

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE PROTEST OF
**B R INTERIORS, INC. D/B/A NEW
MEXICO CARPET SALES, PROTEST TO
DETERMINATION OF SUCCESSOR IN
BUSINESS TO SALVO BEACHWEAR, INC.
D/B/A NEW MEXICO CARPETS, INC.**

No. 97-06

DECISION AND ORDER

This matter came on for determination before Gerald B. Richardson, Hearing Officer. B R Interiors, Inc. d/b/a New Mexico Carpet Sales, hereinafter, "B R Interiors," was represented by Kathryn Levy, Esq. The Taxation and Revenue Department, hereinafter, "Department," was represented by Donald F. Harris, Special Assistant Attorney General. The parties agreed that the matter would be submitted for determination based upon the facts as established in the deposition of Mr. Ben Rodriguez, President of B R Interiors, Inc. and Salvo Beachwear, Inc. and that written legal argument would be submitted by the parties. Ms. Levy submitted no argument and has waived the right to submit any written exposition of her case. Mr. Harris did submit written legal argument. Based upon the submissions outlined above, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. In 1983 Ben Rodriguez registered the trade name, "New Mexico Carpets" in his name with the Secretary of State. This trade name registration was renewed by Mr. Rodriguez in 1993.

2. At some point, New Mexico Carpets, Inc. changed its corporate name to Salvo Beachwear, Inc., (hereinafter, "Salvo") but it continued to do business as New Mexico Carpets, Inc. until May 31, 1996.

3. Ben Rodriguez was President of Salvo Beachwear, Inc.
4. In May of 1996, Salvo Beachwear, Inc. owed the Department approximately \$1.1 million in unpaid taxes. Collectors at the Department were attempting to collect these unpaid taxes. As part of their collection activities, they had seized a van owned by Salvo.
5. Pursuant to the authority granted the Department in NMSA 1978, § 7-1-53 (1995 Repl. Pamp.), in May of 1996 the Department had obtained a Temporary Restraining Order and had sought a permanent injunction, from the District Court, enjoining Salvo from continuing to engage in business until Salvo could demonstrate that it was no longer delinquent in paying its tax liabilities.
6. Although the Temporary Restraining Order was never served upon Mr. Rodriguez, he was aware that it had been issued and of the Department's efforts to close Salvo.
7. At the same time that the Department was seeking to close Salvo, in May of 1996, Mr. Rodriguez formed a new corporation, named B R Interiors, Inc. d/b/a New Mexico Carpet Sales. Mr. Rodriguez is the President of B R Interiors.
8. Since the time that B R Interiors was formed, Salvo has filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.
9. During all of its years of operation, Salvo, d/b/a New Mexico Carpets, Inc. had its sales room at 4011 Carlisle, NE, in Albuquerque, New Mexico. This business location was leased from New Mexico Recycling, Inc., a corporation whose president was the son of Ben Rodriguez. No written lease exists.
10. Salvo also leased a warehouse space on Edith, NE from New West Property Management Company.
11. Approximately 80% of Salvo's business came from established business clients, such as apartment building managers. The remaining 20% was from walk-in customers who visited the New Mexico Carpets, Inc. sales room.

12. B R Interiors operated New Mexico Carpet Sales out of the same sales room at 4011 Carlisle, NE as had been used by New Mexico Carpets, Inc. The only change was that B R Interiors now paid the rent and the sign on the building was changed from New Mexico Carpets to New Mexico Carpet Sales.

13. During the month of May, 1996, Salvo or New Mexico Carpets Inc. paid the rent for the entire month on the carpet showroom although during the second half of the month, B R Interiors was doing business out of the showroom.

14. During the month of June, 1996, Salvo or New Mexico Carpets, Inc. paid one half of the rent for the carpet showroom facility even though B R Interiors was now using the space and carpet sales were being run through B R Interiors. Thereafter, B R Interiors assumed the payment of rent on the carpet showroom and otherwise assumed the lease on the property.

15. B R Interiors also took over the lease payments for the warehouse space.

16. The telephone number for New Mexico Carpet Sales remained the same as the telephone number for New Mexico Carpets, Inc.

17. New Mexico Carpet Sales retained the same employees and salespeople as had been employed by New Mexico Carpets, Inc.

18. After the formation of B R Interiors, the lease payments for the office equipment which had been leased by Salvo, such as the copy machine, the postage meter and computer equipment, were assumed by B R Interiors.

19. The office equipment which was used by Salvo continues to be used by B R Interiors. Other than the leased equipment referenced in paragraph 18, above, the office equipment is owned by Salvo.

20. Salvo had an agreement with a computer software servicing company to lease and service the computer software which Salvo used to conduct its business. B R Interiors maintained the same agreement with the software servicing company to use the same software. B R Interiors

also had available to it all of the information in Salvo's information system, such as customer lists, information about accounts and account balances, etc.

21. After commencing its carpet sales business, B R Interiors made carpet sales from the inventory of carpet owned by Salvo. Although B R Interiors purchased the carpet from Salvo, it purchased the carpet at Salvo's cost, with no markup for Salvo's expenses in handling the carpet or for profit to Salvo. All markup and profit from carpet sales was retained by B R Interiors. Also, B R only purchased the amount of carpet it needed for a specific job from Salvo, leaving remnants which may be unusable by Salvo. There exists no written agreement between Salvo and B R Interiors to govern the terms and conditions upon which B R Interiors may sell Salvo's inventory.

22. B R Interiors, d/b/a New Mexico Carpet Sales stood in the shoes of Salvo, d/b/a New Mexico Carpets, Inc. with respect to its relationship to the suppliers of carpet who had previously sold carpet to Salvo.

23. B R Interiors deposited payments and receipts of Salvo into B R Interiors' bank accounts.

24. B R Interiors acquired considerable value from Salvo in the form of business goodwill.

25. On July 3, 1996 the Department mailed a notice to B R Interiors that the Department considered B R Interiors to be the successor in business to Salvo Beachwear, Inc., and made demand for payment of \$1,184,425.52 from B R Interiors.

26. On July 16, 1996 B R Interiors filed a written protest with the Department to the Department's determination that B R Interiors is successor in business to Salvo Beachwear, Inc. and further disputing that B R Interiors is liable for the payment of any tax liability of Salvo Beachwear, Inc.

27. The process whereby Salvo ceased doing business and B R Interiors took over the business location, employees, business goodwill, leases and other aspects of Salvo's business

operations was nothing more than a scheme by Mr. Rodriguez to attempt to avoid Salvo's tax liabilities.

28. There was a transfer of value and consideration between Salvo and B R Interiors sufficient to constitute a sale and to make B R Interiors a successor in business to Salvo.

DISCUSSION

The issue to be determined herein is whether B R Interiors is properly classified as a successor in business to Salvo. The successor in business provisions of the Tax Administration Act are found at NMSA 1978, §§ 7-1-61 to 7-1-64 (1995 Repl. Pamp.). There has been no issue raised that the taxes the Department seeks to collect from B R Interiors are not among those listed in Subsection A of § 7-1-61, so it is assumed that they are. The remainder of § 7-1-61 provides as follows:

- B. The tangible and intangible property used in any business remains subject to liability for payment of the tax due on account of that business to the extent stated herein, even though the business changes hands.
- C. If any person liable for any amount of tax sells out his business, the purchaser shall withhold and place in a trust account sufficient of the purchase price to cover such amount until the secretary issues a certificate stating that no amount is due, or he shall pay over the amount due to the department upon proper demand therefor by the secretary.

Section 7-1-62 sets out a procedure whereby a purchaser of a business may request a certificate from the department as to the amount of tax due from the business so that the purchaser knows how much of the purchase price needs to be placed in trust to comply with § 7-1-61(C). Section 7-1-63 sets out the procedure for the Department to make demand upon the purchaser of a business for payment of the tax due from the business sold. Finally, Section 7-1-64 sets out the consequences when a purchaser fails to withhold and pay over any tax owed by the business he purchased. It provides as follows:

- A. If the purchaser has wrongfully failed to withhold and pay over as provided by Subsection C of Section 7-1-61 NMSA 1978, or has not made payment after demand by the director or his delegate as provided in Section 7-1-63 NMSA 1978, he becomes a delinquent taxpayer.
- B. The purchaser hereunder may completely discharge his responsibility under the provisions of this section by surrendering and assigning all his interest in the tangible and intangible property acquired, or the proceeds thereof, to the director or his delegate for disposition by him in the manner provided for disposition of property levied upon by Section 7-1-31 NMSA 1978.

Reading these statutes together, it is clear that the Legislature has sought to establish a means to protect the fiscal interests of the state so that taxes which are owed are not avoided by simply selling an existing business and its assets to a new or different business entity.

B R Interiors presented no legal argument in support of its protest. I will assume that B R Interiors bases its position that it is not a successor in business upon an argument that there was no sale of Salvo or New Mexico Carpets, Inc. and therefore it cannot be held liable under the successor in business statutes as a purchaser who failed to withhold and pay over taxes.

The limited facts presented do not reveal that the normal formalities of a sale took place. There was no contract or sales agreement entered into and no purchase money changed hands. It does appear, however, that there was a transfer of Salvo's carpet business to B R Interiors. Since Mr. Ben Rodriguez was the President of both New Mexico Carpets, Inc. and New Mexico Carpet Sales, he didn't observe the normal business formalities to transfer the carpet business. He simply did it by incorporating a new business and running all of his new and his old business through his new corporation. B R Interiors simply took over the lease payments for Salvo's business locations. B R Interiors continued to operate out of Salvo's longstanding business location, with only a cosmetic change to the sign on the building. The same employees and sales people were employed by B R Interiors as had worked for Salvo. The business continued to use Salvo's telephone number, Salvo's computer software, Salvo's office equipment, Salvo's customer lists, and to deal with the same carpet wholesalers and manufacturers with whom Salvo had established business relationships. B R Interiors also simply assumed the inventory of Salvo, making sales therefrom and essentially treating the inventory as its own, except it reimbursed Salvo for the carpet sold at acquisition cost. This cost would not cover Salvo's ordinary business overhead costs of maintaining this inventory, nor does it account for the carpet remnants which are left when B R Interiors has sold what it can. Although no money transferred from B R Interiors, I have no doubt that B R Interiors acquired significant value when it simply took over the business of Salvo. The

value which was acquired is commonly called "business goodwill" and it is an intangible asset which is considered to be part of the value acquired when purchasing an ongoing business. In this case, New Mexico Carpets, Inc. had been operating out of the business location for 13 years. People who had purchased carpet from New Mexico Carpets and been happy with the transaction knew where to go when they needed carpet again. The majority of New Mexico Carpet, Inc.'s business was conducted with established business clients, such as apartment building managers. B R Interiors acquired these clients through Salvo's customer lists and through continuing to operate essentially the same business, in the same business location, with the same sales representatives and even the same telephone number.

There was also consideration that flowed from B R Interiors to Salvo in the form of liabilities of Salvo which B R assumed. B R assumed Salvo's obligations under the lease agreements for its sales room and its warehouse facilities. Thus, we have both a transfer of value and consideration between Salvo and B R Interiors. This is more than sufficient to establish that a sale has taken place for purposes of the successor in business statutes.

Additionally, I do not read New Mexico's successor in interest statutes so narrowly as to require that the formalities of a "sale" even be established. Section 7-1-61(B) speaks in terms of a "business" which "changes hands". This broad construction received the approval of the Court of Appeals in *Sterling Title Co. of Taos v. Commissioner of Revenue*, 85 N.M. 279, 511 P.2d 765, where the court cited with approval two decisions from other jurisdictions with successor in business statutes which found that where a person had simply taken over the assets of an insolvent or defunct business, that the person was a successor liable for the taxes of the business which was taken over. *See, Knudsen Dairy Products Co. v. State Board of Equalization*, 12 Cal. App. 3d 47, 90 Cal. Rptr. 533 (1970), and *Tri-Financial Corp. v. Department of Revenue*, 6 Wash. App. 637, 495 P.2d 690 (1972).

This construction of New Mexico's successor in business statutes is also wholly consistent

with the legislative intent in enacting these provisions. As noted by Judge Sutin in his concurring opinion in *Sterling Title, supra*:

...the primary purpose of the statute was to make tangible and intangible property security for payment of the tax. The legislature intended this to protect the Bureau and the public against successors who did not withhold an amount sufficient to pay the tax owed by delinquent taxpayers.

* * *

...the phrase "the business changes hands" is a broad, all inclusive expression for maintaining the personalty as security. Its purpose is to avoid, by any means, schemes for evasion of payment of the tax. *It is broad enough to include the personalty as security even though a taxpayer quits business, sells out, exchanges or otherwise disposes of his business or his stock of goods.* (Emphasis added.)

For the foregoing reasons, it is determined that B R Interiors is a successor in business under the provisions of NMSA 1978, §§ 7-1-61 through 7-1-64.

CONCLUSIONS OF LAW

1. B R Interiors filed a timely, written protest, pursuant to NMSA 1978, § 7-1-24 to the Department's determination that it was a successor in business and therefore jurisdiction lies over both the subject matter and the parties to this protest.
2. The manner by which B R Interiors took over the existing business of Salvo amounted to a sale of Salvo for purposes of NMSA 1978, §§ 7-1-61 through 7-1-64.
3. NMSA 1978, §§ 7-1-61 through 7-1-64 apply whenever a business changes hands, even though the formalities of a sale may not have been observed.

For the foregoing reasons, B R Interiors protest **IS HEREBY DENIED.**

DONE, this 11th day of February, 1997.