STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
MVT SERVICES
TO THE DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L0527603248

v. **D&O No. 18-11**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing in the above-captioned protest occurred on January 30, 2018 before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. Attorneys, Mr. Keith C. Mier, Esq. and Mr. Robert Johnston, Esq. (Sutin, Thayer & Browne, PC), appeared representing MVT Services, LLC ("Taxpayer"). Mr. Steven Bartlett of Axiom Certified Public Accountants and Business Advisors, LLC appeared in person as a witness for Taxpayer. Attorney, Ms. Tonya Noonan Herring, Esq., appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Mr. Steven Valenzuela and Ms. Elizabeth Florence appeared in person as witnesses for the Department. Taxpayer Exhibits 1.2 – 1.3, 4.1 – 4.6, 5-A.1 – 5-G.2, 9-C.1 – 9-C.17, 9-E.1 – 9-E.6, and 10.1 and Department Exhibit M were admitted into the evidentiary record. All exhibits are more thoroughly described in the Administrative Exhibit Log. The parties further stipulated that the Hearing Officer should take administrative notice of exhibits to the protest and subsequent motions, filed as of the date of hearing, and regard them as evidence relevant to the merits of the protest. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a truckload carrier specializing in time sensitive service. [Testimony

of Mr. Bartlett].

2. Taxpayer is based in New Mexico with a physical address of 3590 W. Picacho Ave., Las Cruces NM 88007. [*See* Taxpayer Ex. 1.2].

3. On March 19, 2012, Taxpayer executed a Tax Information Authorization to permit Axiom CPAs and Business Advisors, LLC (hereinafter "Axiom") to represent it pertaining to all taxes administered by the Department. [*See* Administrative File].

4. On August 28, 2015, Taxpayer, by and through Mr. Ron Saavedra (Axiom), executed an Authorization to Provide Tax Information by Facsimile and E-Mail. [*See* Administrative File].

5. On December 23, 2015, Taxpayer, by and through Axiom, submitted an Application for High Wage Jobs Tax Credit (hereinafter "Application"). [*See* Administrative File.].

6. Mr. Bartlett is an accountant employed by Axiom and serves as the manager of its state and local tax group. [Testimony of Mr. Bartlett].

7. The Application and its supporting documents were assembled by Mr. Bartlett on Taxpayer's behalf relying on information provided by Taxpayer's human resources personnel. [Testimony of Mr. Bartlett].

8. Axiom is sometimes compensated for its services on a contingency fee basis determined by the amount of tax credit that is approved by the Department. It is unknown in the present protest whether Taxpayer and Axiom have entered into such an arrangement. [Testimony of Mr. Bartlett].

9. The Application was received by the Department on December 28, 2015. [*See* Revised Joint Prehearing Statement, Stip. A, Pg. 12].

10. Taxpayer's Application claimed a High Wage Jobs Tax Credit (hereinafter "Credit") in the total amount of $377,358.12 for the periods between August 7, 2012 and April 25, 2015, representing 61 qualifying periods occupied by 45 employees. [*See* Taxpayer Ex. 1.2 – 1.3; Revised Joint Prehearing Statement, Stips. B – C, Pg. 12; Testimony of Mr. Bartlett].

11. Taxpayer's Application was accompanied by (a) an executed Tax Information Authorization Form ACD-31102 authorizing Axiom to represent Taxpayer in reference to all taxes administered by the Department for any year; (b) an executed Authorization to Provide Tax Information by Facsimile and E-mail (c) a completed Form RPD-41288; (d) a completed Form RPD-41376; (e) a complete employee list; (f) a headcount worksheet and detail of calculations prepared by Axiom for Taxpayer; (g) payroll registers with information regarding health benefits and retirement plan deductions; and (h) verification of Taxpayer's eligibility for the Job Training Incentive Program ("JTIP") from the New Mexico Economic Development Department. [Testimony of Mr. Bartlett; *See* Taxpayer Ex. 4.2].

12. On June 13, 2016, the Department under Letter ID No. L0527603248 partially approved Taxpayer's Application. The approved Credit amount was $42,546.85. The difference of $334,811.27 between the amount claimed in Taxpayer's Application and the amount approved, was denied. [*See* Administrative File; Revised Joint Prehearing Statement, Stip. D, Pg. 12; Letter ID L0527603248; Taxpayer Ex. 4].

13. The Department denied Taxpayer the Credit for 39 claimed employees occupying a total of 53 qualifying periods. [Testimony of Mr. Bartlett; *See* Taxpayer Ex. 5-A.1 – 5-A.2].

14. The Department approved a Credit for eight qualifying periods for six employees. [Testimony of Mr. Bartlett; *See* Taxpayer Ex. 5-A.1 – 5-A.2].

15. The Department disallowed the Credit for 33 employees the Department found to

be occupying jobs that were not new or newly created, otherwise referred to as "replacement" jobs. [Testimony of Mr. Bartlett; Taxpayer Ex. 4.3].

16. On June 30, 2016, Taxpayer, by and through Axiom, executed and delivered a Formal Protest of the partial denial of its Application to the Department's Protest Office. [*See* Administrative File; Revised Joint Prehearing Statement, Stip. E, Pg. 12].

17. On July 11, 2016, the Department's Protest Office acknowledged receipt of the protest under Letter ID No. L1388893744. [*See* Administrative File; Revised Joint Prehearing Statement, Stip. F, Pg. 12].

18. On August 12, 2016, the Department filed a Hearing Request with the Administrative Hearings Office in which it requested a scheduling hearing to address scheduling a hearing on Taxpayer's protest. [*See* Administrative File].

19. Taxpayer is no longer protesting the Department's denial of the Credit for 16 claimed employees occupying 22 qualifying periods. Taxpayer's protest is concentrated instead on the denial of the Credit for 23 employees (Jeffery Barnes, Cortney Castle-Chavez, Billy Chastain, Bryan Conn, Israel Herrera, Robert Hutchison, Derel Lackey, Francisco Limones-Carranza, Jonathan Lindsey, Ronald McClure, Thomas Misner, Sergio Pacheco, Arlin Powers, Randy Shipley, Christopher Silvas, Jose Torres, Luis Valverde, Jr., James Vollmar, Nancy Walton, Clifton Warren, Cortney Watson, Scott Webb, and Claudia Zamora) representing 31 qualifying periods and an amount in dispute of $185,299.46. [Testimony of Mr. Bartlett; *See* Taxpayer Ex. 5-A.l – 5-A.2; Taxpayer Ex. 1.3].

20. On August 16, 2016, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference, setting this matter for a scheduling hearing on September 2, 2016. [*See* Administrative File].

21. On September 2, 2016, a telephonic scheduling hearing occurred in which the parties addressed the issues at protest, the necessity of discovery and motions, and the selection of a date for a hearing on the merits of Taxpayer's protest. The parties did not object that the scheduling hearing satisfied the 90-day hearing deadline. [*See* Administrative File].

22. On September 9, 2016, the Administrative Hearings Office issued a Scheduling Order and Notice of Hearing on the Merits that in addition to establishing various prehearing deadlines, also set a hearing on the merits of Taxpayer's protest for June 6, 2017. [*See* Administrative File].

23. On October 6, 2016, Taxpayer, by and through Axiom, filed Taxpayer's Preliminary Witness and Exhibit List. [*See* Administrative File].

24. On October 11, 2016, the Department filed New Mexico Taxation and Revenue Department's Preliminary Witness and Preliminary Exhibit Lists. [*See* Administrative File].

25. On March 28, 2017, Taxpayer, by and through Axiom, filed its Motion to Continue Formal Hearing on the Merits or Vacate Deadlines and Request for a New Scheduling Conference. [*See* Administrative File].

26. On March 31, 2017, the Administrative Hearings Office entered a Continuance Order, Amended Scheduling Order and Notice of Hearing on the Merits which in addition to establishing various deadlines, set a hearing on the merits of Taxpayer's protest for November 2, 2017. [*See* Administrative File].

27. On August 18, 2017, the Department filed a Certificate of Service indicating that it served a true copy of Department's First Set of Requests for Admissions, First Set of Interrogatories, and First Set of Requests for Production of Documents on Taxpayer and Axiom. [*See* Administrative File].

28. On September 18, 2017, Taxpayer, by and through Axiom, filed a Certificate of Service indicating that it served its responses to Department's First Set of Requests for Admissions, First Set of Interrogatories, and First Set of Requests for Production of Documents. [*See* Administrative File].

29. On September 22, 2017, Ms. Herring substituted as counsel and entered her appearance for the Department. [*See* Administrative File].

30. On October 17, 2017, Taxpayer, by and through Axiom, filed a Motion to Quash Department's Subpoena for Appearance of Person and Subpoena Duces Tecum for Protest Hearing. [*See* Administrative File].

31. On October 17, 2017, Taxpayer, by and through Axiom, filed a Motion to Stay the Formal Hearing and Request for a New Scheduling Conference. [*See* Administrative File].

32. On October 18, 2017, the parties filed a Joint Prehearing Statement. [*See* Administrative File].

33. On October 18, 2017, the Department filed Department's Response in Opposition to Taxpayer's Motion to Quash Subpoena. [*See* Administrative File].

34. On October 18, 2017, the Department filed Department's Response in Opposition to Taxpayer's Motion to Stay the Formal Hearing and Request for a New Scheduling Conference. [*See* Administrative File].

35. On October 25, 2017, Taxpayer, by and through Axiom, filed its Motion to stay the Formal Hearing Pending Petition to Quash Subpoena and Request for a New Scheduling Conference. [*See* Administrative File].

36. On October 25, 2017, the Department filed Department's Response in Opposition to Taxpayer's Second Motion to Stay the Formal Hearing Pending Petition to Quash Subpoena

and Request for a New Scheduling Conference. [*See* Administrative File].

37. On October 26, 2017, the Administrative Hearings Office entered a Formal Order on Motion to Quash in which it determined that it lacked jurisdiction to grant the relief Taxpayer requested in Taxpayer's Motion to Quash Department's Subpoena for Appearance of Person and Subpoena Duces Tecum for Protest Hearing. [*See* Administrative File].

38. On October 30, 2017, Mr. Timothy R. Van Valen, Esq., and Mr. Robert L. Johnston, Esq. (Sutin, Thayer, & Browne, PC), entered their appearance on behalf of Taxpayer. [*See* Administrative File].

39. On October 30, 2017, the Administrative Hearings Office entered a Continuance Order, Amended Scheduling Notice, and Amended Notice of Administrative Hearing that in addition to setting various prehearing deadlines continued the hearing on the merits of Taxpayer's protest to January 30, 2018 at 10 a.m. [*See* Administrative File].

40. On November 15, 2017, Taxpayer, by and through Axiom, filed a Certificate of Service of Discovery indicating that it served Taxpayer's First Set of Interrogatories, Requests to Admit, and Request for Production of Documents. [*See* Administrative File].

41. On November 16, 2017, Taxpayer, by and through counsel of record, filed a Certificate of Service indicating that it served Taxpayer's First Set of Interrogatories and Requests for Production, and First Set of Requests for Admission on the Department. [*See* Administrative File].

42. On November 16, 2017, Taxpayer, by and through counsel of record, filed a Certificate of Service indicating that it served Taxpayer's Second Set of Interrogatories and Requests for Production on the Department. [*See* Administrative File].

43. On November 20, 2017, the Department filed Department's Motion for Injunctive

Relief and Declaratory Judgment Against Axiom CPAs and Business Advisors, LLC. [*See* Administrative File].

44. On December 4, 2017, Taxpayer, by and through Axiom, filed a Notice of Errata which withdrew the discovery requests it asserted it served in error on November 15, 2017. [*See* Administrative File].

45. On December 5, 2017, Taxpayer, by and through its counsel of record, filed Taxpayer's Response to Department's Motion for Injunctive Relief and Declaratory Judgment Against Axiom CPAs and Business Advisors, LLC. [*See* Administrative File].

46. On December 6, 2017, the Administrative Hearings Office entered an Order on Department's Motion for Injunctive Relief and Declaratory Judgment Against Axiom CPAs and Business Advisors, LLC, which for reasons explained therein, denied injunctive relief as requested by the Department, but ordered that communications between the parties be conducted through their counsel of record. [*See* Administrative File].

47. On December 18, 2017, Taxpayer, by and through its counsel of record filed a Certificate of Service indicating that it served on the Department the Taxpayer's Objections, Answers and Responses to the New Mexico Department of Taxation and Revenue's Second Set of Interrogatories and Requests for Production of Documents. [*See* Administrative File].

48. On January 2, 2018, Taxpayer, by and through its counsel of record, filed a substitution of counsel indicating that Mr. Wade L. Jackson, Esq. (Sutin, Thayer, & Browne, PC), was substituting for prior counsel, Mr. Van Valen. [*See* Administrative File].

49. On January 2, 2018, Taxpayer, by and through its counsel of record, filed a Motion for Summary Judgment and Brief in Support of Motion. [*See* Administrative File].

50. On January 15, 2018, the parties filed a Revised Joint Prehearing Statement. [*See*

Administrative File].

51. On January 17, 2018, the Department filed New Mexico Taxation and Revenue Department's Response to Taxpayer's Motion for Summary Judgment. [*See* Administrative File].

52. On January 25, 2018, the Administrative Hearings Office entered a Notice of Reassignment of Hearing Officer for Administrative Hearing which reassigned the above-captioned protest to the undersigned Hearing Officer. [*See* Administrative File].

53. On January 26, 2018, Mr. Keith C. Mier, Esq. (Sutin, Thayer, & Browne, PC), entered his appearance on behalf of Taxpayer. [*See* Administrative File].

54. On January 30, 2018, Taxpayer filed with the Hearing Officer, while on the record of the hearing on the merits, a Declaration of Representative for Administrative Hearing. [*See* Administrative File].

55. Mr. Steven Valenzuela is a Tax Auditor II. He has been employed by the Department for 12 years and is responsible for reviewing applications for business tax credits in the Business Tax Credit Bureau of the Department's Audit and Compliance Division. [Testimony of Mr. Valenzuela].

56. Mr. Valenzuela has reviewed more than 250 applications for the Credit. [Testimony of Mr. Valenzuela].

57. Ms. Elizabeth Florence has been a Department employee for 21 years and is a tax supervisor in the Business Tax Credit Bureau of the Department's Audit and Compliance Division. She has worked with Credit applications for more than seven years and has reviewed, processed or supervised approximately 300 Credit applications. [Testimony of Ms. Florence].

58. As part of its evaluation to determine if a claimed job position is a "new" high-

wage job position, the Department employs a technique it commonly refers to as "job replacement analysis" or "replacement analysis." [Testimony of Mr. Valenzuela; Testimony of Ms. Florence].

59. The job replacement analysis consists of reviewing the employee list provided by Taxpayer (Dept. Ex. M) which includes all of Taxpayer's employees beginning July 1, 2004, and for each employee, provides their names, job titles, wage rates, and hiring and termination dates. [Testimony of Ms. Florence; Testimony of Mr. Valenzuela].

60. Utilizing the sorting and filtering features available in Microsoft Excel, Mr. Valenzuela compared job titles, job creation dates, hire dates, and termination dates to identify positions which he concluded were not newly created. [Testimony of Mr. Valenzuela; Taxpayer Ex. 4; Taxpayer Ex. 5;].

61. To the extent any taxpayer disputes the Department's conclusions resulting in a denial of the Credit, taxpayers may refute the determination by providing documentation which substantiates that the claimed positions are newly created high wage jobs. To the extent the parties are unable to resolve a dispute, the taxpayer is entitled to file a protest. [Testimony of Mr. Valenzuela; Testimony of Ms. Florence].

62. The methods by which the Department analyzed the employee list to identify whether jobs are newly created or replacements are not established in any promulgated rule or written policy. Rather, the method utilizes and relies on the sorting and filtering features available in Microsoft Excel. [Testimony of Mr. Valenzuela; Testimony of Ms. Florence].

63. This method of determining whether a job is new or newly created has been utilized since 2008. [Testimony of Mr. Valenzuela; Testimony of Ms. Florence].

64. This method of determining whether a job is new or newly created is utilized with

all applications for the Credit. [Testimony of Ms. Florence].

65. It is extremely common that the Department's analysis will identify one or more positions that may be replacements. [Testimony of Mr. Valenzuela].

66. In evaluating Taxpayer's Application, the Department relied on documentation and information provided by Taxpayer on forms prescribed by the Department. [Testimony of Mr. Valenzuela; Taxpayer Ex. 4].

67. If documents are insufficient to make a determination on eligibility, the Department will request additional information. [Testimony of Mr. Valenzuela].

68. Eligible employers may claim up to four qualifying periods for each job eligible to receive the Credit. The periods commence with the year in which the job was created, and proceed thereafter for the duration of three consecutive annual periods. [Testimony of Mr. Valenzuela; Testimony of Ms. Florence].

69. The replacement analysis in intended to prevent employers from replacing an employee in a vacated high-wage job and asserting entitlement to another qualifying period, thus circumventing the statutory limit for four-qualifying periods for each new high-wage job created. [Testimony of Mr. Valenzuela].

70. The Department evaluated Taxpayer's Application and determined that no less than 44 qualifying periods requested were replacement positions. [Testimony of Mr. Valenzuela; Taxpayer Ex. 4].

71. On February 9, 2018, the Department filed Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law. [*See* Administrative File].

72. On February 9, 2018, Taxpayer filed MVT Services, LLC's Proposed Findings of Fact and Conclusions of Law. [*See* Administrative File].

DISCUSSION

The issue in this protest is whether the Department properly disallowed a Credit for 24 purported new high-wage jobs, representing 31 qualifying periods, because it determined that the claimed jobs were replacement positions rather than new high wage jobs as required by NMSA 1978, Sections 7-9G-1A and 7-9G-1 (M) (5) (2013). Taxpayer no longer disputes whether 16 employees were ineligible employees for the Credit because they did not satisfy the New Mexico residency requirements established by NMSA 1978, Section 7-9G-1 (M) (2013).

In addition to the arguments presented at the hearing, the Hearing Officer also considered the arguments contained in Taxpayer's Motion for Summary Judgment and Brief in Support of Motion and the New Mexico Taxation and Revenue Department's Response to Taxpayer's Motion for Summary Judgment.

Standing and Potential Conflict of Interest.

The Department made several observations regarding Axiom's role at the hearing, which ultimately gave rise to an objection asserting that Axiom lacked standing to appear on Taxpayer's behalf. Most notably, no individual with any association to Taxpayer was present except for Taxpayer's counsel of record and Mr. Bartlett.

"Standing doctrine generally requires litigants to allege three elements: (1) they are directly injured as a result of the action they seek to challenge; (2) there is a causal relationship between the injury and the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *See ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶1, 144 N.M. 471, 188 P.3d 1222. Axiom, on the other hand, did not assert that it had standing, but that it merely appeared in a representative capacity for Taxpayer.

Perhaps the use of the term "represent" is subject to differing interpretations, as the

Department inferred that Taxpayer's counsel of record and Axiom both *represented* Taxpayer. However, only Taxpayer's counsel of record appeared as an advocate. Mr. Bartlett appeared merely as a witness having personal knowledge of facts relevant to the issues at protest. He did not make opening statements, examine or cross-examine witnesses, make or respond to evidentiary objections, or make closing arguments. Those tasks were all handled by Taxpayer's counsel of record.

In contrast, Axiom, by and through Mr. Bartlett, appeared as Taxpayer's designated agent for the purpose of the hearing. *See* TIA; *See* Declaration of Representative for Administrative Hearing. Despite the Department's argument that a TIA does not permit Axiom to "represent" Taxpayer, the TIA executed by Taxpayer on March 19, 2012 (ACD-31102 (INT. 10/97)) expressly provided that Axiom is authorized to "represent [it] pertaining to taxes administered by the New Mexico Taxation and Revenue Department" for "any year."

Notwithstanding the plain language authorizing Axiom to represent it, the Department argued that the TIA only permitted the Department to disclose confidential information to Axiom, and nothing further. However, the Hearing Officer is unwilling to disregard the clear and unambiguous expression of intent provided by the TIA. *See Benz v. Town Ctr. Land, Ltd. Liab. Co.*, 2013-NMCA-111, ¶31, 314 P.3d 688 (the purpose, meaning, and intent of the parties to a contract is to be deduced from the language employed by them; and where such language is not ambiguous, it is conclusive). Moreover, if the TIA were vague as to Axiom's authority, which it was not, then any ambiguity was clarified by Taxpayer's Declaration of Representative for Administrative Hearing, in which Taxpayer expressly designated Axiom to appear as its agent with full decision-making authority. Any assertion that such designation was improper or invalid was unsupported by citation to any legal authority.

In contrast, the Taxpayer Bill of Rights, NMSA 1978, Section 7-1-4.2 (B), affords "the right to be represented or advised by counsel or other qualified representatives at any time in administrative interactions with the department in accordance with the provisions of Section 7-1-24 NMSA 1978 or the administrative hearings office in accordance with the provisions of the Administrative Hearings Office Act [7-1B-1 through 7-1B-9 NMSA 1978][.]"

Furthermore, Mr. Bartlett testified that Axiom was occasionally compensated for its services based on a percentage of an approved credit amount, or contingency fee arrangement. For that reason, the Department argued that there was an impermissible transfer or assignment of rights from Taxpayer to Axiom, by virtue of it purportedly acquiring an interest in the outcome of the protest. However, the evidence failed to establish that there was such a fee arrangement between Taxpayer and Axiom in this case. Moreover, even if the existence of such agreement had been established in this matter, the Department did not establish by citation to any legal authority how it might offend the law. In a field in which the employment of contingency fee arrangements is commonplace, legal services, our courts have observed "[t]he contingency fee compensates the attorney for services rendered. The attorney is not intermeddling in litigation, but is acting as an agent for the client." *See Quality Chiropractic, PC v. Farmers Ins. Co.*, 2002-NMCA-080, ¶27, 132 N.M. 518, 51 P.3d 1172.

Neither review of the Administrative File nor any of the evidence presented supports finding that Taxpayer attempted to transfer or assign any rights to Axiom, or that Axiom was asserting rights on its own behalf. Instead, the facts indicated that Taxpayer engaged Axiom to assist with its application for the Credit. In doing so, Axiom prepared Taxpayer's Application, submitted it, served as its primary contact with the Department, tendered a protest on its behalf, and appeared to offer evidence on its behalf at the hearing. The Department's reliance on

standing under the circumstances of this protest is misplaced.

The Department also asserted the existence of a conflict of interest because Taxpayer's counsel of record acknowledged having attorney-client relationships with both Axiom and Taxpayer. However, this fact alone does not establish the existence of a conflict of interest. The Rules of Professional Conduct only prohibit representation involving concurrent conflicts of interest when: 1) the representation of one client will be directly adverse to another client; or 2), there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, former client or a third person or by a personal interest of the lawyer. *See* Rule 16-107 (A).

In this protest, there was no evidence to suggest that the interests of Axiom and Taxpayer were misaligned or inconsistent in a manner that could be detrimental to Taxpayer's interests, nor was there any evidence to suggest a risk, significant or otherwise, that counsel's representation of Taxpayer might be materially limited by counsel's responsibilities to its other client, Axiom. Again, the Department's argument to the contrary was unsupported by citation to any legal authority and was unpersuasive.

For the reasons stated, the Department's objections as to standing and any alleged conflict of interest were not well-taken and were overruled.

Burden of Proof.

Although the current protest does not arise from an assessment, but rather from a partial denial of a credit application, Taxpayer bears the burden of establishing entitlement to the claimed Credit central to its protest. The New Mexico Court of Appeals has found that tax credits are legislative grants of grace to a taxpayer that must be narrowly interpreted and construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't,*

2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4 (internal citations omitted). Accordingly, Taxpayer carries the burden of proving that it is entitled to the claimed Credit.

Although, pursuant to *Team Specialty*, a credit must be narrowly interpreted and construed against a taxpayer, the credit must also 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, 760 P.2d 1306 (although construed narrowly against a taxpayer, deductions and exemptions—similar to credits—are still to be construed in a reasonable manner).

High Wage Job Tax Credit – NMSA 1978, Section 7-9G-1 (2013)

The High Wage Job Tax Credit (also referred to herein as "Credit") subject of this protest is established at NMSA 1978, Section 7-9G-1 (2013) (hereinafter the "Act"). Although the Act was revised in 2016 during the Second Special Session of the 52nd Legislature of the State of New Mexico, the parties do not dispute that the Application at issue in this protest is governed by the 2013 enactment, which was applicable until October 19, 2016. *See* 2016 (2nd S.S.), ch. 3, § 6.

The Act provides that "[a] taxpayer who is an eligible employer may apply for, and the taxation and revenue department may allow, a tax credit *for each new high-wage economic-based job*. The credit provided in this section may be referred to as the 'high-wage jobs tax credit'." *See* NMSA 1978, Section 7-9G-1 (A) (2013) (Emphasis Added). The Act states that "[t]he purpose of the high-wage jobs tax credit is to provide an incentive for urban and rural businesses to create and fill new high-wage jobs in New Mexico." *See* NMSA 1978, Section 7-9G-1 (B) (2013).

In summary, eligible employers that create new high-wage jobs may apply for credit against gross receipts tax, compensating tax, withholding tax, Emergency 911 Service Surcharges (E911), and Telecommunications Relay Service Surcharges. *See* NMSA 1978, Section 7-9G-1 (K) and (M)

(4) (2013).

To establish its status as an eligible employer, an applicant must demonstrate that it "made more than fifty percent of its sales of goods or services produced in New Mexico to persons outside New Mexico during the applicable qualifying period" or that it "is certified by the economic development department to be eligible for development training program assistance pursuant to Section 21-19-7 NMSA 1978[.]" *See* NMSA 1978, Section 7-9G-1 (M) (3) (a) and (b) (2013).

The Act thereafter permits a credit in the amount of 10 percent of wages and benefits for eligible employees that are employed in eligible high-wage jobs, not to exceed $12,000 per job per qualifying period. *See* NMSA 1978, Section 7-9G-1 (C) (2013). The number of qualifying periods for which an eligible employer may obtain Credit for a new high-wage economic-based job consists of the initial one-year period beginning on the date in which the job was created, provided the date falls on or after July 1, 2004, and three consecutive one-year periods thereafter. *See* NMSA 1978, Section 7-9G-1 (D) (2013).

The Act further provides that for jobs created prior to July 1, 2015, the job must be occupied for at least 48 weeks during a qualifying period, and the eligible employee must be compensated with wages and benefits of $40,000 or more if the job is performed or established in a municipality having a population of at least 60,000 residents, or within ten miles of the external boundary of such a municipality. If the job is performed or established in an area of New Mexico not satisfying those population requirements, then the minimum wage-threshold increases to $28,000. For new high wage jobs created after July 1, 2015, the minimum compensation increases to $60,000 within a municipal area and $40,000 elsewhere in the state. *See* NMSA 1978, Sections 7-9G-1 (M) (5) and (M) (1) (2013). Eligible employees must be New Mexico residents who have no relationship to the eligible employer or to any entity owning stock in the employer. *See* NMSA 1978, Section 7-9G-1

(M) (2) (2013).

The evidence presented established that: (1) Taxpayer was an eligible employer under Section 7-1G-1 (M) (3); (2) each job for which Taxpayer claimed the Credit was created after July 1, 2004 under Section 7-9G-1 (M) (5) (2013); (3) employees subject of the protest were eligible under Section 7-9G-1 (M) (2) (2013); (4) each job for which the Credit was claimed satisfied the minimum wage requirements under Section 7-9G-1 (M) (5) (a) (2013); (5) each job for which the Credit was claimed was occupied for the minimum period of time necessary to establish a qualifying period under Sections 7-9G-1 (M) (5) and (6) (2013); and (6), that the total number of employees with high-wage economic-based jobs on the last day of the qualifying period at the location at which the job is performed or based increased by at least one more than the number on the day prior to the date the new high-wage economic-based job was created under Section 7-9G-1 (E) (2013).

Accordingly, Taxpayer argued that it satisfied all of the essential elements necessary to qualify for the Credit, which the Department nevertheless denied because it was not satisfied that the jobs for which the Credit were claimed were "newly created." In fact, Taxpayer's evidence and argument did not challenge the Department's determinations that the disallowed jobs were not "newly created." Rather, Taxpayer concentrated its effort on the broader issue of whether the Department exceeded its statutory authority by further scrutinizing the Application employing what the parties referred to as a "replacement analysis."

Consequently, the fundamental question at hand is whether the Department acted within its statutory authority when it engaged in a "replacement analysis." That determination turns on a question of statutory construction to determine whether the statute permits or precludes disallowance of the Credit based on such analysis.

It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, an absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. In *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d 881 (internal quotations and citations omitted), the New Mexico Court of Appeals stated:

> the 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.

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; *see also Amoco Prod. Co. v. N.M. Taxation & Revenue Dep't*, 1994-NMCA-086, ¶8 & ¶14, 118 N.M. 72, 878 P.2d 1021. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473, 212 P.3d 361. Because this case also involves a tax credit, which is an act of legislative grace, the language of the credit statute must be narrowly construed. *See Team Specialty Prods*, 2005-NMCA-020, ¶9.

Applying these principles to the Act, the Hearing Officer is persuaded that it is not beyond the authority of the Department to examine whether a claimed position is newly created or a "replacement."

The Legislature has clearly stated that the purpose of the Act is to permit "a tax credit *for each new high-wage economic-based job*." *See* NMSA 1978, Section 7-9G-1 (A) (2013) (Emphasis Added). Since permitting a Credit for any other type of job under the Act would contradict the

statute and the Legislature's clearly expressed intentions, it is reasonable to imply a grant of authority that empowers the Department to examine whether a high-wage job is genuinely "new" within the meaning of the statute. With regard for such an implication, "[i]t is, of course, a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom." *See Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, ¶6, 83 N.M. 757, 758, 497 P.2d 968, 969.

Notwithstanding the authority recognized in *Wimberly*, the Legislature has also expressly authorized the Department, for the purpose of enforcing any statute administered under the provisions of the Tax Administration Act, to examine and require the production of pertinent records, books, information or evidence concerning the subject matter of its inquiry. *See* NMSA 1978, Section 7-1-4 (2005). In this case, the Act clearly comes within the provisions of the Tax Administration Act. *See* NMSA 1978, 7-1-2 (A) (16).

Nevertheless, Taxpayer correctly notes that the process by which the Department evaluates whether a high-wage job is new, has not been promulgated in conformity with the State Rules Act, NMSA 1978, Sections 14-4-1 to – 11. This raises the question of whether or not the analysis is a "rule" under NMSA 1978, Section 14-4-2. Once again, the meaning of a statute is derived from the plain meaning of the words selected by the Legislature.

The definition of "rule" is broad. *See State v. Ellis*, 1980-NMCA-187, ¶11, 95 N.M. 427, 622 P.2d 1047 *cert. denied*, 95 N.M. 426, 622 P.2d 1046 (1981). Excluding specific exceptions not applicable to the matter at hand, a "rule" is defined as follows at NMSA 1978, Section 14-4-2 (C):

> "rule" means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and

> purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency.

The Hearing Officer is not persuaded that the analysis described by the testimony comes within the definition of "rule" under the State Rules Act. Despite the informal use of a somewhat-sounding formal and technical term, "replacement analysis," the evidence established a process that is far from either. The evidence established that the analysis relies on the built-in functions of Microsoft Excel, a common spreadsheet application, to extrapolate and comprehend data. The auditor utilizes the sort and filter functions within the program to visualize the jobs by various categories, including job titles, hire dates, and termination dates. This readily enables an auditor to identify jobs that may not be newly created, which is an essential function of the auditor. "'To audit' means to examine and verify, as an account or accounts. In its broad sense 'audit' means to hear, examine, and determine a claim or claims by their allowance or disallowance or rejection in toto, or in part." *See State ex rel. Heglar v. Wheeler*, 146 Wash. 513, 514, 263 P. 946 (1928); *See also Black's Law Dictionary*, 150 (9th ed. 2009) ("Audit" is "[a] formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards.").

In contrast to a rule, the so-called "replacement analysis" does not explicitly or implicitly implement or interpret law in a manner that affects one or more agencies or persons not members or employees of the issuing agency. It is merely a technique utilized for extrapolating data from a spreadsheet in aid of perceiving indicators of whether a high-wage job, for which a tax credit is claimed, is genuinely new or perhaps a replacement. The authority to make that determination is both express and implied because whether or not a high wage job is new is a threshold inquiry under the Act. In other words, even where as in the present matter, a taxpayer satisfies all of the other

conditions for eligibility, the Legislature has only permitted "a tax credit *for each new high-wage economic-based job*." *See* NMSA 1978, Section 7-9G-1 (A) (2013).

The so-called "replacement analysis" does not determine whether a taxpayer will be disqualified from receiving the Credit. The evidence established that it primarily identifies jobs in which it may be appropriate to make additional inquiries. For example, in situations where the evaluation identifies high-wage jobs that may not be new within the purpose of the Act, the Department provides an opportunity for a taxpayer to provide further explanation or to submit additional information. [Testimony of Mr. Valenzuela; Testimony of Ms. Florence]. However, such additional explanation or information may not always resolve a question to the satisfaction of either party. Where a taxpayer's application, or any part thereof is disallowed, the taxpayer is entitled to file a protest, as Taxpayer did in this matter.

Even if there were some aspect of the Department's evaluation that came within the definition of "rule," the Department's implementation of the law in the absence of rules promulgated under the State Rules Act would not be void absent some contradiction of the controlling law. *See Dir., Labor & Indus. Div., N.M. DOL v. Echostar Communs. Corp.*, 2006-NMCA-047, ¶14, 139 N.M. 493, 134 P.3d 780, *citing Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal.4th 557, 59 Cal.Rptr.2d 186, 927 P.2d 296 (1996) ("If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with [required administrative procedures], then we would undermine the legal force of the controlling law.") Under the facts of this protest, the Hearing Officer perceives no contradiction of the law.

As previously stated, Taxpayer's evidence and arguments did not attempt to rebut the Department's underlying determinations which resulted in the partial denial of its Application.

Taxpayer instead challenged the Department's interpretation and implementation of the law. However, Courts not only confer a greater weight to an agency's interpretation of a statute, but give a heightened degree of deference to an agency's interpretation if the statute implicates special agency expertise or reference to an agency's policies. *See Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶12, 120 N.M. 579, 904 P.2d 28.

In this case, the Department has determined that verifying whether or not a high-wage job is new is essential for the purpose of determining whether a taxpayer is entitled to the Credit. The Department's perception of its duty to verify such information is reasonable and consistent with its grant of authority provided in the statute, which also provides that "an eligible employer shall apply to the taxation and revenue department *on forms and in the manner prescribed by the department*." *See* NMSA 1978, Section 7-9G-1 (J) (2013) (Emphasis Added).

An interpretation of the Act that restricts the Department's ability to thoroughly scrutinize the contents of an application is inconsistent with the plain meaning of the statute, and would require that the Act be construed in favor of Taxpayer contrary to the directive in *Team Specialty*.

For these reasons, and because Taxpayer has not carried the burden of proving that it was entitled to the claimed credit, the protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's partial denial of the Application for Credit, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Scheduling Hearing occurring on September 2, 2016 satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

C. Taxpayer did not establish an entitlement to the High Wage Jobs Tax Credit as to 23

purported new high-wage jobs, representing 31 qualifying periods. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't,* 2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4 (Tax credits are legislative grants of grace to a taxpayer that must be narrowly interpreted and construed against a taxpayer).

For the foregoing reasons, Taxpayer's protest **IS DENIED**.

DATED: March 23, 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 23, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interdepartmental Mail*