STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
WALL COMPANY INC.
TO DENIAL OF TECHNOLOGY JOBS AND
RESEARCH AND DEVELOPMENT TAX CREDIT
ISSUED ON February 3, 2017

v. **D&O No. 18-08**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

A telephonic summary judgment hearing on the above-referenced protest occurred on November 3, 2017, before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Staff Attorney, Mr. David Mittle, Esq., appeared telephonically representing the Taxation and Revenue Department ("Department") and was accompanied by Protest Auditor, Mr. Thomas Dillon. Mr. Tony Pastoria, C.P.A. (Wall Colmonoy), and Mr. Robert Hartman, C.P.A. and Mr. Donny Lucaj, C.P.A. (Plante & Moran, P.L.L.C.) appeared by telephone on behalf of Wall Co., Inc. ("Taxpayer").

The matter came before the Hearing Officer on the Department's Motion for Summary Judgment (hereinafter "Motion") filed on September 18, 2017 and Taxpayer's Response to Department's Motion for Summary Judgment (hereinafter "Response") filed on October 2, 2017.

The Department's Motion presented a statement of facts which Taxpayer did not dispute. Based on the undisputed facts, review of exhibits and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On or about December 29, 2016, Taxpayer submitted its Application for Technology Jobs and Research and Development Tax Credit (hereinafter "Application") to the Department. [*See* Administrative File].

2. Taxpayer's Application sought a credit in the amount of $36,196.00 for the period from January 1, 2015 through December 31, 2015. [*See* Administrative File].

3. The Application was mailed to the Department by Certified U.S. Mail on Thursday, December 29, 2016. [*See* Administrative File].

4. The Application was received by the Department on Tuesday, January 3, 2017. [*See* Response, Pg. 2, ¶6].

5. The deadline to claim the Technology Jobs and Research and Development Tax Credit under the facts of this protest was December 31, 2016. [*See* Formal Protest; Motion, Pg. 1, ¶1; Response, Pg. 1, ¶1].

6. The Application identified the name of Taxpayer as Wall Co., Inc. and provided a New Mexico CRS Identification Number of 762328. [*See* Application, Administrative File].

7. The Application provided an incorrect CRS number. [*See* Motion, Pg. 2, ¶7; Response, Pg. 2, ¶7].

8. On February 3, 2017, the Department mailed correspondence to Taxpayer notifying it that Taxpayer's Application was denied because Wall Co., Inc. was not registered with the Department to engage in business in the State of New Mexico. [*See* Administrative File; Motion, Pg. 2, ¶8; Response, Pg. 2, ¶8].

9. In response, also on February 3, 2017, Taxpayer provided a correct name and valid CRS number. [See Motion, Pg. 2, ¶9; Response , Pg. 2, ¶9]. Taxpayer indicated that the correct name of the entity seeking the credit was Wall Colmonoy Corp., and that its CRS number was 01-788319-00-9. [*See* Formal Protest, Administrative File].

10. Taxpayer's Application was nevertheless denied. [*See* Motion, Pg. 2, ¶¶9 – 11; Response, Pg. 2, ¶¶9 – 11].

11. On May 1, 2017, the Department received Taxpayer's Formal Protest of the Denial of its Application for Technology Jobs and Research Development Tax Credit. [*See* Administrative File].

12. On May 12, 2017, the Department acknowledged Taxpayer's Formal Protest of the Denial of its Application for Technology Jobs and Research Development Tax Credit. [*See* Administrative File].

13. On May 18, 2017, the Department filed a Hearing Request with the Administrative Hearings Office in which it requested that the matter be set to address scheduling. [*See* Administrative File].

14. On May 19, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a telephonic scheduling hearing on June 16, 2017. [*See* Administrative File].

15. A telephonic scheduling hearing occurred on June 16, 2017. Neither party objected that the hearing was within 90 days of Taxpayer's protest and should satisfy the 90-day hearing requirement. [*See* Administrative File].

16. On June 19, 2017, the Administrative Hearings Office entered a Second Notice of Telephonic Scheduling Conference that set a scheduling conference for August 18, 2017. [*See* Administrative File].

17. On August 18, 2017, Taxpayer requested a continuance of the telephonic scheduling hearing also set for August 18, 2017. The Department did not oppose the request. [*See* Administrative File].

18. On August 18, 2017, the Administrative Hearings Office entered a Continuance Order and Amended Notice of Second Telephonic Scheduling Hearing. [*See* Administrative File].

19. On September 11, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Motions Hearing that set a hearing on any potentially dispositive motions for November 9, 2017. [*See* Administrative File].

20. On September 18, 2017, the Department filed its Motion. [*See* Administrative File].

21. On September 22, 2017, the Administrative Hearings Office entered an Order Allowing Telephonic Appearance. [*See* Administrative File].

22. On October 2, 2017, Taxpayer filed Taxpayer's Response to Department's Motion. [See Administrative File].

23. On November 9, 2017, the Department verbally acknowledged at the hearing that Exhibits A through G to its Motion were attached in error and should be disregarded.

DISCUSSION

The sole issue at hand is whether Taxpayer's Application for Technology Jobs and Research and Development Tax Credit for 2015 is barred due to errors contained in the Application it submitted no more than two calendar days before the statutory deadline. The parties do not contest

that Taxpayer's Application misstated Taxpayer's name and provided an incorrect CRS number, nor do the parties dispute that Taxpayer's first attempt to cure the errors did not occur until after the statutory deadline for submission passed.

Accordingly, the dispositive questions are whether or not the error should preclude Taxpayer's Application, or whether the law permits an amendment under the circumstances to relate back to the initial submission of the Application, or whether the law permits the application to be filed beyond the one-year deadline. These are the questions of law presented for summary judgment.

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris, Inc.,* 2010-NMSC-035, ¶7, 148 N.M. 713. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664.

Turning to the legal questions central to the protest, evaluation of what constitutes a timely application is determined from the Act and applying the plain meaning rule. "[T]he guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *See Wood v. State Educ. Ret. Bd.,* 2011-NMCA-020, ¶12; 149 N.M. 455, 250 P.3d 881. A statutory construction analysis begins by examining the words chosen by the legislature and the plain meaning of those words. *See State v. Hubble*, 2009-NMSC-014, ¶13, 146 N.M. 70, 206 P.3d 579. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978

P.2d 327.

The purpose of the Technology Jobs and Research and Development Tax Credit Act (hereinafter "Act") is "to provide a favorable tax climate for technology-based businesses engaging in research, development and experimentation and to promote increased employment and higher wages in those fields in New Mexico." *See* NMSA 1978, Section 7-9F-2 (2015); *Team Specialty Prods. v. N.M. Taxation & Revenue Dep't*, 2005-NMCA-020, ¶14, 137 N.M. 50, 107 P.3d 4.

The Act states "A taxpayer may apply for approval of a credit within one year following the end of the reporting period in which the qualified expenditure was made." *See* NMSA 1978, Section 7-9F-9 (A) (2015); Regulation 3.13.5.9 NMAC. Subject to exceptions which are not pertinent to the issue before the Hearing Officer, a taxpayer thereafter approved to receive the credit may claim the credit against the taxpayer's compensating tax, withholding tax or gross receipts tax due to the state of New Mexico. *See* NMSA 1978, Section 7-9F-9 (B) (2015).

Notwithstanding the use of "may," "[i]f a taxpayer chooses to apply for either a basic and/or an additional credit, the taxpayer is required to apply for approval of the credit within one year following the end of that taxable year. *The Technology Act does not allow a taxpayer to apply for a tax credit during any other period.*" (Emphasis Added). *See Team Specialty Prods.*, 2005-NMCA-020, ¶13.

The Act restricts eligibility to "taxpayers" as the Legislature specifically defined the term at NMSA 1978, Section 7-9F-3 (L):

> "taxpayer" means any of the following persons, other than a federal, state or other governmental unit or subdivision or an agency, department, institution or instrumentality thereof: (1) a person liable for payment of any tax; (2) a person responsible for withholding and payment or collection and payment of any tax; (3) a person to whom an assessment has been made if the assessment remains unabated or

> the assessed amount has not been paid; or (4) for purposes of the additional credit against the taxpayer's income tax pursuant to the Technology Jobs and Research and Development Tax Credit Act and to the extent of their respective interest in that entity, the shareholders, members, partners or other owners of: (a) a small business corporation that has elected to be treated as an S corporation for federal income tax purposes; or (b) an entity treated as a partnership or disregarded entity for federal income tax purposes[.]

Accordingly, the Act provides two threshold issues to consider when evaluating an application for the credit: 1) is the applicant a "taxpayer"; and 2) is the application timely?

The Legislature has conferred authority on the Department to establish the procedure through which taxpayers apply for the credit. *See* NMSA 1978, Section 7-9F-10 (2015). In adhering to its responsibility under the Act, the Department developed and presently utilizes RPD – 41385 (Rev. 10/16/2015), which is the form Taxpayer utilized in the present matter. The form consists of a fill-in-the-blank application and detailed instructions for its completion and submission.

As might be expected, the form requires an applicant to identify itself by name and CRS number. Not only is that information necessary for identifying the entity or individual submitting the application, but it is also relevant for establishing whether an applicant is a "taxpayer" under the Act. Because the Department is tasked with administering numerous tax programs involving countless taxpayers, it has implemented a system for the registration and identification of taxpayers who are subject to taxes and various tax acts, including the Act subject of this protest. *See* Regulation 3.1.1.15 (A) (1) NMAC; NMSA 1978, Section, 7-1-2 (A) (16).

A significant component of that system is the assignment of a unique identification number, or CRS number, which is associated with the taxpayer's name and other information relevant to the character of the business. *See* ACD – 31015 (Rev. 12/14). By use of the CRS number, the Department may identify a single taxpayer amid a myriad of other taxpayers in its system, even

among taxpayers potentially having similar names.

Consequently, it is evident that Taxpayer's failure to provide a valid CRS number on its Application posed a significant problem, especially when the first step to establishing entitlement to the credit required establishing its identity as a "taxpayer."

There is no dispute that Taxpayer's application was critically flawed in this regard. The Department was unable to verify the most fundamental information provided by Taxpayer in its Application and the Department was well within its authority to respond as it did on February 3, 2017:

> "Unfortunately, because your company is not registered with a Combined Reporting System (CRS) number to remit gross receipts, withholding, or compensating taxes, your company does not qualify to be awarded the credit."
>
> [*See* Administrative File, Correspondence by J. Wittig, Feb. 3, 2017].

In response, Taxpayer immediately attempted to correct the erroneous information[1]. Having found that Taxpayer's Application was properly denied because it was not a "taxpayer", the next issue is whether a subsequent correction, submitted after the deadline, could relate back to the original Application, or whether the Department could accept it after the one-year deadline had passed. The correction in this protest sought to fundamentally substitute one entity (Wall Co., Inc.) for another (Wall Colmonoy Corp.), after the latter had neglected to timely apply for the requested credit, and the prior's Application had been denied because it was not a taxpayer.

Taxpayer cited no legal authority in support of either option. The New Mexico Court of Appeals has found that tax credits are legislative grants of grace to a taxpayer that must be narrowly

[1] Although the parties make reference to an "amended application," the record is lacking of such document. Nevertheless, for the purpose of this analysis, the Hearing Officer finds that a copy of an amended application is immaterial to the ultimate issue. The parties do not dispute the critical facts that Taxpayer's Application contained an incorrect name and CRS number, and that Taxpayer provided corrected information on or about February 3, 2017.

interpreted and construed against a taxpayer. *See Team Specialty Prods.*, 2005-NMCA-020, ¶9. Under the rationale of *Team Specialty Prods*, Taxpayer carries the burden of proving that it is entitled to the claimed credit. Although a credit must be narrowly interpreted and construed against a taxpayer, it still should be construed in a reasonable manner consistent with legislative language. *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶9, 107 N.M. 540 (although construed narrowly against a taxpayer, deductions and exemptions—similar to credits—are still to be construed in a reasonable manner).

Taxpayer does not direct the Hearing Officer to any language in the Act, nor does examination of the Act reveal any Legislative intent to confer authority on the Department to permit the substitution of entities to relate back to the date of the initial application, or in the alternative, to permit it to accept a late-filed application. *See In re Application of PNM Elec. Servs.*,1998-NMSC-17, ¶10, 125 N.M. 302, 961 P.2d 147 (because administrative agencies are creatures of statute, their power and authority are limited to that which is expressly granted and necessarily implied by statute); *Maxwell Land Grant Co. v. Jones*, 1923-NMSC-008, 28 N.M. 427, 213 P. 1034 ("The state tax commission is a creature of statute, and it has only such powers as are conferred upon or granted to it by the statute under which it assumed to act[.]"); *Chalamidas v. Envtl. Improvement Div. (In re Proposed Revocation of Food & Drink Purveyor's Permit for House of Pancakes)*, 1984-NMCA-109, 102 N.M. 63, 691 P.2d 64 ("Administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them.")

Given the opportunity to examine the Department's authority to extend an application deadline or to accept a late application, the court in *Team Specialty Prods* declined finding that the facts in that case did not require such determination because the evidence was devoid of evidence to

establish that the taxpayer exercised due diligence in pursuit of the credit. *See Team Specialty Prods.*, 2005-NMCA-020, ¶¶16 – 17.

In that case, a taxpayer filed an application for tax credit nine months after the one-year deadline. The taxpayer provided various reasons justifying the lateness of its application, including misconduct and potential criminal behavior of employees responsible for its finances and taxes. Nevertheless, the court observed that the taxpayer did not present evidence in the record to establish any due diligence, despite the misconduct of its employees. *See Team Specialty Prods.*, 2005-NMCA-020, ¶17, *citing El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't.*, 1989-NMCA-070, ¶ 14, 108 N.M. 795, 779 P.2d 982 ("Every person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.")

In this protest, as a demonstration of due diligence, Taxpayer relied on an email attached as Exhibit B to its Response. Taxpayer asserted that the email placed the Department on notice of its intention to submit an application. The email is dated December 20, 2016 and indicates that on or about that date, Taxpayer made a general inquiry regarding the application process. The email appears to memorialize a preceding conversation and to provide additional information. The email does not indicate that it was specific to a particular taxpayer by reference to any taxpayer's name or CRS number. The email makes reference to an address, but only for the purpose of verifying that the address was in a "rural area" as applicable to the Act.

Otherwise, the email tends to give credence to the Department's claim that Taxpayer did not act with due diligence, because it demonstrated that Taxpayer may have delayed, at least until

December 20, 2016, to begin preparation of its Application. Eleven calendar days remained, at the peak of the holiday season, between December 20, 2016 and the deadline. Had the Application been submitted without error, then this protest would not have arisen because Taxpayer had through December 31, 2016 to submit its application.

Yet, delaying until such a late date left no room for error, especially one as significant as submitting an application on behalf of an incorrect business entity. The earliest occasion for the Department to review, potentially discover, and notify Taxpayer of its error, was January 3, 2017. According to Taxpayer, that was the date the postal service completed delivery of the package containing the Application. By that date, however, the deadline had passed.

Because there is no statutory authority permitting a correction of this nature, the substitution of entities, to relate back to the date of the initial application, or permitting the Department to accept a late-filed application, Taxpayer's Application is barred. This is further supported by the guiding principle that "tax credits are strictly matters of legislative grace and are to be construed against the taxpayer." *See Team Specialty Prods.*, 2005-NMCA-020, ¶9, *citing Murphy v. Taxation & Revenue Dep't.*, 1979-NMCA-065, 94 N.M. 90, 607 P.2d 628.

Since Taxpayer failed to file a valid application on or before December 31, 2016, the Department's Motion should be GRANTED and Taxpayer's protest should be DENIED.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's denial of Taxpayer's Application for Technology Jobs and Research and Development Tax Credit for 2015, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was held within 90 days of Taxpayer's protest. *See* NMSA 1978, Section 7-1B-6 (D).

C. There is no genuine dispute as to any material fact and summary judgment is appropriate in this matter. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

D. Taxpayer's Application for Technology Jobs and Research and Development Tax Credit for 2015 refund was invalid under NMSA 1978, Section 7-9F-9 (A) (2015) because it failed to establish that it was a taxpayer under the Act.

E. The Technology Jobs and Research and Development Credit does not authorize the Department to accept an untimely application for credit, to permit an untimely amended application to relate back to the date of a timely, but invalid application, or for a substitute of applicants. *See In re Application of PNM Elec. Servs.*,1998-NMSC-17, ¶10, 125 N.M. 302, 961 P.2d 147.

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

DATED: March 8, 2018

Chris Romero
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 March 8, 2018, a copy of the foregoing Decision and Order Granting Summary Judgment was mailed to the parties listed below in the following manner:

First Class Mail *Interagency Mail*