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

IN THE MATTER OF THE PROTEST OF
HARRINGTON INDUSTRIAL PLASTICS, INC.
ID. NO. 02-125533-00 4 NO. 98-53
PROTEST TO DEMAND FOR PAYMENT
AS SUCCESSOR IN BUSINESS

DECISION AND ORDER

This matter came on for formal hearing on April 9, 1998 before Gerald B. Richardson, Hearing Officer. Harrington Industrial Plastics, Inc., hereinafter, "Taxpayer", was represented by Fred W. Schwendimann, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Gail MacQuesten, Special Assistant Attorney General. After the hearing the parties were given leave to file briefs. Subsequently, the Hearing Officer requested additional briefing from the parties and the last brief was filed on September 16, 1998 and the matter was considered submitted for decision at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a California corporation that has been engaged in the sale and distribution of plastic pipe, valves, fittings, pumps, flow meters, fans and scrubbers (its "plastics business") in New Mexico since February 3, 1989.

2. The Taxpayer purchased its New Mexico plastics business from Heflin-Harrington Industrial Plastics, Inc. ("Heflin"), an Arizona corporation whose principal place of business was 1048 West Maricopa Freeway, Phoenix, Arizona 85007.

3. Prior to February 3, 1989, Heflin had operated its own plastics business as an unincorporated division, and it had also operated an unincorporated division that was engaged in the installation of rubber linings in storage tanks and other items of supply.

4. On February 3, 1989, the Taxpayer purchased Heflin's entire plastics division, but Heflin continued to own and operate its rubber linings division. The Asset Purchase Agreement (the "Agreement") whereby the Taxpayer purchased Heflin's plastics division was admitted into evidence as Exhibit 1.

5. Pursuant to paragraph 3 of the Agreement, the Taxpayer assumed certain liabilities allocable to Heflin's plastics division, including any gross receipts taxes due and payable from Heflin as of the February 3, 1989, closing date.

6. Heflin self reported and paid gross receipts taxes in the amount it determined it owed in a timely manner for the reporting periods of January, 1988 through February, 1989. The amount of gross receipts, deductions from gross receipts, gross receipts tax, compensating tax and withholding tax reported and paid for those periods are reflected in Exhibit 2.

7. The Taxpayer did not avail itself of the procedure set forth in Section 7-1-62 NMSA 1978 (1988 Repl. Pamp.) for requesting and obtaining a tax clearance certificate from the Department with respect to Heflin's tax liabilities for taxable periods occurring before March 1, 1989.

8. On or about June 4, 1991, The Department commenced a field audit of Heflin's books and records for taxable periods occurring after January 1, 1988 and before June 1, 1991. Because Heflin owned the plastics division during part of that time, the Department's audit covered Heflin's taxable activities with respect to both of its divisions.

9. The Department's audit was concluded in late October, 1991, and as a consequence the Department proposed to assess deficiency gross receipts taxes against Heflin in the aggregate amount of $47,682.52, plus penalty and interest.

10. Of the aggregate amount of the proposed gross receipts tax deficiency, $44,666.77 was attributable to taxable periods commencing January 1, 1988 and ending March 1, 1989.

11. Subsequently, the aggregate amount of proposed gross receipts tax deficiency was reduced by the Department to $46,854.62, of which $43,838.87 was attributable to periods commencing January 1, 1988 and ending March 1, 1989.

12. On December 21, 1991, the Department issued an assessment to Heflin, assessing $46,854.62 in gross receipts taxes, plus penalty and interest.

13. Heflin filed a timely protest of the December 21, 1991 assessment.

14. The Department's audit of Heflin was based upon an audit procedure using test months which are audited in detail to arrive at a percentage of error which is then applied to the other months under audit. For the 1988 tax year, the months of January, May and June were chosen as tests months. A percentage of error was calculated for those months and applied to the other months of 1988.

15. Heflin's protest contested the use of the month of January, 1988 as a test month for purposes of calculating a percentage of error. Heflin's sales receipts during that month, approximately $542,000, were significantly higher than the other test months, whose sales receipts were approximately $112,000. During that month it had claimed deductions of approximately $522,000. As a result of negotiations between the Department and Heflin to resolve Heflin's protest, the Department agreed to remove the month of January from the calculation of the percentage of error and simply use the actual amount of disallowed deductions for that month, approximately $389,000, to calculate the proper amount of tax for that month. At the same time, the Department determined that the month of February, 1988 also contained an unusually high amount of gross receipts, $583,000, and deductions of approximately $402,000, and determined that if it was proper to exclude January from the test month calculation for purposes of arriving at a percentage of error, that February should also be excluded. Instead, however, of calculating a separate percentage of error for the month of January, and applying it to determine the amount of disallowable deductions for February, the Department simply disallowed the same dollar amount of deductions for February, as it had for January.

16. The Department's methodology for calculating the amount of disallowed deductions for February was improper. The proper way to have handled the month of February would have been to calculate a percentage of error for January, 1988 and apply it to February, 1988, which was a similar, but not identical sales month in terms of the amount of gross receipts.

17. Heflin did not dispute the manner by which the Department calculated the amount of disallowed deductions for February, 1988.

18. As a result of Heflin's protest, on September 20, 1994, the Department abated $5,831.13 of the gross receipts taxes assessed, together with the penalty and interest relating to the amount of gross receipts taxes abated.

15. In consideration of the foregoing abatement, on October 11, 1994, Heflin withdrew its protest and accepted the amended assessment.

16. The entire amount of the abated gross receipts taxes were attributable to taxable periods commencing January 1, 1988 and ending March 1, 1989. Accordingly, as of September 20, 1994, Heflin owed $38,007.74 in gross receipts taxes for periods occurring prior to the sale of its plastics division to the Taxpayer on February 3, 1989.

17. The assessment against Heflin remains unpaid and outstanding.

18. By letter dated June 5, 1996, the Department demanded, pursuant to Section 7-1-63 NMSA 1978, that the taxpayer pay Heflin's unpaid gross receipts taxes together with the penalty and interest relating thereto in the aggregate amount of $94,255.19.

19. Subsequently, by letter dated September 30, 1996, the Department amended its demand, reducing the amount demanded to $93,938.24.

20. On October 21, 1996, the Taxpayer filed a timely, written protest to the Department's September 30, 1996 demand letter.

21. The amounts demanded of the Taxpayer by the Department relate only to liabilities attributable to Heflin's plastics division.

DISCUSSION

Pursuant to the provisions of Sections 7-1-61 through 7-1-64 NMSA 1978 (1988 Repl. Pamp.)[1], which shall be referred to as the "successor in business" provisions of the Tax Administration Act, Sections 7-1-1 to 7-1-82 NMSA 1978, the Department issued a demand letter to the Taxpayer, demanding payment of unpaid gross receipts taxes which had been assessed against Heflin for periods prior to the date of the Taxpayer's purchase of Heflin's plastics division. The Taxpayer purchased its plastics division business from Heflin in February of 1989 without availing itself of the procedures provided in the successor in business statutes to obtain a tax clearance from the Department for any tax liabilities of Heflin. There were no outstanding assessments against Heflin at the time of the Taxpayer's purchase of Heflin's plastics division. The Department, however, audited Heflin during 1991 and assessed gross receipts taxes for periods predating Heflin's sale of its plastics division to the Taxpayer. The Taxpayer was not notified of the Department's audit or assessment of Heflin, and learned of the Department's claim against it as a successor in business when the Department made its demand for payment in June of 1996. The primary issue to be decided, then, is whether the Taxpayer may be held liable under the successor in business provisions for the liabilities assessed to Heflin relating to its plastics division for periods prior to the Taxpayer's purchase of the plastics division. Before discussing the Taxpayer's arguments, the operation of the successor in business statutes will be examined.

Section 7-1-61(B) provides that:

> The tangible and intangible property used in any business remains subject to liability for payment of the tax due on

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[1] The 1988 Replacement Pamphlet version of these provisions shall be the version referred to herein as those were the statutes in effect at the time of the sale of Heflin to the Taxpayer.

> account of that business to the extent stated herein, even though the business changes hands.

This provision makes clear that even though a business changes hands, the assets of that business remain subject to liability for any taxes due from the business which changed hands. The statute then goes on to prescribe the duties of a successor in business.[2] Specifically, Section 7-1-61(C) provides:

> 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 director or his delegate issues a certificate stating that no amount is due, ***or he shall pay over the amount due*** to the division upon proper demand therefor by the director or his delegate. (emphasis added).

It is a well settled rule of statutory construction that the use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary, unless a contrary legislative intent is clearly demonstrated. ***State v. Lujan,*** 90 N.M. 103, 560 P.2d 167 (1977). Applying this rule to Section 7-1-61(C), the statute mandates that a purchaser place sufficient funds in a trust account to cover the amount of tax for which the business is liable, or, in the alternative, the purchaser is mandated to pay over the amount due upon demand by the Department.

Section 7-1-62 provides the means for a purchaser of a business to determine the amount of taxes for which the Department may hold him liable and provides for releasing a purchaser and the assets of the business purchased from liability for the taxes of the business purchased if the procedures outlined are followed. It provides:

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[2] "Successor in business" is not defined in the Tax Administration Act. However, the successor in business statutes themselves refer to "the purchaser" of a business. In this case the tax liability at issue was assessed to Heflin and there is no dispute that the Taxpayer in this case was the purchaser of Heflin, whose liability the Department seeks to collect from the Taxpayer, as successor in business.

> A. Within thirty days after receiving from the purchaser a written request for a certificate, or within thirty days from the date the former owner's records are made available for audit, which ever period expires the later, but in any event not later than sixty days after receiving the request, the director or his delegate shall either issue the certificate or mail a notice to the purchaser of the amount of tax for which the vendor is liable and which must be paid as a condition of issuing the certificate.
> B. Failure of the director or his delegate to mail the notice within the required time releases the purchaser from any obligation to withhold from the purchase price and releases the property from the operation of Section 7-1-61 NMSA 1978.

Thus, this section provides a means for a purchaser to protect himself from any demands from the Department for payment of taxes owing by the business purchased. The purchaser can request a certificate of no tax due. The Department has, at most, sixty days to either tell the purchaser the amount for which he and the assets purchased are liable, or the Department is barred from making further claims against him or the assets for taxes owing by the former business. Because in this case it is undisputed that the Taxpayer did not place in trust any portion of the purchase price to cover any tax liability of Heflin, nor did the Taxpayer obtain a tax clearance from the Department for the tax liabilities of Heflin, the Department has made demand upon the Taxpayer for payment of Heflin's liability, and the Taxpayer's liability for payment of that liability is what is at issue herein.

Section 7-1-63 provides the legal basis for the demand for payment which was made in this case. It provides:

> A. If, after any business is sold, any tax for which the former owner is liable remains due, the director or his delegate shall make demand upon the purchaser for payment over of that amount and the purchaser shall comply with the demand.
> B. Upon the payment over of the amount required to be withheld as provided by Subsection C of Section 7-1-61

> NMSA 1978, the balance, if any, may be released to the former owner or otherwise lawfully disposed of. The former owner shall be credited with the payment of tax.

Finally, Section 7-1-64 sets out the consequences for a purchaser who has failed to withhold a portion of the purchase price for payment of taxes for which a seller of a business was liable or has refused a demand for payment pursuant to Section 7-1-63. It provides:

> 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 of 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.

The Taxpayer's argument that it should not be liable for the amounts assessed against and remaining unpaid by Heflin turns on its reading of the language of Section 7-1-64(A) which refers to a purchaser who has "wrongfully failed to withhold and pay over" amounts as provided by Section 7-1-61(C). The Taxpayer argues that because Heflin had self-reported and paid taxes every month to the Department prior to the sale of the business and the taxes owing for the month of January, 1989 were reported and paid the following month, that Heflin was not "liable for any amount of tax" and thus there was no need to escrow any portion of the purchase price for any tax liability and the Taxpayer thus, did not "wrongfully" fail to withhold and pay over taxes. Because the term "wrongfully" is not defined in the Tax Administration Act, the Taxpayer relies upon the common definition of

“wrongful” found Black’s Law Dictionary, Revised Fourth Edition, which defines wrongful as, “injurious, heedless, unjust, reckless or unfair.” The Taxpayer argues that because it was not apparent that Heflin was liable for any unpaid taxes, its conduct in not escrowing a portion of the purchase price for a tax liability was not wrongful.

The Taxpayer’s reading of the successor in business provisions is too narrow. It assumes that the only basis for imposing liability on a successor in business is when it wrongfully fails to escrow a portion of the purchase proceeds to cover liabilities either already self-assessed by the Taxpayer or those already established by the Department. In fact, a reading of the successor in business statutes makes clear that there are two ways in which a successor in business becomes liable for the unpaid taxes of its predecessor. By using the disjunctive term “or” in describing the duties of a successor in business in Section 7-1-61(C), the statute provides for two alternative options[3] for a successor in business to handle the obligation imposed by subsection B of that same statute upon the assets of the business being acquired. The first option a purchaser has is to withhold and place in a trust account a sufficient portion of the purchase price to cover the liability and to hold that amount in trust until the Director issues a certificate of no tax due. The purchaser then has the option to promptly determine the amount for which it could be held liable by requesting a certificate of no tax due from the Department pursuant to Section 7-1-62. Upon receipt of such a request, the Department has, at most, sixty days to inform a purchaser of the amount of tax due or to issue the certificate of no tax due. Otherwise, the purchaser’s obligation to withhold and pay over any amount demanded is

[3] As noted earlier, the use by the legislature of the word “shall” in describing these options indicates a mandatory obligation upon the successor, under either option chosen by the successor.

extinguished and the assets of the business purchased are released from liability for taxes. Section 7-1-62.

The second option a Taxpayer has under Section 7-1-61(C) is to not escrow a portion of the purchase proceeds and take a chance that there will not be any unpaid tax liability which can be asserted against it or that if there is a liability, that the Department will not discover or determine it and make a demand for payment. This option has more downside risk, however. That is because if this option is chosen, once demand for payment is made by the Department, the purchaser "shall pay over the amount due..."

The language of Section 7-1-64(A) reaffirms the two options provided to purchasers in Section 7-1-61 and makes clear that the consequence of failing to follow either of the options provided has the same result. The purchaser becomes a delinquent taxpayer liable for the tax liability of the predecessor business, for it provides that:

> 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.

Section 7-1-16 NMSA 1978 defines who is a delinquent taxpayer. The status of being a delinquent taxpayer is significant because, under the Tax Administration Act one must be a "delinquent taxpayer" for the Department to seek enforcement of its claims for payment by seizure of property by levy or by enjoining a person from engaging in business. See, Sections 7-1-31 and 7-1-53 NMSA 1978. In this case, the Taxpayer is not a delinquent taxpayer under Section 7-1-16 because that section provides an exception when a protest to a demand for payment pursuant to Section 7-1-63 is filed in a timely manner as provided in Section 7-1-24, which provides for protests to the assessment of tax or the

application to a taxpayer of any provision of the Tax Administration Act. Thus, any liability of the Taxpayer for the matter under protest is held in abeyance pending the resolution of the Taxpayer's protest.

In addition to being subject to liability for the taxes assessed against Heflin for failure to comply with the Department's demand for payment, the Taxpayer may also be held liable for wrongful failure to withhold a portion of the purchase price of the business. First, the Taxpayer argues that because Heflin was reporting and paying tax, and there were no outstanding assessments against Heflin, there was no tax liability to be covered by the requirement to withhold a portion of the purchase price to cover the liability of the business being sold. There is nothing in the Tax Administration Act or the successor in business statutes to justify such a narrow interpretation of tax liability. Section 7-1-13(A) defines when liability for tax attaches, providing that:

> ***Taxpayers are liable for tax at the time of and after the transaction or incident giving rise to tax, until payment thereof is made.*** Taxes are due on and after the date on which their payment is required until payment is made. (emphasis added).

Thus, liability attaches when the transaction generating the tax occurs and is not limited to amounts self-assessed by a taxpayer. Additionally, the fact that the successor in business statutes themselves provide for a tax clearance certificate to be issued within thirty days from the date the former business' records are produced for audit makes it clear that the liability of the business sold is not limited to amounts either self-assessed or assessed by the Department prior to the sale of the business. Section 7-1-62. Thus, the fact that the liability at issue herein was not assessed against Heflin until long after the business was sold to the Taxpayer is irrelevant to whether the Taxpayer had a duty to

withhold a portion of the purchase price to cover such liability. The liability relates only to those periods prior to the Taxpayer's purchase of the business and since the liability was not paid by Heflin at any time after the transactions generating the tax occurred, there was a liability subject to the requirement that a purchaser withhold a portion of the purchase price to cover.

Second, the Taxpayer's argument that its conduct in failing to withhold and escrow a portion of the purchase price does not meet the commonly understood definition of wrongful is also erroneous. Even under the Black's Law Dictionary definition relied upon by the Taxpayer in arguing that it was not wrongful in failing to withhold, the Taxpayer's conduct meets the definition. This is because one of the terms used to define wrongful is "heedless". In this case, the statute directs that the purchaser of a business "shall withhold and place in a trust account sufficient of the purchase price to cover..." the tax liability of the business purchased. The Taxpayer's conduct was heedless of the requirement of Section 7-1-61(C), and was, therefore, wrongful.

As the foregoing discussion illustrates, the statutory scheme which imposes liability upon successors in business is quite strict and comprehensive. It is clear that the legislature intended to ensure that the state does not lose tax revenues because a business changes hands, no matter how the transaction is handled by the seller and the purchaser. ***See, Sterling Title Co. of Taos v. Commissioner of Revenue,*** 85 N.M. 279, 511 P.2d 765 (Ct. App. 1973) (Sutin, J., specially concurring).

DUE PROCESS CONSIDERATIONS

The next issue to be determined is whether, having failed to avail itself of the procedures by which the Taxpayer could have obtained a tax clearance or at least have

known of the amount of tax liability it was undertaking when purchasing Heflin, the Taxpayer is barred from challenging the amount of taxes which were assessed to Heflin and for which it is now being held liable. The Taxpayer has presented evidence that the manner by which the Department adjusted the assessment for the month of February, 1988 was improper, and I have no doubt that the shortcut taken by the Department to calculate the disallowed deductions for that month is not an acceptable audit technique. The Department takes the position that in protesting the Department's assertion of liability as a successor in business, the Taxpayer may not challenge the underlying assessment. To this argument, the Taxpayer argues that such a statutory scheme would deny the Taxpayer fundamental fairness required by the Due Process Clause.

In examining the provisions of Section 7-1-24 NMSA 1978, which govern what may be protested, it would appear that the statute would not allow a successor in business, who did not file a timely protest to the underlying assessment of tax against its predecessor, to protest the assessment itself in its protest to the determination of whether it is liable for tax as a successor in business. Section 7-1-24(A) NMSA 1978 (1990 Repl. Pamp.), provides that a taxpayer may dispute the assessment to the taxpayer of any amount of tax, the application to the taxpayer of any provision of the Tax Administration Act or the denial of or failure to either allow or deny a claim for refund. In this case, the assessment was issued to and protested by Heflin, the "taxpayer" for purposes of the assessment. Liability against the Taxpayer in this case is based upon the Department's determination that the Taxpayer was a successor in business and the Department's demand for payment issued to the Taxpayer on September 30, 1996. The Taxpayer's protest of that determination and demand for payment under Section 7-1-24(A) amounts

to a protest to the application of the successor in business provisions of the Tax Administration Act to the Taxpayer. The time for protesting the assessment had already long passed. Heflin did file a timely protest to the assessment, but apparently did not inform the Taxpayer of the ongoing protest and did not raise the issue now being raised by the Taxpayer with respect to the calculation of taxes due for February, 1988. Clearly, because the time limits for protesting the assessment to Heflin had long passed, the Taxpayer is barred from contesting the underlying assessment itself under Section 7-1-24. Thus, the question presented is whether Section 7-1-24(A) as applied in the context where an assessed liability is asserted against a successor in business, where the assessment was issued *after* the purchase date[4] and the purchaser was not notified[5] of the assessment until after the time for protest has passed, operates to deprive the successor of due process in violation of the constitutions of the state and federal governments.

Prior to answering that question, the authority of this forum to determine that issue must first be addressed. That is because it is well settled that administrative agencies cannot rule on the facial constitutionality of a statute which the agency administers. ***Robinson v. United States,*** 718 F.2d 336 (10th Cir. 1983). The New Mexico Supreme Court has approved, however, the distinction drawn by Professor Davis

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[4] This case presents a very different situation than one in which an assessment was of record before the successor purchases a business. In that case, Section 7-1-8(J) NMSA 1978 provides an exception to taxpayer confidentiality which would otherwise prevent the Department from informing one taxpayer about another taxpayer's liabilities. Subsection J allows the department to provide information about a taxpayer to a purchaser of a business as provided in the successor in business statutes, Sections 7-1-61 through 7-1-64 NMSA 1978 as to the amount and basis of any unpaid assessment of tax for which his seller is liable. Thus, an existing assessment would be of record to the purchaser at the time of purchase.

[5] It is not at all clear why the Taxpayer was not notified of the assessment against Heflin at the time it was issued, since neither party presented any evidence on this issue. If the Department had information obtained during its audit which revealed the sale of the plastics division, it clearly could have informed the Taxpayer of the assessment and its basis (the audit) when it was issued under the provisions of § 7-1-8 (J) NMSA 1978.

in his administrative law treatise at § 20.04 which recognizes the distinction between determining the facial constitutionality of a law and determining the constitutionality of a statute as applied in particular circumstances, and allows administrative agencies to determine the latter. ***Sandia Savings & Loan Association v. Kleinheim,*** 74 N.M. 95, 100, 391 P.2d 324 (1964). Because the Taxpayer's challenge to Section 7-1-24 amounts to a challenge to the constitutional applicability of Section 7-1-24 under the particular circumstances of this case, this forum may address the Taxpayer's due process argument.

The essence of procedural due process is that parties be given notice and an opportunity for a hearing in order to present claims and defenses. ***Rutherford v. City of Albuquerque,*** 113 N.M. 573, 829 P.2d 652 (1992). As stated in ***Erwin v. City of Santa Fe,*** 115 N.M. 596, 855 P.2d 1060 (Ct. App. 1993):

> Due process is not a technical abstraction unrelated to time, place and circumstances, but rather an embodiment of fundamental ideas of fair play and justice. (Citations omitted). Due process, then, is a malleable principle which must be molded to each situation, considering both the rights of the government and the rights of the individual. (Citation omitted). Application of due process principles is therefore intensely practical and the nature of due process negates inflexible procedures. (Citations omitted).

Id., 115 N.M. at 599.

The Department argues that the situation in this case is analogous to the purchase of property subject to a tax lien and has cited to federal decisions which have held that a person who purchases property subject to a federal tax lien may not challenge the merits of the tax assessment itself and that this prohibition does not deprive the purchaser of due process. In ***Myers v. United States,*** 647 F.2d 591 (5th Cir., 1981), the court balanced the competing interests of the parties. It weighed the substantial interest of the government to

collect revenues against the interests of a property owner who acquired his rights through a foreclosure sale made subject to two recorded federal tax liens. It found that although due process required a prompt and meaningful judicial determination of the priority of the respective interests claimed by the property holder and the government, that the taxpayer against whom the lien had been filed had had an ample opportunity to contest the assessment underlying the lien and that a subsequent purchaser's rights were not so substantial as to require that he be allowed to challenge the underlying assessment. ***Id.,*** at 603-604.

I find the facts of this case to be distinguishable from those in the federal cases relied upon by the Department. In ***Myers***, there were recorded federal tax liens of which the purchaser had constructive notice because they were a matter of public record. In this case, the assessment at issue was not even issued until nearly two years after the Taxpayer purchased the plastics division from Heflin. Because the Department audited the predecessor, Heflin, which was still doing business in New Mexico and had only sold a division to the Taxpayer, and the Taxpayer was not notified of the assessment or the basis for the assessment by the Department, it did not have the opportunity to protest the assessment within the statutory time frame provided by § 7-1-24.

The Department argues that because the Taxpayer could have protected itself from liability by seeking a tax clearance at the time of its purchase of Heflin's plastics division and that this should suffice to satisfy the Taxpayer's due process claim. While true, the same could be said of ordinary taxpayers who are on notice of the tax statutes and through either ignorance or carelessness, fail to follow them and are later assessed a liability. Even though they could have prevented their situation, they are still afforded a hearing at

which they have a meaningful opportunity to challenge the basis for the Department's assessment. Due process considerations require the same for the Taxpayer in the circumstances of this case. Given that the liability at issue was not of record at the time the Taxpayer purchased its business and the Taxpayer was not given notice of the audit or assessment when they occurred, the Taxpayer is entitled to challenge the assessment itself.

The Taxpayer did present evidence which established that the Department did not use a proper estimating technique in calculating the disallowable deductions for the month of February, 1988. The Taxpayer does not dispute the Department's removal of February in addition to January from the calculation of the percentage of error for the remainder of 1988. It simply argues that a percentage of error should be calculated for January and applied to February, rather than to simply disallow the identical dollar amount of deductions in February as in January, even though their gross receipts and amount of deductions were not identical. It was erroneous for the Department to have not calculated a separate percentage of error for January and apply that percentage to February. The Department is ordered to do so and to adjust the amount of the assessment accordingly.

The Taxpayer also has raised due process concerns over the hardship created by the fact that the Department waited nearly five years after issuing the assessment to Heflin to assert a successor in business liability, which allegedly has prejudiced the Taxpayer's ability to obtain information from the distant past to otherwise challenge the underlying assessment. While the Department offered no explanation as to why it waited so long to assert successor in business liability and, obviously, it would be a far better

collection practice to assert such liabilities earlier, nonetheless, the Department asserted the liability within the ten-year statute of limitations for collecting an assessment. ***See,*** § 7-1-19 NMSA 1978. I see this issue differently than the issue of whether due process requires that the Taxpayer be given an opportunity to challenge the underlying assessment. While the Taxpayer could not have had notice of the assessment at issue in this case in the circumstances of this case, the Taxpayer did have constructive notice of the successor in business statutes as well as the statute of limitations for both issuing assessments and for bringing actions to collect assessments, since those statutes are of public record. Thus, it was on notice that failing to escrow part of the purchase price and request a tax clearance or statement of taxes due could subject it to liability based upon a subsequent audit for years prior to its purchase and that any assessment issued could be collected at any time within ten years from the date of the assessment. Additionally, the Department did make the audit report of Heflin available to the Taxpayer, which gave the Taxpayer the basis to attempt to challenge the underlying assessment, and by this decision, the opportunity to challenge the assessment itself. While the passage of time has resulted in the accrual of a substantial amount of additional interest and perhaps has made it more difficult for the Taxpayer to obtain the necessary records to mount other challenges to the assessment, the Taxpayer had at least constructive notice that such was a possibility and due process does not require the assessment to be abated because of this passage of time.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's application of the successor in business provisions of the Tax Administration Act to the Taxpayer, and jurisdiction lies over both the parties and the subject matter of this protest.

2. The Taxpayer wrongfully failed to withhold and pay over taxes owed by Heflin when it purchased its business from Heflin and the Taxpayer is therefore liable for Heflin's unpaid taxes for periods occurring prior to the date of Taxpayer's purchase of Heflin's plastics division under the successor in business statutes of the Tax Administration Act.

3. To the extent that Section 7-1-24(A) prevents the Taxpayer from contesting the assessment to Heflin because of the passage of the time for protesting said assessment, Section 7-1-24(A) is unconstitutional as applied to the Taxpayer who had no notice of the Department's assessment at the time it purchased Heflin's plastics division and the Taxpayer must be allowed to challenge the assessment underlying the Department's demand for payment.

4. Due process considerations do not require that the Taxpayer be relieved of liability as a successor in business because of the delay of the Department in asserting successor in business liability against the Taxpayer.

5. The Department used an improper method of calculating the amount of disallowable deductions for the month of February, 1988.

For the following reasons, the Taxpayer's protest IS HEREBY GRANTED IN PART AND DENIED IN PART. The Department IS HEREBY ORDERED TO ADJUST THE AUDIT CALCULATIONS FOR THE MONTH OF FEBRUARY, 1988

IN ACCORDANCE WITH THIS DECISION AND TO ADJUST THE TAXPAYER'S LIABILITY ACCORDINGLY.

DONE, this 1st day of October, 1998.