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

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**IN THE MATTER OF THE PROTEST OF  
M&J OILFIELD SERVICES, LLC  
TO THE ASSESSMENT ISSUED UNDER  
LETTER ID NO. L1745543856**

v.

**AHO No. 20.04-052A,  
D&O No. 20-16**

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**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

**DECISION AND ORDER**

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On November 20, 2020, Hearing Officer Dee Dee Hoxie, Esq. conducted a hearing by videoconference 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. M&J Oilfield Services, LLC (Taxpayer) was represented by its attorneys, James Feuille and David Hansen. Jesus Michael Carrasco, owner of the Taxpayer (Owner), also appeared for the hearing. Michael Carrasco (Father), Elena Carrasco (Mother), and Aundrea Bradshaw also appeared as witnesses for the Taxpayer. The Owner, his Father and Mother, Ms. Bradshaw, and Mr. Pacheco testified. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer's exhibits #1 (financial transfer), #2 (tax return), #3 (balance sheet), #4 (trailer receipts), #5 (MVD records), #6 (titles and insurance), #7 (articles of organization), #8 (employee list), #9 (W-2 information), #10 (schedule C), #11 (emails), #12 (assessment), #13 (pictures), #14 (business names list), #15 (equipment list), #16 (customer list), #18 (dates of employment), and #19 (employee lists) were admitted. The Department's exhibits A (UCC financing statement), B (MVD records), C (employee records), D (W-2 records), E (gross receipts report), F (gross

1 receipts report), G (subcontractors list), H (assessment), I (acknowledgment of protest), J  
2 (business tax application), K (registration certificate), and L (business tax registration update)  
3 were admitted. A more detailed description of exhibits submitted at the hearing is included on  
4 the Administrative Exhibit Coversheet.

5 The main issue to be decided is whether the Taxpayer is a successor in business, and, if  
6 so, to what extent the Taxpayer is liable. The Hearing Officer considered all of the evidence and  
7 arguments presented by both parties. The Hearing Officer finds that the Taxpayer is a successor  
8 in business and that the Taxpayer's liability is limited to the full value of the transferred  
9 property. IT IS DECIDED AND ORDERED AS FOLLOWS:

#### 10 FINDINGS OF FACT

11 1. On October 21, 2019, under letter id. no. L1745543856, the Department issued an  
12 assessment to the Taxpayer as a successor in business to M & J Dumptruck and Backhoe  
13 Services, Inc. The assessment was for tax of \$2,610,552.42, penalty of \$523,189.48, and interest  
14 of \$565,397.29, for a total liability of \$3,699,139.19. [Administrative file, Testimony of Mr.  
15 Pacheco, Testimony of Owner, Exhibit 12].

16 2. On January 17, 2020, the Taxpayer filed a timely protest to the assessment.  
17 [Administrative file, Testimony of Mr. Pacheco, Testimony of Owner].

18 3. On January 31, 2020, the Department acknowledged receipt of the Taxpayer's  
19 protest. [Administrative file].

20 4. On April 13, 2020, the Taxpayer filed a request for hearing with the  
21 Administrative Hearings Office. [Administrative file].

22 5. On April 16, 2020, the Administrative Hearings Office sent notice of a telephonic  
23 scheduling hearing to the parties. [Administrative file].

1           6.       On May 8, 2020, the Department filed its answer to the protest. [Administrative  
2 file].

3           7.       A telephonic scheduling hearing was conducted on May 20, 2020, which was  
4 within 90 days of the request for hearing. [Administrative file].

5           8.       On May 21, 2020, the Administrative Hearings Office issued a scheduling order  
6 and notice of hearing on the merits to the parties. On October 26, 2020, the notice was amended  
7 to convert the hearing to videoconference due to the ongoing public health state of emergency.  
8 [Administrative file].

9           9.       On October 30, 2020, the Department and the Taxpayer filed their prehearing  
10 statements. [Administrative file].

11          10.       In 2016, the Owner started the Taxpayer and began doing business. [Testimony  
12 of the Owner, Exhibit 7, Exhibit J, Exhibit K].

13          11.       The Taxpayer provides services to oilfield companies. The Taxpayer's services  
14 are sandblasting and painting the plants and tanks. The Taxpayer also builds dirt berms around  
15 the tanks. [Testimony of the Owner].

16          12.       In December 2016, the Taxpayer acquired equipment, a track loader and a  
17 backhoe loader (the heavy equipment), and assumed the debt on the heavy equipment from M &  
18 J Dumptruck & Backhoe Services, Inc. (the Dumptruck business). [Testimony of the Owner,  
19 Testimony of the Father, Testimony of Mr. Pacheco, Exhibit 1, Exhibit A].

20          13.       The amount of the debt assumed was 18 payments of \$3,366.85, for a total of  
21 \$60,603.30. [Exhibit 1.12].

22          14.       In 2014 when the Dumptruck business bought the heavy equipment, the original  
23 cash sale price of the heavy equipment was \$173,539.00. [Exhibit 1.4].

1           15.     For insurance purposes at the time that the Taxpayer acquired the heavy  
2 equipment, it was valued at \$57,949.93, including tax. [Exhibit 1.14].

3           16.     The Taxpayer calculated the heavy equipment's value at \$54,583.08, excluding  
4 tax. [Testimony of the Owner, Exhibit 1.14].

5           17.     The Dumptruck business was owned by the Father. The Father also had another  
6 business called M & J Rentals and Oilfield Services, LLC (the Rentals business) and operated a  
7 farming business (the farm). [Testimony of the Owner, Testimony of the Father, Testimony of  
8 the Mother, Testimony of Mr. Pacheco, Testimony of Ms. Bradshaw].

9           18.     The Dumptruck business provided services to oilfield companies. The  
10 Dumptruck business's services were building large pads for rigs, building tank batteries, and  
11 maintenance service on the tank battery lines. [Testimony of the Father].

12          19.     The Rentals business rented equipment to its customers. [Testimony of the  
13 Father, Testimony of the Mother].

14          20.     The Rentals business did not rent equipment to the Dumptruck business because  
15 the Dumptruck business owned its own equipment. [Testimony of the Father, Testimony of the  
16 Mother].

17          21.     The Dumptruck business was assessed by the Department in September 2014, and  
18 it protested the assessment. The protest was later withdrawn. [Testimony of Mr. Pacheco,  
19 Exhibit H, Exhibit I].

20          22.     In November 2014, the Owner's sister was diagnosed with cancer, and the Father  
21 and Mother began neglecting their businesses to spend most of their time with their daughter so  
22 they could assist with her medical treatment. As a result, the problems with the Dumptruck

1 business compounded, and it ultimately failed. [Testimony of the Father, Testimony of the  
2 Mother, Testimony of the Owner, Testimony of Ms. Bradshaw, Exhibit L].

3 23. The Owner worked for the Dumptruck business from 2008 until late 2015.  
4 [Testimony of the Owner, Testimony of the Father, Testimony of the Mother, Testimony of Ms.  
5 Bradshaw, Exhibit 18, Exhibit 19, Exhibit C].

6 24. In late 2015, the Owner noticed that the Dumptruck business was receiving a lot  
7 of complaints from its customers and vendors. The Owner felt that the Dumptruck business was  
8 failing, so he decided to open his own business. [Testimony of the Owner].

9 25. The Owner left the Dumptruck business and began the Taxpayer. [Testimony of  
10 the Owner, Testimony of the Father, Testimony of the Mother, Testimony of Ms. Bradshaw,  
11 Testimony of Mr. Pacheco, Exhibit 7, Exhibit 18].

12 26. The Owner began the process to create the Taxpayer in February 2016, and the  
13 Taxpayer began operating in April 2016. [Testimony of the Owner, Testimony of Mr. Pacheco,  
14 Exhibit 7, Exhibit 3, Exhibit 10, Exhibit F, Exhibit J, Exhibit K].

15 27. From February 1, 2016 to April 1, 2016, the Owner bought five trailers and two  
16 trucks from his Father. One heavy truck was owned by the Rentals business, and all of the other  
17 vehicles were owned by the Father. [Testimony of the Owner, Testimony of the Father, Exhibit  
18 5, Exhibit B].

19 28. All of the vehicles were sold for a nominal amount and did not reflect their actual  
20 fair market value. [Testimony of Mr. Pacheco, Exhibit 5, Exhibit B].

21 29. All of the vehicles were used by the farm or the Rentals business, and none of the  
22 vehicles were used by the Dumptruck business. [Testimony of the Father, Exhibit 6].

1           30.     The Dumtruck business tried to sell its vehicles but was unable to sell them due  
2 to a lien filed by the Department. [Testimony of the Father, Exhibit 13].

3           31.     As the Dumtruck business failed, it began terminating its employees.  
4 [Testimony of the Father, Testimony of Ms. Bradshaw, Exhibit 18].

5           32.     In 2016, the Taxpayer hired approximately 27 former employees of the  
6 Dumtruck business. [Testimony of the Owner, Testimony of Ms. Bradshaw, Exhibit 8, Exhibit  
7 18, Exhibit 19, Exhibit C].

8           33.     Some of those employees left the Taxpayer's service the same year that they were  
9 hired, some remained for a few years, and a few still work for the Taxpayer. [Testimony of Ms.  
10 Bradshaw, Exhibit 8].

11          34.     In 2018, the Father began working for the Taxpayer. [Testimony of the Father,  
12 Testimony of the Owner, Testimony of Ms. Bradshaw, Exhibit 9, Exhibit 18, Exhibit C, Exhibit  
13 D].

14          35.     In total, the Dumtruck business employed approximately 71 employees over the  
15 years, the Taxpayer has employed approximately 38<sup>1</sup> employees over the years, and  
16 approximately 28 of those employees worked for both. [Testimony of Ms. Bradshaw, Testimony  
17 of Mr. Pacheco, Exhibit 19, Exhibit C].

18          36.     The shared employees amount to approximately 39%<sup>2</sup> of the Dumtruck  
19 business's total workforce and to approximately 74% of the Taxpayer's total workforce<sup>3</sup>.  
20 [Testimony of Mr. Pacheco, Exhibit 19, Exhibit C].

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<sup>1</sup> The Taxpayer's count is 39 employees in Exhibit 19, but the Department's count is 38 employees in Exhibit C. The Taxpayer's count of shared employees and of employees of the Dumtruck business is the same as the Department's count.

<sup>2</sup> That is 28 out of 71 employees.

<sup>3</sup> That is 28 out of 38 employees.

1 37. Most of the shared employees are general laborers. [Testimony of the Owner,  
2 Testimony of Ms. Bradshaw].

3 38. The Father works as a mechanic for the Taxpayer and earns significantly less than  
4 he did as the owner and manager of the Dumptruck business. [Testimony of Father, Exhibit 9,  
5 Exhibit D].

6 39. The Taxpayer and the Dumptruck business have used four of the same  
7 subcontractors. [Testimony of the Owner, Exhibit G].

8 40. The Dumptruck business closed as of July 1, 2016, at which time it had a poor  
9 reputation. [Testimony of the Father, Testimony of the Mother, Testimony of the Owner,  
10 Testimony of Ms. Bradshaw, Exhibit L].

11 41. The Taxpayer and the Dumptruck business have one of the same customers. That  
12 customer only began doing business with the Taxpayer after it performed its own independent  
13 audit of the Taxpayer to ensure that the Taxpayer was not affiliated with the Dumptruck  
14 business. [Testimony of the Owner, Testimony of Ms. Bradshaw].

## 15 DISCUSSION

### 16 **Burden of Proof.**

17 Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17  
18 (2007). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the  
19 Taxpayer's burden to present evidence and legal argument to show that it is entitled to an  
20 abatement. *See El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-  
21 070, 108 N.M. 795. *See also Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. *See*  
22 *also N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8. When a  
23 taxpayer presents sufficient evidence to rebut the presumption, the burden shifts to the

1 Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation & Revenue*  
2 *Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

3 **Successor in Business Liability.**

4 A successor in business is required to pay the tax for which the acquired business was  
5 liable. *See* NMSA 1978, § 7-1-61 (C) (2017). *See also* NMSA 1978, § 7-1-63 (1997).

6 Moreover, “tangible and intangible property used in any business remains subject to liability for  
7 payment of the tax due” even when the business is transferred to a new owner. NMSA 1978, §  
8 7-1-61 (B). A successor in business is charged with certain responsibilities in discerning what  
9 tax is owed when the business or its assets are acquired. *See* NMSA 1978, § 7-1-61 (requiring  
10 the successor to set aside an amount in trust for payment of tax) and § 7-1-62 (1997) (allowing  
11 the successor to apply for a certificate from the Department).

12 **Determination of a successor.**

13 A successor in business is “any transferee of a business or property of a business, except  
14 to the extent it would be materially inconsistent with the rights of secured creditors”. 3.1.10.16  
15 (F) (2) NMAC (2001). There are also several nonexclusive factors to be used in determining a  
16 successor in business. *See* 3.1.10.16 (A) NMAC. The first factor is whether there was a transfer  
17 of property. *See* 3.1.10.16 (A) (1) NMAC. The second factor is whether the transfer was not in  
18 the ordinary course of the transferor’s business. *See* 3.1.10.16 (A) (2) NMAC. The third factor  
19 is whether “a substantial part of both equipment and inventories” was transferred. 3.1.10.16 (A)  
20 (3) NMAC. The fourth factor is whether a substantial portion of the business conducted by the  
21 transferor continued to be conducted by the transferee. *See* 3.1.10.16 (A) (4) NMAC. The fifth  
22 factor is whether “the transferor’s goodwill follow[ed] the transfer of the business properties”.  
23 3.1.10.16 (A) (5) NMAC. The sixth factor is whether the sales, service, or lease contracts of the



1 transferor were honored by the transferee. *See* 3.1.10.16 (A) (6) NMAC. The seventh factor is  
2 whether unpaid debts of the transferor were paid by the transferee. *See* 3.1.10.16 (A) (7)  
3 NMAC. The final factor is whether there was an agreement precluding competition. *See*  
4 3.1.10.16 (A) (8) NMAC. If a single one of these factors are present, there is a presumption that  
5 there is a successor in business. *See* 3.1.10.16 (B) NMAC.

6 **The Taxpayer is a successor.**

7         The first factor in determining whether there is a successor in business is whether there  
8 was “a sale and purchase of a major part of the materials, supplies, equipment, merchandise or  
9 other inventory of a business enterprise...between a transferor and a transferee in a single or  
10 limited number of transactions”. 3.1.10.16 (A) (1) NMAC. The Taxpayer acquired the heavy  
11 equipment from the Dumptruck business. [Exhibit 1]. The Taxpayer argues that this was not a  
12 sale or a purchase, and that two pieces are not a major part of the Dumptruck business’s  
13 equipment. A sale is “the transfer of property for a price; the agreement by which such a transfer  
14 takes place.” *Black’s Law Dictionary*, page 559 (pocket ed. 1996). A transfer is “every mode,  
15 direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting  
16 with the property of a business”. 3.1.10.16 (F) (3) NMAC. The equipment was transferred to  
17 the Taxpayer for the consideration of taking over the remaining debt on the equipment. The  
18 evidence showed that the Dumptruck business has other equipment, in the form of trailers and  
19 trucks, but there was no evidence that the Dumptruck business had other heavy equipment.  
20 [Exhibit 13]. Therefore, a major part of the Dumptruck business’s heavy equipment was  
21 transferred to the Taxpayer. This factor weighs in favor of finding that the Taxpayer is a  
22 successor in business.

1           The second factor is whether the transfer was not in the ordinary course of the  
2 transferor's business. *See* 3.1.10.16 (A) (2) NMAC. The Dumptruck business was not in the  
3 business of transferring heavy equipment, so the transfer was not done in the ordinary course of  
4 business. This factor weighs in favor of finding that the Taxpayer is a successor in business.

5           The third factor is whether "a substantial part of both equipment and inventories" was  
6 transferred. 3.1.10.16 (A) (3) NMAC. The Dumptruck business did not have an inventory, and  
7 only two pieces of heavy equipment were transferred, while several trucks and trailers were also  
8 owned. This factor weighs in favor of finding that the Taxpayer is not a successor in business.

9           The fourth factor is whether a substantial portion of the business conducted by the  
10 transferor continued to be conducted by the transferee. *See* 3.1.10.16 (A) (4) NMAC. The  
11 Dumptruck business was mainly constructing large pads for rigs, tank batteries, and maintenance  
12 on the tank battery lines. The Taxpayer's business is mainly sandblasting, painting, and  
13 constructing dirt berms around the tanks. This factor weighs in favor of finding that the  
14 Taxpayer is not a successor in business.

15           The fifth factor is whether "the transferor's goodwill follow[ed] the transfer of the  
16 business properties". 3.1.10.16 (A) (5) NMAC. The Taxpayer acknowledges that the  
17 Dumptruck business and the Taxpayer have similar business names. The Taxpayer argues that  
18 this is inconsequential since many businesses in New Mexico use M&J in their names. [Exhibit  
19 14]. The Taxpayer also argues that the Dumptruck business was run into the ground and,  
20 therefore, had no goodwill to transfer. Goodwill is the "business's reputation, patronage, and  
21 other intangible assets". *Black's Law Dictionary*, page 279 (pocket ed. 1996). A business's  
22 reputation might be good or bad. This factor relates to whether that reputation follows the  
23 transfer of the business's property. The Taxpayer admitted that the only customer that it shared

1 with the Dumptruck business had concerns that the two were affiliated and would only do  
2 business with the Taxpayer after performing its own audit to ensure that they were not. This is  
3 evidence that the Dumptruck business's reputation was attached to the Taxpayer. This factor  
4 weighs in favor of finding that the Taxpayer is a successor in business.

5 The sixth factor is whether the business obligations of the transferor were honored by the  
6 transferee. *See* 3.1.10.16 (A) (6) NMAC. There was no evidence that the Taxpayer honored any  
7 contracts for service that the Dumptruck business had. This factor weighs in favor of finding  
8 that the Taxpayer is not a successor in business.

9 The seventh factor is whether "unpaid indebtedness to suppliers, utility companies,  
10 service contractors, landlords or employees of the transferor [were] paid by the transferee". *See*  
11 3.1.10.16 (A) (7) NMAC. The Taxpayer argues that this factor should not weigh against it  
12 because the heavy equipment dealer was not a supplier, utility company, service contractor,  
13 landlord, or employee. The critical consideration is not the type of entity to whom the transferor  
14 was indebted; rather, it is whether the transferee took on some debt related to the transferor's  
15 business. The Taxpayer assumed the debt on the heavy equipment from the Dumptruck  
16 business. This factor weighs in favor of finding that the Taxpayer is a successor in business.

17 The final factor is whether there was an agreement precluding competition. *See* 3.1.10.16  
18 (A) (8) NMAC. There was no evidence of such an agreement between the Taxpayer and the  
19 Dumptruck business. This factor weighs in favor of finding that the Taxpayer is not a successor  
20 in business.

21 The Taxpayer argues that it rebutted the presumption that it was a successor in business  
22 because it established that there was no intent to transfer the business and it only purchased the  
23 heavy equipment at the suggestion of the equipment dealer. Meeting only one factor creates a

1 presumption that there is a successor in business, and four of the eight factors weigh in favor of  
2 finding that the Taxpayer is successor in business. *See* 3.1.10.16 NMAC. Moreover, all  
3 property used in a business “remains subject to liability for payment of the tax”. NMSA 1978, §  
4 7-1-61 (B). *See also Sterling Title Co. of Taos v. Comm’r of Revenue*, 1973-NMCA-086, ¶ 23-  
5 25, 85 N.M. 279 (noting in the concurrence that the primary purpose of the statute is to make the  
6 property of a business serve as security for the payment of tax). Also, “any transferee  
7 of...property of a business” is a successor in business. 3.1.10.16 (F) (2) NMAC. Purchasing  
8 tangible assets, assuming a lease, keeping one part-time employee, and assuming a note are  
9 sufficient to establish one as a successor in business, even when the prior business was defunct.  
10 *See Sterling Title*, 1973-NMCA-086, ¶ 9-11. *See also Hi-Country Buick GMC, Inc.*, 2016-  
11 NMCA-027. The Taxpayer acquired the heavy equipment from the Dumptruck business and  
12 assumed its debt on the heavy equipment. Therefore, the Taxpayer is a successor in business to  
13 the Dumptruck business.

14 **Extent of liability.**

15 “A successor may discharge an assessment made pursuant to this section by paying to the  
16 department the full value of the transferred tangible and intangible property.” NMSA 1978, § 7-  
17 1-63 (C). The successor may be liable for the full amount of the assessment if the transfer was  
18 done to avoid tax, if the transfer amounted “to a de facto merger, consolidation, or mere  
19 continuation of the transferor’s business”, or if the successor agreed to assume the liability. *Id.*  
20 The statute essentially codifies the exceptions that the court recognized. *See Pankey v. Hot*  
21 *Springs Nat’l Bank*, 1941-NMSC-060, ¶ 13, 46 N.M. 10 (holding that a successor may be liable  
22 for its predecessor’s debts if they agreed to assume the debt, were a merger or consolidation,  
23 were a mere continuation, or if the transaction was a fraudulent attempt to avoid the liability).

1 The Taxpayer did not agree to assume the Dumptruck business’s tax liability. The Department  
2 argues both that the transfer was done to avoid the tax and that the Taxpayer’s business is merely  
3 a continuation of the Dumptruck business.

4 The Department argues that the similarity of services provided, the similarity of name,  
5 the shared employees and subcontractors, and the similarity of gross receipts establish that the  
6 Taxpayer is a “mere continuation” of the Dumptruck business. See 3.1.10.16 (F) (1) (defining  
7 mere continuation using a substantial continuity test from *B.F. Goodrich v. Betkoski*, 99 F.3d 505  
8 (2<sup>nd</sup> Cir. 1996)<sup>4</sup>). However, our courts have determined that the key element of “mere  
9 continuation” is that the successor and the predecessor businesses share the same directors,  
10 officers, or shareholders. See *Garcia v. Coe Mfg. Co.*, 1997-NMSC-013, ¶ 13, 123 N.M. 34. See  
11 also *Pankey*, 1941-NMSC-060, ¶ 13. There is not a “mere continuation...without proof of  
12 continuity of management and ownership”. *Garcia*, 1997-NMSC-013, ¶ 13 (citing *Pancratz v.*  
13 *Monsanto Co.*, 547 N.W. 2d 198, 201 (Iowa 1996)). When the predecessor and the successor did  
14 not share directors, officers, or shareholders, the mere continuation exception did not apply. See  
15 *Garcia*, 1997-NMSC-013, ¶ 13. See also *In the Matter of the Protest of Corrosion Services*  
16 *Corporation*, Decision and Order No. 07-16 (Admin. Hearings Office). The Father was the  
17 owner and manager of the Dumptruck business, and the Owner worked there as a laborer and  
18 salesman. The Owner is the manager of the Taxpayer, and the Father works there as a mechanic.  
19 Ms. Bradshaw worked at the Dumptruck business as a secretary, and now she serves as the office  
20 manager for the Taxpayer. Other shared employees do not have any managerial duties or  
21 ownership of either business. There is not sufficient evidence that there is a continuity of

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<sup>4</sup> The case cited in the regulation has been reversed. See *New York v. National Services Industries, Inc.*, 352 F.3d 682 (2<sup>nd</sup> Cir. 2003) (holding that *Betkoski* is no longer good law because it deviated from the common rules of successor liability).

1 management and ownership between the Taxpayer and the Dumptruck business. Therefore, the  
2 Taxpayer is not a mere continuation of the Dumptruck business.

3         The Department argues that the businesses are owned by members of a close-knit family.  
4 The Department argues that the creation of the Taxpayer occurred a short time after the  
5 Dumptruck business's tax assessment. The Department argues that the Dumptruck business  
6 officially closed shortly after the Taxpayer was created and that many of the Dumptruck  
7 business's employees went to work for the Taxpayer. Based on the evidence, the timing of these  
8 events is not surprising. Most of the witnesses testified that the Dumptruck business's problems  
9 kept getting worse, that its customers and vendors began to complain regularly, and that it  
10 ultimately failed in 2016. The Owner explained that he fielded some of those complaints, felt  
11 that the Dumptruck business was going to fail, and he decided to start his own business so that he  
12 would still have a job. The Owner was familiar with many of the employees and knew that they  
13 needed work after the Dumptruck business failed. Some of the employees only worked for the  
14 Taxpayer for a very short time because it became apparent to the Owner that they were not suited  
15 to the types of services that the Taxpayer was supplying.

16         The Department argues that the Father and the Rentals business made transfers of  
17 vehicles to the Owner shortly after the Taxpayer was created, and those transfers were for  
18 nominal amounts rather than fair market value. [Exhibit 5, Exhibit B]. The Department argues  
19 that the Father had a habit of registering vehicles in his own name even though he used them in  
20 his businesses. The Father's business practices are somewhat suspicious. However, there was  
21 no evidence that the vehicles transferred by the Father or the Rentals business were owned by, or  
22 used by, the Dumptruck business. Apparently, the Dumptruck business had some vehicles  
23 registered to it since the Department filed liens on those vehicles.

1           The Department argues that both businesses are providing strong laborers and  
2 construction-type services to oilfield companies. The Department argues that using M&J in the  
3 business names is a family tradition. The Department argues that the totality should lead to the  
4 conclusion that the family had come together to subvert the Dumptruck business's tax liability.  
5 The Father and the Mother explained how they completely neglected the Dumptruck business  
6 after their daughter was diagnosed with cancer in November 2014. Their continued emotional  
7 distress was apparent during their testimony. The Owner and Ms. Bradshaw also confirmed that  
8 the Father and the Mother were focused solely on their daughter and her healthcare around the  
9 time that the Dumptruck business collapsed and that the Taxpayer was created. According to the  
10 witnesses, during that time, the Father and the Mother were frequently away from home and did  
11 not give their other children much of their time or attention. Given the extreme personal and  
12 emotional upheaval that they were experiencing at the time, as well as the parents' concentration  
13 on their daughter's welfare and neglect of their business, it is unlikely that the family conspired  
14 together to evade the Dumptruck business's tax liability.

15           As the transfer was not done to avoid the tax, the Taxpayer's business is not a mere  
16 continuation, and the Taxpayer did not agree to assume the tax liability, the Taxpayer's liability  
17 is limited to the full value of the heavy equipment that was transferred. *See* NMSA 1978, § 7-1-  
18 63 (C). The only evidence presented on the value of the heavy equipment was contained in  
19 Exhibit 1. The Taxpayer argues that full value of the heavy equipment is reflected in the  
20 insurance valuation, at \$54,583.08, the amount that excludes the tax. [Exhibit 1.14]. "Full  
21 value" is not defined in the statute. *See* NMSA 1978, § 7-1-63. However, value is the worth or  
22 price of an item, and fair market value is the price that an item can garner in an open market in  
23 an arm's-length transaction. *See Black's Law Dictionary*, pages 1690-1691 (9<sup>th</sup> ed. 2009). The

1 Taxpayer agreed to pay a total of \$60,603.30 for the heavy equipment. [Exhibit 1.12].

2 Therefore, the value of the heavy equipment is at least \$60,603.30.

3 **Administrative costs and fees.**

4 This issue was not argued at the hearing. However, the Taxpayer raised this issue in its  
5 protest, and the prehearing statement requests a remedy for the Department’s alleged violation of  
6 the New Mexico Taxpayer Bill of Rights. *See* NMSA 1978, § 7-1-4.2 (2017). The request for a  
7 remedy was also argued at the hearing. The Taxpayer argues that the Department did not  
8 provide the Taxpayer “with an explanation of the results of and basis for” the assessment. *See*  
9 NMSA 1978, § 7-1-4.2 (F). The Taxpayer argues that it made repeated requests for an  
10 explanation and that the Department’s repeated response that it determined that the Taxpayer  
11 was a successor in business based on the criteria of the regulation, without being more specific,  
12 was inadequate and violated the statute. The Taxpayer argues that the Department’s response  
13 was merely a reiteration of its conclusion and was not an explanation. [*See* Exhibit 11].

14 A taxpayer is entitled to recover reasonable costs and fees if the taxpayer is the prevailing  
15 party in the protest. *See* NMSA 1978, § 7-1-29.1 (2019). The statute does not provide for an  
16 award of costs and fees for any other reason. *See id.* The statute provides that “the taxpayer is  
17 the prevailing party if the taxpayer has: (a) substantially prevailed with respect to the amount in  
18 controversy; or (b) substantially prevailed with respect to most of the issues involved in the case  
19 or the most significant issue or set of issues involved in the case”. NMSA 1978, § 7-1-29.1 (C)  
20 (1). The Taxpayer substantially prevailed with respect to the amount in controversy since the  
21 assessment was for a total of \$3,699,139.19, but the Taxpayer’s liability can be satisfied by  
22 paying the full value of the transferred heavy equipment, which is \$60,603.30. *See* NMSA 1978,  
23 § 7-1-63. However, a taxpayer “is not the prevailing party if the administrative hearings office



1 finds that the position of the department in the proceeding was based upon a reasonable  
2 application of the law to the facts of the case.” NMSA 1978, § 7-1-29.1 (C) (2). As detailed in  
3 the previous section, in addition to the Taxpayer’s assumption of the debt and acquisition of the  
4 heavy equipment, the Department drew a number of inferences based on the circumstantial  
5 evidence surrounding the relationships of the owners of the businesses, the timing of their  
6 various transactions, and the business practices used. Although the Taxpayer was ultimately able  
7 to rebut many of those inferences, the Department’s position was reasonable at the time that it  
8 made the assessment. *See id.* Therefore, the Taxpayer is not the prevailing party and is not  
9 entitled to an award of costs and fees. *See id.*

#### 10 CONCLUSIONS OF LAW

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

13 B. The first hearing was timely set and held within 90 days of request for hearing. *See*  
14 NMSA 1978, § 7-1B-8 (2019). *See* 22.600.3.8 (2018).

15 C. The Taxpayer is a successor in business to the Dumptruck business. *See* NMSA  
16 1978, §§ 7-1-61 thru 7-1-63. *See* 3.1.10.16 NMAC. *See Sterling Title*, 1973-NMCA-086. *See also*  
17 *Hi-Country Buick GMC, Inc.*, 2016-NMCA-027.

18 D. The Taxpayer is not a mere continuation of the Dumptruck business, the transfer of  
19 the heavy equipment was not an attempt to evade or defeat the tax, and the Taxpayer did not assume  
20 the tax liability of the Dumptruck business; therefore, the Taxpayer may discharge its assessment by  
21 paying the full value of the transferred heavy equipment, which is \$60,603.30. *See* NMSA 1978, §  
22 7-1-63.

1 E. The Taxpayer is not the prevailing party because the Department's position was  
2 reasonable at the time that it made the assessment. *See* NMSA 1978, § 7-1-29.1.

3 For the foregoing reasons, the Taxpayer's protest **IS DENIED IN PART AND**  
4 **GRANTED IN PART. IT IS ORDERED** that Taxpayer is liable for \$60,603.30 as a successor  
5 in business and that the remaining amount of the Taxpayer's assessment is **HEREBY ABATED**.

6 DATED: December 11, 2020.

7 *Dee Dee Hoxie*

8 \_\_\_\_\_  
9 Dee Dee Hoxie  
10 Hearing Officer  
11 Administrative Hearings Office  
12 P.O. Box 6400  
Santa Fe, NM 87502

13 **NOTICE OF RIGHT TO APPEAL**

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

1 **CERTIFICATE OF SERVICE**

2 On December 11, 2020, a copy of the foregoing Decision and Order was submitted to the  
3 parties listed below in the following manner:

4 *Email*

*Email*

5 INTENTIONALLY BLANK

6  
7 \_\_\_\_\_  
8 John Griego  
9 Legal Assistant  
10 Administrative Hearings Office  
11 P.O. Box 6400  
Santa Fe, NM 87502