the Taxpayer contracted the lease of the business with the Furlong Corporation, the Browns filed a special warranty deed that granted the business property back to Nygren Investments. [Exhibit C, and Exhibit #1]

42. The LLC ceased operating the business on January 31, 2017, and the Taxpayer commenced operating the business on February 1, 2017. [Testimony of Mr. Gill]

43. After the Taxpayer commenced operations, Mr. Brown was still on site and met with a federal revenue agent to deal with the LLC's business issues regarding outstanding federal tax. [Testimony of Mr. Gill]

44. Mr. Gill also spoke to the federal revenue agent and was told that purchasing the LLC's accounts receivable would not subject the Taxpayer to liability on the federal taxes. [Testimony of Mr. Gill]

45. The Taxpayer kept the LLC's business name and kept the LLC's sign on the building. As an employee of the Taxpayer, Wesley Brown is aware that the Taxpayer is using the same name and sign. [Testimony of Mr. Gill]

46. The Taxpayer kept most of the LLC's employees and hired Wesley Brown as well. [Testimony of Mr. Gill, Exhibit L, and Exhibit M]

47. Mr. Gill is not involved in the day-to-day operations of the Taxpayer. Mr. Gill identified one of the employees as the shop manager. [Testimony of Mr. Gill]

48. Wesley Brown has been the highest paid employee of the Taxpayer for the two years that it has been operating, even though Mr. Gill identified a different employee as the shop manager. [Testimony of Mr. Gill, Testimony of Mr. Pacheco, Exhibit U]

49. The Taxpayer took over the LLC's website, its phone number, and its email address. The only change that the Taxpayer made to the website was to add its corporate name and to drop "LLC" from the business's name. [Testimony of Mr. Gill, Exhibit #7, and Exhibit I]

50. The LLC had a service contract with the State of New Mexico's General Services Department (GSD). [Testimony of Mr. Gill, Testimony of Nicholas Pacheco, Exhibit #6]

51. The Taxpayer honored and agreed to the terms of the LLC's contract with GSD from February 2017 until October 2018. [Testimony of Mr. Gill, and Exhibit #7]

52. After some paperwork issue, the Taxpayer informed GSD that it did not purchase the LLC's business, and GSD terminated the contract and advised that the Taxpayer would have to bid for its own contract. [Testimony of Mr. Gill, and Exhibit #7]

53. The Taxpayer did not explore how much it would cost to develop a webpage or to create a new name and contact points for its business. The Taxpayer kept the LLC's information to save money. [Testimony of Mr. Gill]

54. The Taxpayer did not explore how much the LLC's goodwill was worth, but Mr. Gill was aware that the LLC's business name had recognition in the community. [Testimony of Mr. Gill]

55. Mr. Gill estimates that the LLC's goodwill was worth approximately $10,000.00 based on the Taxpayer's sales since it took over the business. [Testimony of Mr. Gill]

DISCUSSION

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17 (2007). 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 (Y) (2017). *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.

The presumption.

The Taxpayer objected to the presumption of correctness. The Taxpayer argued that the presumption is unconstitutional because it is fundamentally unfair to place the burden of proof on the taxpayers. The Taxpayer argued that the Department should have to prove that taxpayers are liable for the tax assessed. There is a strong presumption that statutes are constitutional. *See Ortiz v. Taxation and Revenue Dep't,* 1998-NMCA-027, ¶ 5, 124 N.M. 677. A challenge to a statute's constitutionality must be proven beyond a reasonable doubt. *See City of Farmington v. Fawcett*, 1992-NMCA-075, 114 N.M. 537. *See also City of Albuquerque ex rel. Albuquerque Police Department v. One 1984 White Chevy*, 2002-NMSC-014, ¶ 5.

Several cases clearly establish that the burden of proof is on the taxpayers due to the presumption of correctness afforded by the statute. *See El Centro Villa Nursing Ctr.*, 1989-NMCA-070. *See Archuleta v. O'Chesky*, 1972-NMCA-165, 84 N.M. 428. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16. *See N.M. Taxation and Revenue Dep't v. Casias Trucking*, 2014-NMCA-099. *See MPC Ltd. v. N.M. Taxation and Revenue Dep't*, 2003-NMCA-021, 133 N.M. 217. *See also Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation and Revenue*, 2006-NMSC-050, ¶ 23, 139 N.M. 498 (rejecting the taxpayer's

argument that the Department must prove that the value assessed was commensurate with the actual price of similar products because there is a presumption that the assessment is correct and the burden is on the taxpayer). The Taxpayer failed to establish beyond a reasonable doubt that Section 7-1-17 is unconstitutional.

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) (2017). *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). There are also several factors to be used in determining a successor in business. *See* 3.1.10.16 (A) NMAC. 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 other inventory…in a single or limited number of transactions". 3.1.10.16 (A) (1) NMAC. 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. The third factor is whether "a substantial part of both equipment and inventories" was transferred. 3.1.10.16 (A) (3) NMAC.

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 fifth factor is whether "the transferor's goodwill follow[ed] the transfer of the business properties". 3.1.10.16 (A) (5) NMAC. The sixth factor is whether the sales, service, or lease contracts of the transferor were honored by the transferee. *See* 3.1.10.16 (A) (6) NMAC. The seventh factor is whether unpaid debts of the transferor were paid by the transferee. *See* 3.1.10.16 (A) (7) NMAC. The final factor is whether there was an agreement precluding competition. *See* 3.1.10.16 (A) (8) 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.

The regulation.

The Taxpayer objected to Regulation 3.1.10.16. The Taxpayer argued that the regulation is unconstitutional because it requires only one factor to be present to presume that a business is a successor. The Taxpayer argues that the regulation violates due process, is unfair, is unjustifiably in favor the Department, outrageous, and without any rational basis. *See* Taxpayer's Prehearing Statement.

The Department has the authority to issue regulations to interpret and exemplify the statutes. *See* NMSA 1978, § 9-11-6.2 (2015). Any regulation issued "is presumed to be a proper implementation of the provisions of the law". NMSA 1978, § 9-11.6.2 (G). *See also Hammack v. N.M. Taxation and Revenue Dep't*, 2017-NMCA-086, ¶ 16 (noting that the purpose of the Department's regulations is to interpret, exemplify, implement and enforce the tax statutes). The same legal principles apply to determining if a regulation is unconstitutional as apply to determining if a statute is unconstitutional. *See Old Abe Co. v. N.M. Mining Comm'n*, 1995-NMCA-134, ¶ 25, 121 N.M. 83. A regulation is unconstitutional if it is so vague that one has to

guess at its meaning and its application would differ. *See id. See also City of Albuquerque v. Sanchez*, 1992-NMCA-038, ¶ 21, 113 N.M. 721. The regulation is considered in determining if a taxpayer is a successor in business. *See Hi-Country Buick GMC, Inc. v. Taxation and Revenue Dep't of N.M.*, 2016-NMCA-027, ¶ 12-18.

The regulation details a number of factors that can be used to determine if a taxpayer is a successor. *See* 3.1.10.16 NMAC. It also defines terms used in the statute. *See id. See* NMSA 1978, § 7-1-61. The regulation is rationally related to the statute. The regulation also appears to interpret and exemplify the statute. Therefore, the regulation is a proper implementation of the statute. The regulation is also not so vague that its meaning must be guessed, and its application does not differ. Therefore, the Taxpayer failed to prove that the regulation is unconstitutional.

Due process requires an opportunity to be heard in a meaningful time and meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976). *See also State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 777 P.2d 386 (Ct. App. 1989) (holding that in an administrative hearing due process is flexible and should conform to the demands of a particular situation). The essence of due process is the right to be heard at a meaningful time and in a meaningful manner. *See Dente v. State*, 1997-NMCA-099, 124 N.M. 93, overruled in part on other grounds by *State v. Bargas*, 2000-NMCA-103, 129 NM 800. The Taxpayer has the opportunity through the hearing process to rebut any presumptions of the statute and of the regulation. *See* NMSA 1978, § 7-1-24 (2017). Therefore, the Taxpayer's right to due process is satisfied.

Transfer of the business and its property.

The Taxpayer argued that it leased the property of the business from a disinterested third party. The Taxpayer argued that no property was transferred from the LLC to the Taxpayer, so the Taxpayer was not liable as a successor. Again, all "tangible and intangible property *used in any*

business remains subject to liability for payment of the tax due on account of that business…even though the business changes hands." NMSA 1978, § 7-1-61 (A) (emphasis added). The term "used in any business" means any tangible and intangible property "reasonably necessary for the business's continued operations, *whether or not the property is actually owned by the business*." *See* 3.1.10.16 (F) (4) (emphasis added). Moreover, the statute imposes liability when the business is transferred, whether or not there is any tangible property. *See* NMSA 1978, § 7-1-61 and § 7-1-63. 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. A taxpayer may also be liable as a successor when it accepts a transfer from a third party who took over the predecessor business. *See Hi-Country Buick GMC, Inc.*, 2016-NMCA-027, ¶ 16-17 (nothing that the crucial inquiry is whether the party who took over the business and its property intended to retain and operate the business).

It was undisputed that the building and equipment used in the Taxpayer's business are the same building and equipment used in the LLC's business. In fact, the building and equipment's sole purpose is to be used in an automotive maintenance and repair business. *See* Exhibit #2. The Browns transferred ownership of the building and equipment to Nygren Investments on the same day that Julie Brown, through Furlong Corporation, leased the business to the Taxpayer. *See* Exhibit #1, and Exhibit C. The Taxpayer approached Nygren Investments about the building and equipment, and it was informed that it would have to deal with Furlong Corporation about the business. Even if the building and equipment are currently owned by Nygren Investments, it is apparent that the Furlong Corporation has control of the building and equipment. The Taxpayer's lease was with the Furlong Corporation, an entity that is apparently entirely controlled by Julie

Brown. *See* Exhibit V. Julie Brown was also the registered agent of the LLC and is married to the LLC's owner. *See* Exhibit A. Therefore, the building and equipment used in the business were leased to the Taxpayer by the same person or persons who controlled the LLC. The building and equipment used in the LLC's business were transferred to the Taxpayer by lease.

Although there was a lease rather than a purchase, there was clearly a transfer when the right to use the building and equipment were granted to the Taxpayer in the lease by a corporation that was entirely controlled by a person who was also the registered agent of the LLC. *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). *See also Williams v. Farrand,* 88 Mich. 473 at 487, 50 N.W. 446 (Sup. Ct. Mich.) (November 20, 1891) (noting that the goodwill of a business may include the advantage of the location, which can be obtained by lease). *See also Burckhardt v. Burckhardt,* 42 Ohio St. 474 at 501 (Sup. Ct. Ohio) (January 1885) (noting that leasing the furniture and property of a business for a fixed term may be more valuable than if it were sold piecemeal because goodwill is enhanced when everything is kept together to carry on the same business at the same place of business where customers were used to finding it). *See also Detroit Hilton Ltd. Partnership v. Dep't of Treasury, Revenue Div.*, 422 Mich. 422, 373 N.W.2d 586 (Sup. Ct. Mich.) (September 5, 1985) (holding that a company that leased its building and operating assets from the corporation that owned and previously operated the hotel was a successor in business and that the predecessor hotel was not liable for its successor's taxes).

The Taxpayer's argument that it did not purchase or acquire any property from the LLC is without merit. Mr. Gill testified several times that no money or property of any kind was exchanged between the Taxpayer and the LLC. However, his testimony changed when asked to explain the statement previously made in the Joint Prehearing Statement that said the Taxpayer paid $3700 to the LLC for its accounts receivable. Mr. Gill then admitted that the Taxpayer paid $3700 to the LLC for its accounts receivable, but he attempted to discount the worth of the accounts receivable by explaining that the Taxpayer has never collected on those accounts. Mr. Gill also eventually admitted that the Taxpayer took over the LLC's website and only changed the name on it so that the Taxpayer's name was added and the "LLC" was dropped from American Car and Truck Care. This testimony demonstrates that the Taxpayer also kept using the phone number and email address that the LLC had used in its business, since that information was also included on the website. *See* Exhibit I, and Exhibit #7. 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. Based upon the totality of the circumstances, the LLC's business was transferred to the Taxpayer.

The Taxpayer is a successor.

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 Taxpayer leased all of the physical property of the LLC's business from a corporation controlled by the LLC's registered agent. The Taxpayer also purchased the LLC's accounts receivable and took over its website, phone number, and email address. The Taxpayer has also used the same

name and same sign as the LLC used. 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. The LLC was not in the business of transferring its business and property, so the transfer was not done in the ordinary course of 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 the equipment used in the LLC's business was leased to the Taxpayer by the same person or persons who controlled the LLC. *See also* 3.1.10.16 (F) (4) (noting that the ownership of the equipment used in the business does not matter). 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. The Taxpayer's business is exactly the same as the LLC's was, automotive maintenance and repair. The business also continued uninterrupted because the Taxpayer commenced its operations on the date after the LLC ostensibly ceased its operations. 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 is operating from the exact same location as the LLC was. The Taxpayer is using the exact same equipment that the LLC used. The Taxpayer is engaged in the exact same business that the LLC was. The Taxpayer continues to employ many of the same employees as the LLC employed. The owner of the LLC is employed by the Taxpayer. After a conversation with a revenue agent while obtaining the

Taxpayer's tax number, Mr. Gill knew that the LLC's business name was well-recognized in the community, and the Taxpayer continues to use the LLC's business name. Consequently, the LLC's goodwill transferred to the Taxpayer.

The sixth factor is whether the business obligations of the transferor were honored by the transferee. *See* 3.1.10.16 (A) (6) NMAC. The Taxpayer honored the LLC's contract with GSD from February 2017 until October 2018. This factor weighs in favor of finding that the Taxpayer is 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. There was no evidence that the Taxpayer assumed or paid any unpaid debts of the LLC. This factor weighs in favor of finding that the Taxpayer is not 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 evidence of such an agreement between the Taxpayer and the LLC. This factor weighs in favor of finding that the Taxpayer is not a successor.

When a business is transferred, or when any of the property used in the business is transferred, the recipient 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. *See also Hi-Country Buick GMC, Inc.*, 2016-NMCA-027. The Taxpayer acquired the right to all of the property, tangible and intangible, used in the LLC's business. The right to use all of the tangible and intangible property was transferred to the Taxpayer by Furlong Corporation, which is controlled by the same person or persons who controlled the LLC. The Taxpayer continues to operate the same business, in the same location, with many of the same employees. Therefore, the Taxpayer is a successor in business to the LLC.

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.* The Department argued that the Taxpayer's business is merely a continuation of the LLC. The Department argued that the owner of the LLC is the highest-paid employee of the Taxpayer. The Department inferred that the former owner of the business is still in charge of the business.

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. Although there are certainly suspicious connections between the LLC and the Taxpayer, there is not sufficient evidence that there is a continuity of management and ownership between the Taxpayer and the LLC. Therefore, the Taxpayer is not a mere continuation of the LLC.

The Taxpayer argued that the business was not transferred to evade or defeat the tax. The Taxpayer argued that it was unaware of the LLC's tax problems. The Taxpayer argued that it was unaware of the potential liability it would face as a successor in business to the LLC and that no one would agree to the scheme that the Department had inferred from the circumstances. Mr.

Gill initially testified that he was not aware of the LLC's tax liability, that his friend did not tell him about it, and that if he had known he would not have leased and taken over the business. Mr. Gill also initially testified that Mr. Brown was not working for the Taxpayer or involved in the business for some time after the Taxpayer began doing business because Mr. Brown had taken a job in Albuquerque after the LLC went out of business. This testimony is not credible. Mr. Gill later admitted that Mr. Brown was still working on things at the business a few days after the Taxpayer commenced its operations. Mr. Gill also admitted that he knew Mr. Brown was meeting with a federal revenue agent at the business a few days after the Taxpayer commenced its operations, but again denied any knowledge of the details of the LLC's tax problems. However, Mr. Gill eventually admitted that he had also spoken to the federal revenue agent to confirm that the accounts receivable would not subject the Taxpayer to the LLC's federal tax liability. Based upon the totality of the evidence, Mr. Gill was aware that the LLC had tax problems, was aware that the Taxpayer had the potential to be liable for the LLC's taxes, and was actively trying to ensure that the Taxpayer would not have to pay the LLC's tax obligations. The Taxpayer's creation and lease also correspond closely in time to the creation of Furlong Corporation. Given this evidence as well as the close personal relationship between Mr. Gill and the Browns, it is reasonable to conclude that the business was transferred in an attempt to evade or defeat the tax. Consequently, the Taxpayer is liable for the full amount of the assessment.

The Taxpayer also argued that there was nothing of value transferred. The Taxpayer argued that if there was any value transferred, it was only for the goodwill. The Taxpayer argued that Mr. Gill's guess that the goodwill's value was a maximum of $10,000 should control and argued that its liability should be limited to that amount. The Taxpayer's argument relies largely

upon the testimony that no money or property of any kind was exchanged between the Taxpayer and the LLC. However, as previously discussed, that testimony is not credible. The Taxpayer paid for the accounts receivable, kept the name, kept the sign, and took over the website. The Taxpayer did not explore the costs of creating its own website, but Mr. Gill supposed that the cost would be substantial. Moreover, Mr. Gill's guess is not sufficient evidence of the value of the goodwill transferred. Even if the Taxpayer's liability should be limited to the value of the property transferred, the Taxpayer failed to overcome the presumption of correctness as it failed to provide substantial evidence that the value transferred was less than the amount assessed. *See* NMSA 1978, § 7-1-17.

Estoppel.

The Taxpayer argued that the Department should be estopped from treating it as a successor in business because Mr. Gill spoke to the Department's employee at the local office when he obtained a tax number for the Taxpayer. The Taxpayer argued that the Department's employee did not notify the Taxpayer of any potential successor liability and did not recommend that the Taxpayer seek a tax clearance. The Taxpayer argued that the Department's employee said that the form did not need to include information about the former owner.

Equitable estoppel may be found against the state where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State, Human Servs. Dep't*, 1998-NMSC-011, ¶ 17, 125 N.M. 140. Equitable estoppel against the state is disfavored, especially in cases involving taxes. *See Taxation and Revenue Dep't v. Bien Mur Indian Market*, 1989-NMSC-015, ¶9-10, 108 N.M. 228. Equitable estoppel will not apply against the state when it would be contrary to the requirements of statute or law. *See Rainaldi v.*

Pub. Employees Ret. Bd., 1993-NMSC-028, ¶ 18-19, 115 N.M. 650. *See also In re Kilmer*, 2004-NMCA-122, ¶ 26, 136 N.M. 440.

The Department's employee was merely assisting Mr. Gill in filling out a form and was only aware of what Mr. Gill was telling her, essentially that the business did not have a former owner because he was starting a new business. If the Taxpayer was misled by the conversation, the error occurred because the Taxpayer was not providing full and accurate information, not because the Department was engaged in aggravated and overreaching conduct.

The Taxpayer also argued that the Department should be estopped because another state agency, the GSD, has already determined that the Taxpayer is not a successor in business to the LLC. The Taxpayer argued that when GSD terminated the LLC's contract, which the Taxpayer operated under for over a year, it served as a determination of the Taxpayer's status. For more than a year, GSD treated the Taxpayer as a successor to the LLC. Only after the Taxpayer asserted that it had not purchased the LLC or its assets did GSD cancel the contract. *See* Exhibit #7. Again, even if GSD previously determined that the Taxpayer was not a successor who could take over the contract, it was only because of the erroneous information that the Taxpayer provided. As previously discussed, the Taxpayer's assertion was not true as it did purchase assets from the LLC, such as the accounts receivable. Therefore, the state did not engage in aggravated or overreaching conduct. However, the issue of equitable estoppel is moot in the context of this protest because the Administrative Hearings Office has not been granted statutory authority to exercise an equitable judicial remedy. *See AA Oilfield Serv. v. N.M. State Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of an administrative body did not empower it to grant equitable relief, such as estoppel, because the authority is limited to making factual and legal determinations as authorized by the statute). *See*

Gzaskow v. Pub. Employees Ret. Bd., 2017-NMCA-064, ¶35 (recognizing *AA Oilfield Serv.* for the proposition that an agency with quasi-judicial powers did not have authority to grant an equitable remedy). *See also* NMSA 1978, § 7-1B-1, *et seq*.

Jurisdiction.

The Taxpayer argued that there was not jurisdiction to decide the protest because the Department did not provide the Taxpayer with the assessments that were made to the LLC, despite the Taxpayer's repeated requests for them. The Taxpayer argued that the Department failed to prove that the LLC was assessed within the statute of limitations, which divested jurisdiction for the protest and the assessment against any successors in business.

The Administrative Hearings Office has jurisdiction to hear all protests against actions taken under the Tax Administration Act. *See* NMSA 1978, § 7-1B-6. The Taxpayer's protest was taken against an assessment under the Tax Administration Act. *See* NMSA 1978, § 7-1-63 and § 7-1-24. "If, after any business is transferred to a successor, any tax from the operating the business for which the former owner is liable *remains due*, the successor shall pay the amount due within thirty days." NMSA 1978, § 7-1-63 (A) (emphasis added). A successor is liable for any amount of tax still owed, and there is no requirement that the predecessor business be assessed. *See id.*

In this case, the Department provided sufficient evidence to show that the LLC was assessed and did not protest the assessment. *See* Exhibit T. The LLC admitted its liability when it agreed to a payment plan. *See* Exhibit T. The Taxpayer has no standing to protest the assessment made to the LLC. *See* NMSA, 1978, § 7-1-24 (E) (when an assessment is not timely protested, the assessment is final and the Department may take collection action). *See also Hi-Buick Country GMC, Inc.*, 2016-NMCA-027, ¶ 11 (holding that the assessment to the successor

was sufficient to give proper notice of the nature and amount of tax liability as a successor in business). The Taxpayer became a successor in February 2017, and the Taxpayer was assessed in March 2017. Therefore, the assessment to the Taxpayer was made within the statute of limitations. *See* NMSA 1978, § NMSA 1978, § 7-1-18 (generally requiring assessments to be within three years of the year in which the tax became due). *See* NMSA 1978, § 7-1-63 (requiring successors to pay tax due within 30 days of the transfer of the business). The lack of copies of the assessments to the LLC does not divest jurisdiction to the Taxpayer's protest.

Cruel and unusual punishment.

The Taxpayer argued that the assessment is tantamount to cruel and unusual punishment under the federal and state constitutions. The Taxpayer argued that the amount due in the assessment, because it is more than $500,000, is out of proportion to the Taxpayer's conduct and is so excessive that it will effectively ruin Mr. Gill's life and force the Taxpayer out of business and into bankruptcy.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. *See also* N.M. Const. Art. II, § 13. Generally, taxes are not considered to be penalties. *See State ex rel. Foy v. Austin Capital Mgmt.*, 2013-NMCA-043, ¶ 13 (noting the holding of a federal case). Most of the cases dealing with whether a tax should be treated as a punishment or not deal with double jeopardy issues rather than cruel and unusual punishment or excessive fines. *See State v. Kirby*, 2003-NMCA-074, 133 N.M. 782. *See N.M. Taxation and Revenue Dep't v. Whitener*, 1993-NMCA-161, 117 N.M. 130. *See State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, 120 N.M. 619. However, the cases are instructive in this issue. Just because the taxpayer perceives the tax as a punishment does not render the tax to be a punishment. *See Schwartz*, 1995-NMSC-069, ¶ 32. *See Kirby*, 2003-

NMCA-074, ¶22. *See also City of Albuquerque ex rel. Albuquerque Police Dep't*, 2002-NMSC-014, ¶ 11. A high tax is not necessarily a punishment. *See Schwartz*, 1995-NMSC-069, ¶ 39. The critical inquiry is the legislative purpose of the statute imposing the tax, whether it is meant to be a punishment or if it is meant to raise revenue. *See Schwartz*, 1995-NMSC-069, ¶ 27 and 38. *See Kirby*, 2003-NMCA-074, ¶ 37. *See Whitener*, 1993-NMCA-161, ¶ 20. The purpose of the successor in business statute is to ensure that a business's unpaid taxes are paid and cannot be avoided by transferring the business to another party. *See* NMSA 1978, §§ 7-1-61 thru 7-1-63. *See also Sterling Title*, 1973-NMCA-086, ¶ 25. It is not meant to be punitive and does not violate the constitutional principles against excessive fines or cruel and unusual punishment.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the assessment issued under Letter ID number 0596711728, and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA, § 7-1B-6.

B. The first hearing was timely set and held within 90 days of protest. *See* NMSA 1978, § 7-1B-8 (2015). *See* 22.600.3.8 NMAC (2018).

C. The Taxpayer is a successor in business to the LLC. *See* NMSA 1978, §§ 7-1-61 thru 7-1-63. *See* 3.1.10.16 NMAC. *See Sterling Title*, 1973-NMCA-086. *See also Hi-Country Buick GMC, Inc.*, 2016-NMCA-027.

D. The business was transferred to evade or defeat the tax, and the Taxpayer is liable for the full amount of the assessment. *See* NMSA 1978, § 7-1-63 (C).

E. The Taxpayer failed to overcome the presumption that the assessment of tax was correct. *See* NMSA 1978, § 7-1-17, and § 7-1-63.

F. The Department was not estopped from assessing the Taxpayer as a successor in business. *See Wisznia*, 1998-NMSC-011. *See Bien Mur Indian Market*, 1989-NMSC-015. *See Rainaldi*, 1993-NMSC-028. *See also In re Kilmer*, 2004-NMCA-122, ¶ 26, 136 N.M. 440.

G. The Taxpayer did not have standing to protest the assessments made the LLC as they were already final. *See* NMSA 1978, § 7-1-24. *See* Exhibit T.

H. The assessment against the Taxpayer does not constitute cruel and unusual punishment. *See State ex rel. Foy v. Austin Capital Mgmt.*, 2013-NMCA-043. *See Kirby*, 2003-NMCA-074. *See Whitener*, 1993-NMCA-161{check cite}. *See Schwartz*, 1995-NMSC-069.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. **IT IS ORDERED** that Taxpayer is liable for, as of the date of the hearing, a total outstanding liability for tax, penalty, and interest of $599,551.86. *See* Exhibit W.

DATED: July 17, 2019.

Dee Dee Hoxie

Dee Dee Hoxie
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 July 17, 2019, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interdepartmental Mail*

INTENTIONALLY BLANK

John Griego
Legal Assistant
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