STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
HARRIS CORPORATION
TO DENIAL OF HIGH WAGE JOB TAX CREDIT ISSUED UNDER
LETTER ID NOs. L1924638000, L0597968176 and L0850896176

v. **D&O 18-35**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing in the above-captioned protest occurred on August 14, 2018 before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. Mr. Wade Jackson, Esq. (Sutin, Thayer & Browne, P.C.) appeared representing Harris Corporation (Taxpayer) and was accompanied by Ms. Vanessa Sanz and Ms. Lisa Leff from Harris Corporation, and Ms. Brandi Price and Mr. Vaqar Khan from ADP, LLC. Ms. Sanz and Ms. Price testified as witnesses for Taxpayer.

Mr. David Mittle, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (Department). Ms. Amanda Carlisle, protest auditor, was present and testified as the Department's only witness. Department employees, Ms. Priscilla Castro and Ms. Regina Ryanczak, Esq., were present for observation and training purposes only and did not participate in the hearing.

On September 28, 2018, the Department filed Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law and Taxpayer filed Harris Corporation's Proposed Findings of Fact and Conclusions of Law.

Taxpayer Exhibits 1, 2, 3, 5, 7, 9, 11, 12, 13, 14, 15, 16 and Department Exhibits A, B and C were admitted into the evidentiary record. All exhibits are described in the Administrative

Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 12, 2013, Exelis, Inc. executed an Application for High Wage Jobs Tax Credit seeking a total high wage jobs tax credit in the amount of $2,773,542.83 for 313 periods between November 7, 2011 and April 24, 2013 ("Exelis Application"). [*See* Taxpayer Exhibit 1; Taxpayer Exhibit 2].

2. The Exelis Application only included the initial-qualifying periods of jobs for which Exelis, Inc. sought the High Wage Jobs Tax Credit. It did not include subsequent qualifying periods. [*See* Taxpayer Exhibit 1; Taxpayer Exhibit 2].

3. Exelis, Inc. was an entity engaging in business similar to Taxpayer, and could be characterized as one of its competitors. [Testimony of Ms. Sanz].

4. On or about May 29, 2015, Taxpayer acquired Exelis, Inc. [Testimony of Ms. Sanz; *See* Taxpayer Exhibit 14].

5. After acquiring Exelis, Inc., Taxpayer took control of its business operations. It retained jobs created by Exelis, Inc. in New Mexico, and continued to employ the individuals occupying those jobs. [Testimony of Ms. Sanz].

6. The Exelis Application was fully approved on September 24, 2015 under Letter ID No. L0089204784. [Testimony of Ms. Sanz; Testimony of Ms. Price; *See* Taxpayer Exhibit 3].

7. By approving the Exelis Application, the Department was satisfied that Exelis, Inc. had wholly established right and entitlement to the credit for which application was made.

8. On December 22, 2016, Taxpayer executed an Application for High Wage Jobs Tax Credit seeking a total high wage jobs tax credit in the amount of $1,932,653.95 for 253 periods

between November 8, 2012 and April 11, 2014 ("Harris Application 1"). [*See* Administrative File; Taxpayer Exhibit 5].

9. Harris Application 1 contained the second qualifying periods for the same jobs and same employees subject of the Exelis Application. [Testimony of Ms. Sanz; Testimony of Ms. Price; *See* Taxpayer Exhibit 5; Taxpayer Exhibit 2].

10. On December 22, 2016, Taxpayer executed an Application for High Wage Jobs Tax Credit seeking a total high wage jobs tax credit in the amount of $1,821,620.40 for 216 periods between November 8, 2013 and April 25, 2015 ("Harris Application 2"). [*See* Administrative File; Taxpayer Exhibit 7].

11. Harris Application 2 contained the third qualifying periods for the same jobs and same employees subject of the Exelis Application and Harris Application 1. [Testimony of Ms. Sanz; Testimony of Ms. Price; *See* Taxpayer Exhibit 5; Taxpayer Exhibit 7; Taxpayer Exhibit 2].

12. On December 22, 2016, Taxpayer executed an Application for High Wage Jobs Tax Credit seeking a total high wage jobs tax credit in the amount of $1,284,213.65 for 179 periods between November 10, 2014 and April 12, 2016 ("Harris Application 3"). [*See* Administrative File; Taxpayer Exhibit 9].

13. Harris Application 3 contained the fourth and final qualifying periods for the same jobs and same employees subject of the Exelis Application, Harris Application 1, and Harris Application 2. [Testimony of Ms. Sanz; Testimony of Ms. Price; *See* Taxpayer Exhibit 5; Taxpayer Exhibit 7; Taxpayer Exhibit 9; Taxpayer Exhibit 2].

14. If an eligible employee vacated a previously-approved job, Taxpayer abandoned its claim for credit as to that specific job. Accordingly, Harris Applications 1, 2, and 3 (collectively "Harris Applications") did not seek credit for new employees who replaced previous employees

for whom the credit was previously approved, even if the position that the new employee occupied was still eligible for a credit. [Testimony of Ms. Price].

15. Taxpayer's decision not to seek credit for new employees hired into previously approved, eligible new high-wage jobs was motivated by Taxpayer's desire to simplify evaluation of its applications, and avoid areas of potential dispute. [Testimony of Ms. Sanz; Testimony of Ms. Price].

16. Consequently, the total number of employees with high wage positions on the last day of each qualifying period appeared to decline from the total established in each previous qualifying period, although it still exceeded the total number of jobs on the day prior to the date the new high wage economic based job was created. [Testimony of Ms. Price; *See* Harris Applications; Taxpayer Exhibits 1, 2, 5, 7, 9].

17. On April 7, 2017, the Department denied the Harris Applications under Letter ID Nos. L0597968176, L0850896176, and L1924638000. [*See* Administrative File; Taxpayer Exhibit 11].

18. The denials were based on the determination that the Harris Applications were untimely. [Testimony of Ms. Carlisle; *See* Department Exhibits A, B and C].

19. If the Department considered any other factors in the denial of the Harris Applications, those factors were not evident from the denial letters under Letter ID Nos. L0597968176, L0850896176, and L1924638000 or the narratives that apparently accompanied the denials. [*See* Department Exhibits A, B, and C].

20. On July 3, 2017, Taxpayer executed a protest of the denial of its applications. The protest was received in the Department's protest office on July 12, 2017 and asserted that the Harris Applications were timely filed contrary to the Department's conclusion. [*See*

Administrative File].

21. On July 27, 2017, the Department acknowledged the Taxpayer's protest under Letter ID No. L1345613104. [*See* Administrative File].

22. On September 11, 2017, the Department filed a Hearing Request in which it requested a scheduling hearing for the purpose of setting a date for a hearing on the merits of Taxpayer's protest and establishing associated prehearing deadlines. [*See* Administrative File].

23. The amount in controversy represented the sum of the denied credits in the amount of $5,038,488.00. [*See* Administrative File].

24. On September 11, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a telephonic scheduling hearing for October 6, 2017. [*See* Administrative File].

25. On October 6, 2017, a telephonic scheduling hearing occurred for which Taxpayer did not appear. The hearing occurred within 90 days of Taxpayer's protest being acknowledged by the Department. [*See* Administrative File; Record of Hearing 10/6/2017].

26. On October 6, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, set a hearing on the merits of Taxpayer's protest for April 9, 2018. [*See* Administrative File].

27. On March 9, 2018, Taxpayer filed Harris Corporation's Motion for Partial Summary Judgment. [*See* Administrative File].

28. On March 15, 2018, Taxpayer filed Taxpayer's Motion to Convert hearing on the Merits into Summary Judgment Hearing and to Hold Hearing on the Merits in Abeyance. [*See* Administrative File].

29. On March 21, 2018, the Department filed Department's Response to Taxpayers Motion to Convert Hearing on the Merits into Summary Judgment Hearing and to Hold Hearing on the Merits in Abeyance. [*See* Administrative File].

30. On March 21, 2018, the Department filed Department's Response to Motion for Partial Summary Judgment. [*See* Administrative File].

31. On March 26, 2018, the parties filed a Joint Prehearing Statement. [*See* Administrative File].

32. On March 27, 2018, the Hearing Officer entered an Order Denying Taxpayer's Motion to Convert Hearing on the Merits into Summary Judgment Hearing and to Hold Hearing on the Merits in Abeyance. [*See* Administrative File].

33. On March 29, 2018, Taxpayer filed taxpayer's Motion to Continue Hearing stating that counsel recently entered his appearance on March 9, 2018 and required additional time to prepare. [*See* Administrative File].

34. On March 30, 2018, the Department filed Department's Response to Taxpayer Motion to Continue Hearing. The Department did not oppose the request for a continuance. [*See* Administrative File].

35. On April 3, 2018, the Administrative Hearings Office entered a Continuance Order and Amended Notice of Administrative Hearing. [*See* Administrative File].

36. On July 10, 2018, the Administrative Hearings Office entered an Order Denying Harris Corporation's Motion for Partial Summary Judgment and Motion for Leave to File Motion for Partial Summary Judgment. [*See* Administrative File].

37. On August 2, 2018, the parties filed a Joint Prehearing Statement. [*See* Administrative File].

38. Ms. Vanessa Sanz is the senior tax manager for Taxpayer and has served in that capacity for approximately 7 years. [Testimony of Ms. Sanz].

39. Taxpayer is engaged in the business of manufacturing high-tech communications systems for governmental agencies, including the U.S. Department of Defense, National Aeronautics and Space Administration (NASA), U.S. Customs and Border Protection, and the Federal Aviation Administration (FAA). [Testimony of Ms. Sanz; *See e.g.* Taxpayer Exhibits 15 and 16].

40. Taxpayer employs approximately 23,000 employees in the United States and abroad, of which approximately 9,000 are engineers and scientists. [Testimony of Ms. Sanz].

41. Taxpayer's corporate headquarters is in Melbourne, Florida where it employs approximately 6,000 of its 23,000-employee workforce. [Testimony of Ms. Sanz].

42. Taxpayer employs less than 500 individuals in New Mexico. [Testimony of Ms. Sanz].

43. Taxpayer operates in nearly every state and internationally, and generates approximately $8 billion in revenue per year. [Testimony of Ms. Sanz].

44. Gross revenue generated from activities in New Mexico is less than two percent of Taxpayer's total global revenue. [Testimony of Ms. Sanz].

45. Invoices for Taxpayer's services, and payments for those services are generated in Virginia or Florida, and remitted to Virginia or Florida. [Testimony of Ms. Sanz].

46. In New Mexico, Taxpayer operates the Tethered Aerostat Radar System (TARS) which is used for a variety of purposes, including detection of activities in areas where smuggling may be prevalent along the United States-Mexico border. Taxpayer's primary client for the TARS program is U.S. Customs and Border Protection. [Testimony of Ms. Sanz; *See* Taxpayer Exhibit

15].

47. In New Mexico, Taxpayer operates the Space Communications Network Services (SCNS) which provides communications for a variety of earth-orbiting craft and equipment, including the International Space Station and Hubble Space Telescope. Taxpayer's primary client for the SCNS program is NASA. [Testimony of Ms. Sanz; *See* Taxpayer Exhibit 16].

48. NASA and U.S. Customs and Border Protection operate on a national, if not a global level. The product of the services of TARS and SCNS is transmitted to the client-agency for use in their respective national or global missions, although data generated by the TARS program may also be transmitted back to law enforcement agencies in New Mexico for local border protection operations. [Testimony of Ms. Sanz].

49. Data generated by the SCNS program would similarly be transmitted to NASA which might use it anywhere it had a presence, including orbiting space craft. [Testimony of Ms. Sanz].

50. Taxpayer's employees in New Mexico, subject of the Exelis Application as well as the Harris Applications, concentrated their work primarily on TARS and SCNS. [Testimony of Ms. Sanz].

51. All jobs subject of the Harris Applications were occupied for 48 weeks out of each qualifying period. [*See* Taxpayer Exhibits 5, 7, and 9; Testimony of Ms. Price].

52. All jobs subject of the Harris Applications satisfied the minimum wages required to be eligible for the credit. [*See* Taxpayer Exhibits 5, 7, and 9; Testimony of Ms. Price].

53. All jobs subject of the Harris Applications were occupied by New Mexico residents. [*See* Taxpayer Exhibits 5, 7, and 9; Testimony of Ms. Price].

54. All jobs subject of the Harris Applications were occupied by eligible employees.

[*See* Taxpayer Exhibits 5, 7, and 9; Testimony of Ms. Price].

DISCUSSION

A preliminary issue in this protest concerns the choice of law governing the Harris Applications, which will specifically determine whether they were timely submitted, or untimely and therefore barred. The dispute in controlling law arises by virtue of an amendment to the High-Wage Jobs Tax Credit Act in 2016 which modified the period of time and deadlines for an employer to submit an application for a high-wage jobs tax credit.

Whether the protest is controlled by the 2013 or 2016 version of the High-Wage Jobs Tax Credit Act.

The solitary reason specified for the denial of the Harris Applications was their alleged untimeliness. *See* Department Exhibit A, B, and C. If additional factors contributed to the denial of the Harris Applications, the influence of those factors was undetermined as of the date the denials occurred.

With regard for the issue of timeliness, the Department reasoned that a 2016 amendment to the High-Wage Jobs Tax Credit Act had established new deadlines for submission of the applications, which Taxpayer failed to satisfy. Consequently, the 2016 amendment to the High-Wage Jobs Tax Credit Act would preclude the consideration of two of the three Harris Applications, and a significant portion of the third, if it applied.

In contrast, the Harris Applications would be timely if the 2013 version of the High-Wage Jobs Tax Credit Act continued to govern. Therefore, it is critical to determine which version of the Act controls.

Under the 2013 version of the High-Wage Jobs Tax Credit Act (hereinafter "2013 Act"), an applicant was required to "apply for approval of the credit after the close of the qualifying

period, but not later than twelve months following the end of the calendar year in which the taxpayer's final qualifying period close[d]." *See* NMSA 1978, Section 7-9G-1 D (2013).

Accordingly, a taxpayer could submit applications for its initial qualifying period in addition to its three subsequent periods no later than one year from the date the final period closed. In this protest, the initial periods closed in 2012 and 2013. They were presented in the Exelis Application submitted on or about June 12, 2013, and eventually approved on September 24, 2015.

Credits for the remaining unclaimed periods could have thereafter been claimed annually, or in bulk so long as they were claimed no later than one year from the end of the calendar year in which the final period closed. The evidence in this protest established that the final periods closed in 2016, therefore permitting Taxpayer through December 31, 2017 to apply for all remaining and eligible credits, if the 2013 Act applies.

However, on September 30, 2016, the 52nd Legislature of the State of New Mexico convened for the second special session of 2016. One purpose of the second special session was to address concerns with the status of the state budget.[1] On that very same day, Sen. John Arthur Smith and Sen. Carlos R. Cisneros introduced Senate Bill 6 (hereinafter "SB 6") which proposed an amendment to the 2013 Act. By October 6, 2016[2], it passed both chambers of the legislature and was sent to the governor for final action. The governor signed SB 6 on October 19, 2016. Because it contained an emergency clause[3], SB 6 became effective immediately.

Consequently, within three weeks of its introduction, SB 6 was law. One of its changes

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[1] *See* Proclamation, Second Special Session 2016, available at http://www.sos.state.nm.us/uploads/files/2016%20Special%20Session%20Proclamation.pdf

[2] https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=6&year=16s

[3] Section 10 of SB 6 stated "It is necessary for the public peace, health and safety that this act take effect immediately."

would require taxpayers to submit credit applications on an annual basis, rather than permitting an application in bulk at the end of four years of accumulated qualifying periods. *See* NMSA 1978, Section 7-9G-1 D (2016). The parties do not dispute that the intended outcome of this specific amendment was to enable the State to more accurately forecast and anticipate the fiscal impact of the credit to the State budget on an annual basis.

The 2016 Act presently requires an annual application presenting all qualifying periods that closed during the calendar year for which the application is made, and provides that any qualifying period that did not close in the calendar year for which the application is made must be denied. The deadline for submitting an application for qualifying periods closing in a calendar year is the last day of the following calendar year. Accordingly, the deadline for submitting an application for qualifying periods closing at any time in 2015 would be the last day of 2016. Likewise, the deadline for submitting an application for qualifying periods closing at any time in 2016 would be the last day of 2017, and so on. *See* NMSA 1978, Section 7-9G-1 D (2016).

The quandary is that Taxpayer, under the 2013 Act, was not required to file the Harris Applications until the end of the calendar year following the calendar year in which its final qualifying period closed. Under the facts of this protest, that deadline would have been *December 31, 2017* with respect to all of the Harris Applications. Therefore, the Department asserts that the 2016 Act foreclosed consideration of applications that may have been proper, but not submitted by the end of 2016. *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Proposed Finding Nos. 6 - 7. Consequently, the Department seems to argue that Taxpayer's ability to submit its applications perished with the stroke of the governor's pen, except for those employees whose final qualifying period closed in 2016, but even those portions of Harris Application 3 were denied.

In response, Taxpayer asserts that the Harris Applications are timely because Section 8 of SB 6 applies only to new applications addressing new jobs, or in other words, new jobs in which the initial qualifying period closed on or after January 1, 2017. Section 6 addressing the application of SB 6 provides that the amendment should "apply to applications for a high-wage jobs tax credit *for a new high-wage economic-based job filed with the taxation and revenue department on or after January 1, 2017*." *See* 2016 (2nd S.S.), ch. 3, sec. 8.

The starting point for resolving this dispute resides in the plain wording of the law. 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, 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.

Adhering to the foregoing, the Hearing Officer finds that the Legislature's intentions were clearly embodied in the language used in the 2016 enactment when it expressed the intention that the 2016 Act "apply to applications for a high-wage jobs tax credit *for a new high-wage economic-based job* filed with the taxation and revenue department on or after January 1, 2017." The effect of this language was to apply the 2016 Act prospectively to new jobs which would be seeking a credit for their initial qualifying period on or after January 1, 2017. It did not terminate a taxpayer's opportunity to submit applications which were ripe and timely under the 2013 Act. Had the Legislature intended that consequence, it would have stated so in clear and unambiguous terms, but it did not.

Furthermore, accepting the Department's interpretation of the 2016 Act with respect to its effect on the Harris Applications would require that the Hearing Officer disregard the emphasized portion of the statute as surplusage or superfluous contrary to the rules of statutory construction. *See Katz v. N.M. Dep't of Human Servs., Income Support Div.*, 1981-NMSC-012, ¶18, 95 N.M. 530, 624 P.2d 39 (a statute must be construed so that no part of the statute is rendered surplusage or superfluous).

If the Legislature intended that the 2016 Act apply to all applications, then it would not have inserted the descriptive phrase "*for a new high-wage economic-based job*," and it could have achieved the result the Department suggests by simply stating that the 2016 Act should "apply to applications for a high-wage jobs tax credit filed with the taxation and revenue department on or after January 1, 2017." This language would have mimicked its approach to the application of the 2013 Act. *See e.g.* 2013, ch. 160, sec. 14(e).

The Department places considerable reliance on Decision and Order 18-20 ("D&O 18-20")

addressing the protest of Raytheon Company. However, the facts relevant to *Raytheon* are wholly distinguishable because that matter involved a conflict between the application of the 2013 Act and its predecessor. Coincidentally, the Department acknowledged the protest in that matter the very same day that the Legislature convened for the second special session that would eventually produce the 2016 Act at issue in this protest. *See* D&O 18-20, Finding of Fact No. 6. Accordingly, all material facts in *Raytheon* were firmly established well before the Legislature enacted the 2016 Act.

Despite that significant distinction, the Department partly quoted D&O 18-20 in reference to the application of the 2016 Act, stating:

> In this regard, 2016 SB 6 Section 8 "notified the public that it would apply to claims made after its effective date, thereby providing an opportunity for potential claimants, including [Harris Corporation], to submit applications before that date, in order for them to be evaluated under the prior law. This observation is significant because had there been genuine concern for the effect of the [2016 enactment, Harris Corporation] had ample opportunity to submit its Applications under the previous version of the Act, but did not do so. *In the Matter of the Protest of Raytheon*, 2018 WL 3434602, at *9.
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> *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 11.

The undersigned Hearing Officer administratively notices that he also presided in the matter of *Raytheon* and drafted the language upon which the Department's quotation is based. That paragraph *was specifically in reference to the 2013 Act*, as applied to the unique facts of that protest, *not the 2016 Act*, and it stated *exactly* as follows at page 14 of D&O 18-20:

> In this regard, 2013 N.M. Ch. 160, Sec. 14 notified the public that it would apply to claims made after its effective date, thereby providing an opportunity for potential claimants, including Taxpayer, to submit applications before that date, in order for them to be evaluated under the prior law. This observation is significant because had there been genuine concern for the effect of the 2013 enactment, Taxpayer had ample opportunity to submit its Applications under the previous version of the Act, but did not do so.

The Hearing Officer would not generally call out the use of a quotation in this manner, if the circumstances could be perceived as analogous. However, the 2016 Act took effect *immediately* upon the governor's approval, while the 2013 Act was signed on April 4, 2013[4], but did not take effect until June 13, 2013, which provided the window of notice and opportunity to which the quotation in *Raytheon* spoke. In contrast, the 2016 Act took *immediate* effect, less than three weeks following the commencement of the special legislative session, and it also employed different terms in reference to its intended application. The Department's reliance on the quotation in its modified form is clearly misplaced.

The facts in *Raytheon* are distinguishable for other reasons as well. First, the 2013 Act was not raised as a bar to preclude the taxpayer's application for the credit, which is the primary consequence of the 2016 Act, as asserted by the Department in this protest. Instead, the 2013 Act in *Raytheon* amended various factors effecting a taxpayer's eligibility for the credit, but it did not impose them retrospectively. Second, the 2013 Act in *Raytheon* preserved a taxpayer's ability to submit an application under the prior version of the Act, before its amendments became effective. In contrast to *Raytheon*, the consequence of the 2016 Act, as suggested by the Department, should fundamentally terminate Taxpayer's applications by moving the deadline back in time, so that compliance becomes an impossibility, a result that clearly resembles an improper retrospective application of the law that the Legislature did not intend.

The Legislature intends that its enactments be applied prospectively only, unless it expressly states otherwise. *See* NMSA 1978, Section 12-2A-8A ("A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires

[4] https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=641&year=13

that it operate retrospectively.") There is no clear statement of intent, nor indication from the context of the 2016 Act that the Legislature intended it to apply retrospectively.

The next question requires closer examination of the context of the 2016 Act. The parties do not dispute that the primary Legislative concern underlying the 2016 Act was elimination of the "sticker shock" that resulted from a taxpayer presenting applications for several years of accumulated qualifying periods. In other words, there was no perceived desire or intent to legislatively terminate the applications of otherwise eligible employers who may have had a legitimate claim to a credit prior to the moment the governor signed the 2016 Act.

In fact, construing the 2016 Act in the manner the Department suggests could actually raise constitutional questions because it could be perceived as a local or special law prohibited by the New Mexico Constitution. *See* N.M. Const. Art. IV, Sec. 24; *See Thompson v. McKinley Cty.*, 1991-NMSC-076, ¶5, 112 N.M. 425, 816 P.2d 494 ("[a] special law is generally defined as legislation written in terms which [make] it applicable only to named individuals or determinative situations."). In this protest, the application of the 2016 Act to Taxpayer could be perceived as a local or special law because by virtue of its application to these facts, it arguably singles out and terminates the Harris Applications and others that might be similarly situated.

However, "[i]t is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." *See Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991); *See also* NMSA 1978, Section 12-2A-18 (A) (3) (a statute is construed, if possible, to avoid an unconstitutional result.); *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶8, 70 N.M. 226, 372 P.2d 808 (every presumption is to be indulged in favor of the validity and regularity of the legislative act).

Accordingly, the Hearing Officer will abstain from any inferences that the Legislature

intended a consequence that might potentially offend the constitution. Instead, the Legislature's intentions were to encourage employers to create and fill jobs in New Mexico while simultaneously providing a mechanism for the State to better monitor and manage the fiscal consequences of the credit. Terminating the claims of a select class of employers, in which Taxpayer was a member, would not have accomplished that purpose. In conclusion, nothing within the context of the 2016 Act suggests that the Legislature intended retrospectivity.

The Hearing Officer acknowledges that "[a]lthough the presumption of prospectivity appears straightforward, confusion often arises as to what retroactivity means in particular contexts." *See Gadsden Fed'n of Teachers v. Bd. of Educ.*, 1996-NMCA-069, ¶14, 122 N.M. 98, 920 P.2d 1052. A statute is considered retroactive if it impairs vested rights or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. *See GEA Integrated Cooling Tech. v. State Taxation & Revenue Dep't*, 2012-NMCA-010, ¶18, 268 P.3d 48. "[A] statute does not operate retroactively just because it is applied to facts and conditions existing on its effective date, even though the condition results from events that occurred prior to its enactment." *Id. citing State v. Morales*, 2010-NMSC-026, ¶9, 148 N.M. 305, 236 P.3d 24.

In *GEA*, the New Mexico Court of Appeals considered whether a 2007 amendment to the statute establishing the rate at which tax penalty was to be calculated and assessed should be applied to liabilities arising prior to its effective date, but assessed subsequent to its effective date, and whether such application gave the amendment an improper retroactive effect. *GEA* acknowledged that the Supreme Court's holding in *Crane v. Cox*, 1913-NMSC-089, ¶6, 18 N.M. 377, 137 P. 589 was dispositive, having addressed an analogous issue in which it considered whether there was an impermissible retrospective application of a new law providing for collection of delinquent taxes outstanding as of the enactment of that statue.

In its discussion, *GEA* recognized the long-standing presumption against the retroactive application of a statute, but nevertheless held that the application of a new law to pre-existing facts did not automatically give the statute retroactive effect. Relying on the reasoning in *Crane*, it agreed that "[a] statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law [is] intended to affect transactions which occurred . . . before it became operative . . . and which ascribes to them affects not inherent in their nature in view of the law in force at the time of their occurrence." *See GEA*, 2012-NMCA-010, ¶20 *quoting Crane*, 1913-NMSC-089, ¶6.

GEA summarized the holding in *Crane*, stating "the new act . . . did not operate retroactively because the operation of the statute did not affect any right the taxpayer possessed under prior law, did not change the taxpayer's status, and did not impose a consequence that was not already anticipated." *See GEA*, 2012-NMCA-010, ¶20.

In contrast to *GEA* and *Crane*, the 2016 Act, if interpreted as the Department suggests imposed a new consequence that could not have been anticipated because the 2016 Act took *immediate* effect. The consequence to Taxpayer was that the deadline to submit the Harris Applications expired before the ink forming the governor's signature dried. *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Proposed Finding Nos. 6 - 7.

From Taxpayer's vantage point, the Exelis Application had been approved in full under the 2013 Act, and Taxpayer, having acquired Exelis, Inc., assumed and occupied the same status that Exelis, Inc. occupied at the time the Exelis Application was submitted. After the acquisition, and during all times relevant to the protest, Taxpayer retained Exelis, Inc. employees in the very same positions subject of the Exelis Application, and when previously-approved employees left

previously approved high-wage jobs, Taxpayer simply abandoned any claim to the position even if the position continued to be eligible for the high-wage jobs tax credit. Without substantial change in circumstances, it was reasonable for Taxpayer under these facts to have an expectation that its applications would be accepted, evaluated on their merits, and most likely approved, in reliance on the Department's previous conduct.

Application of the 2016 Act would eviscerate Taxpayer's status under the 2013 Act and impose consequences that Taxpayer could not reasonably anticipate. Under these circumstances, the presumption of prospectivity weighs heavily in Taxpayer's favor, and the Department's arguments in contradiction of that presumption fail to persuade. The 2013 Act governs the Harris Applications.

Burden of Proof.

Having considered which version of the Act should apply to the protest at hand, it is now appropriate to discuss the burden of proof. Although the current protest does not arise from an assessment, but rather from the denial of the Harris Applications, Taxpayer bears the burden of establishing entitlement to the credit central to its protest. The New Mexico Court of Appeals has found that tax credits are legislative grants of grace 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. 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).

<u>Basis for Denial of Harris Applications.</u>

Department Exhibits A, B, and C, state rather clearly that the sole basis for the denial of the Harris Applications is the fact that the Department perceived them as untimely. There is no indication that the Department based the denial on any other factors. That is not to say that other factors were not considered, but if they were, there is no indication of what they were or how they influenced the Department's final action. The only evidence on the record indicates that *as of the time of the denials*, timing of the Harris Applications, and nothing else, was dispositive.

At the hearing, the Department asserted various reasons why Taxpayer should nevertheless fail to qualify for the credit. However, there was no reliable evidence to establish that those reasons actually contributed to the Department's denial, *at the time of the denial*. *See* Department Exhibits A, B and C.

The Department previously approved the Exelis Application which contained all of the employees that were subsequently included in the Harris Applications and the Department did not dispute, for example, that all jobs subject of the Harris Applications: (1) were occupied for 48 weeks out of each qualifying period; (2) that all jobs subject of the Harris Applications satisfied the minimum wages required to be eligible for the credit; (3) that all jobs subject of the Harris Applications were occupied by New Mexico residents; and (4) that all jobs subject of the Harris Applications were occupied by eligible employees.

The issues that the Department did dispute in reference to the merits of the Harris Applications are summarized as follows: (1) whether Taxpayer is an eligible employer by virtue of its locale and its sales; and (2) whether Taxpayer satisfied the headcount requirement. These issues were not specifically noted in any of the denials of the Harris Applications. *See* Department Exhibits A, B, and

C. The Hearing Officer will nevertheless address them below.

Whether Taxpayer is a "New Mexico" Business.

The most significant development from the time the Department approved the Exelis Application to the time it denied the Harris Applications was Taxpayer's acquisition of Exelis, Inc. However, that alone would not preclude Taxpayer from qualifying for the credit so long as the acquired positions retained their eligibility. *See* NMSA 1978, Section 7-9G-1 G (2013).

However, the Department argued that the credit conferred by the 2013 Act, as well as the 2016 Act for that matter, was limited to *New Mexico businesses*. In other words, an out-of-state entity creating high-wage economic based jobs in New Mexico is not eligible for the credit because the Department construes NMSA 1978, Section 7-9G-1 B as limiting eligibility to urban and rural businesses in New Mexico. The Department claimed Taxpayer was not a New Mexico business because it is based in another state and employees less than 500 of its 23,000-employee workforce in New Mexico.

The Department relies on NMSA 1978, Section 7-9G-1 B which 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 economic-based jobs *in New Mexico*." *See* NMSA 1978, Section 7-9G-1 B (2013) (Emphasis Added). The Department claims the phrase "urban and rural" describes locations within New Mexico where eligible businesses must be established. In support of its construction, the Department argued "[t]he words 'urban and rural businesses' are very important. If one were to eliminate them, the statute reduces to[:] 'to provide an incentive […] to create and fill new high-wage economic-based jobs in New Mexico.'" *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 29.

The Department concludes:

> Given that no words in a statute are surplusage, the words must be included and the legislative intent becomes clear - "to provide an incentive for [New Mexico] urban and rural businesses to create and fill new high-wage economic-based jobs in New Mexico." (Yes, it could be urban and rural business located anywhere, but that would result in an absurd result.) *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, ¶14, 96 N.M. 354, 630 P.2d 753 (Citing the rule of statutory construction that no part of a statute should be construed so that it is rendered surplusage.) (citation omitted).
>
> *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 30 (brackets and parentheticals included in original).

The Department's perception of Section 7-9G-1 B is erroneous. It does not limit eligibility to New Mexico businesses. Had there been a genuine intention to limit the credit to New Mexico businesses, at the exclusion of all others, the Legislature would have specifically said so in its definition of "eligible employer." *See* NMSA 1978, Section 7-9G-1 M (3).

Instead, the Legislature's reference to "urban and rural" areas simply conveyed its objective to encourage business to create and fill new high-wage jobs in those areas, as demonstrated by the fact that it established the amounts of available credit by reference to area population. *See* NMSA 1978, Section 7-9G-1 M (5) (2013).

Interpreting the phrase "urban and rural" in this manner does not render the term superfluous or surplusage as submitted by the Department. In contrast, the Department's position literally inserts words into an otherwise clear and unambiguous statute that the Legislature did not see fit to insert. *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 30; *See Johnson*, 1999-NMSC-021, ¶27; *See also Amoco*, 1994-NMCA-086, ¶8 & ¶14.

Moreover, the Department's interpretation fails to conform to ordinary rules of grammatical construction regarding prepositional phrases. "According to standard rules of grammar,

prepositional phrases modify those nouns or verbs closest to the phrase." *See e.g. In re the disp. of: A Brown Ford Pickup Truck*, NO. 1403, 1983 Ohio App. LEXIS 13586, at *5 (Ct. App. July 7, 1983); *See United States v. Nader*, 542 F.3d 713, 717-18 (9th Cir. 2008) ("A prepositional phrase with an adverbial or adjectival function should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings.") (*citing William Strunk, Jr. & E. B. White*, The Elements of Style 30 (4th ed. 2000)).

In this scenario, the prepositional phrase ("in New Mexico") modifies the phrase closest to it ("new high-wage economic-based jobs"). *See also Envtl. Improvement Div. of N.M. Health & Env't Dep't v. Bloomfield Irrigation Dist.*, 1989-NMCA-049, ¶11-14, 108 N.M. 691, 778 P.2d 438 (interpreting a regulation according to the clause that the prepositional phrase modified). *See also State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975 (holding that striking a prepositional phrase from a bill amounted to an alteration to its meaning and was not an appropriate exercise of the veto power to disapprove or to destroy an item).

In addition to the basic grammatical analysis, the Department's construction doesn't accurately reflect the Legislature's intent behind establishing the credit, which was to maximize high-wage employment opportunities for New Mexico residents in urban and rural areas by providing an incentive for businesses to create those opportunities. Instead, the Department's interpretation dis-incentivizes out-of-state businesses, similarly situated to Taxpayer, which have the resources and desire to create high-wage jobs in New Mexico and employ its residents in those jobs. Although the Department minimizes the total number of employees Taxpayer retains in New Mexico by comparison to its global workforce, Taxpayer nevertheless employs hundreds of New Mexico residents, which even if less than 500 total, represents a significant figure of employed New Mexicans. Considering the foregoing, the Department's interpretation produces an absurd

result in direct opposition to the stated purpose of the statute. *See In the Matter of the Protest of Old Dominion Freight Lines*, Administrative Hearings Office, D&O 18-35 (non-precedential).

The Hearing Officer is not persuaded that Taxpayer should be disqualified from eligibility under Section 7-9G-1 B because it is not based in New Mexico, and therefore not a New Mexico business.[5]

Whether Taxpayer was an Eligible Employer by virtue of sales or other eligibility.

The Department asserted that Taxpayer failed to prove that it was an "eligible employer" under NMSA 1978, Section 7-9G-1. Under the 2013 Act, an "eligible employer" means an employer that "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[.]" *See* NMSA 1978, Section 7-9G-1 M (3) (a) (2013). (Emphasis Added).

The 2016 Act revised the definition of "eligible employer" to require that "more than fifty percent of its goods produced in New Mexico or non-retail services performed in New Mexico" be sold and delivered to persons outside New Mexico, "provided that the fifty percent of those goods or services is measured by the eligible employer's gross receipts." *See* NMSA 1978, Section 7-9G-1 Q (6) (a) (2016). Although the 2013 Act applies, Taxpayer nevertheless satisfied both standards.

Taxpayer established that its gross revenue generated through its global operations exceeded $8 billion. Taxpayer presented evidence to establish that less than two percent of that

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[5] The record does not indicate where Exelis, Inc. was headquartered. However, administrative notice may be taken that it was incorporated in the State of Indiana and conducted business in New Mexico as a Foreign Profit Corporation, and its application was approved. *See* Business ID No. 4510607 at https://portal.sos.state.nm.us/BFS/online/CorporationBusinessSearch/CorporationBusinessInformation. Taxpayer is incorporated in the State of Delaware and similarly conducts business in New Mexico as a Foreign Profit Corporation. *See* Business ID No. 1636877.

revenue is attributed to its activities in New Mexico. Although two percent may seem insignificant on its face, in this protest it represents approximately $160 million of New Mexico-generated gross revenue from services *produced in New Mexico*, nearly all of which all were sold and delivered to entities outside New Mexico. Taxpayer is an eligible employer under the 2013 Act and would similarly qualify under the 2016 Act, if it applied.

The Hearing Officer will not consider Taxpayer's alternate argument that it was eligible for development training program assistance pursuant to NMSA 1978, Section 21-19-7. None of the applications asserted eligibility in reliance on that factor. In fact, each application responded "No" in reference to the inquiry of whether the "Employer was eligible for JTIP assistance [.]" *See* Taxpayer Exhibits 5, 7, and 9.

Headcount.

The Department argued that Taxpayer lacked evidence to establish that its headcount was increasing from year-to-year. However, the Department reads requirements into the statute which are not there. The 2013 Act provides that "[a] new high-wage economic-based job shall not be eligible for a credit pursuant to this section unless the eligible employer's 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 is at least one more than the number on the day prior to the date the new high-wage economic-based job was created." *See* NMSA 1978, Section 7-9G-1 E (2013).

Accordingly, the statute measures headcount against the number of jobs "on the day prior to the date the new high-wage economic-based job was created." It does not measure headcount against the number of jobs in the immediately-adjacent period. Taxpayer Exhibits 5, 7, and 9 establish that Taxpayer satisfied this requirement.

The 2016 Act would amend this requirement to require that "[a] new high-wage economic-based job shall not be eligible for a credit pursuant to this section for a consecutive qualifying period unless the total number of threshold jobs at a location at which the job is performed or based on the last day of that qualifying period is greater than or equal to the number of threshold jobs at that same location on the last day of the initial qualifying period for the new high-wage economic-based job." However, this amendment does not apply to Taxpayer under the 2013 Act. In fact, the Department's argument on this issue appears to rely solely on the 2013 Act, not the 2016 Act. *See* Department of Taxation and Revenue's Proposed Findings of Fact and Conclusions of Law, Proposed Finding Nos. 38 – 39.

For the reasons discussed, the Harris Applications were timely submitted under the 2013 Act applicable to Taxpayer's claims. None of the alternative reasons for denying Taxpayer's protest were identified as contributing to the denial of the Harris Applications, but even if they were, the Hearing Officer is not persuaded that they render Taxpayer ineligible for the claimed credit. Taxpayer satisfied its burden and its protest should be granted.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denials of the Harris Applications for high wage jobs tax credit, and jurisdiction lies over the parties and the subject matter of this protest.

B. A scheduling hearing occurred on October 6, 2017 that satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

C. The 2013 version of the High-Wage Job Tax Credit Act governs the issues at protest. *See* 2016 (2nd S.S.), ch. 3, sec. 8; *See* NMSA 1978, Section 12-2A-8A ("A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires

that it operate retrospectively.”)

D. Taxpayer established that the Harris Applications were timely under the 2013 version of the High-Wage Job Tax Credit Act which provides that Taxpayer may “apply for approval of the credit after the close of the qualifying period, but not later than twelve months following the end of the calendar year in which the taxpayer’s final qualifying period close[d].” *See* NMSA 1978, Section 7-9G-1 D (2013).

E. Taxpayer is an eligible employer under NMSA 1978, Section 7-9G-1 M (3) (a) because 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 periods.

F. Taxpayer is not an ineligible employer because it conducts business in other locales or because it is incorporated or headquartered in another state. *See* NMSA 1978, Section 7-9G-1 M.

G. Taxpayer established its 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 was performed or based was at least one more than the number on the day prior to the date the new high-wage economic-based job was created. *See* NMSA 1978, Section 7-9G-1 E (2013).

H. Taxpayer satisfied the minimum requirement to establish right and entitlement to the credit claimed in the Harris Applications. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep’t*, 2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4

For the foregoing reasons, Taxpayer’s protest **IS GRANTED** and its applications should be approved in full.

DATED: November 2, 2018

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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 November 2, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interagency Mail*

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