STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
3D GLASS SOLUTIONS INC.
TO DENIAL OF REFUND ISSUED UNDER
LETTER ID NO. L0406539952

v. **AHO No. 20.12-144R, D&O No. 21-05**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER ON SUMMARY JUDGMENT

On July 14, 2021, and on September 2, 2021, Chief Hearing Officer Brian VanDenzen, Esq., of the Administrative Hearings Office conducted a summary judgment motions hearings in the matter of the tax protest of 3D Glass Solutions, Inc. (Taxpayer) pursuant to the Tax Administration Act and the Administrative Hearings Office Act. With agreement of the parties and in accord with the standing order addressing hearings during the pandemic, the hearings occurred via videoconference. At the hearing, Attorney Keith C. Mier of Butler Snow LLP and accountant Steven Barlett of Axiom CPAs and Business Advisors LLC appeared, representing Taxpayer. Staff Attorney David Mittle appeared, representing the opposing party in the protest, the Taxation and Revenue Department (Department).

On June 16, 2021, both parties moved for summary judgment in this protest. On June 30, 2021, both parties filed responses in opposition to the other party's respective summary judgment pleading. After the July 14, 2021, summary judgment motions hearing, on August 20, 2021, both parties filed supplementary briefing in support of their proffered statutory construction arguments in the summary judgment pleadings. The September 2, 2021, summary judgment hearing provided the parties an opportunity to argue their respective supplemental briefs and make final arguments on their respective summary judgment motions.

In quick summary, this protest involves whether the 2013 version or the 2016 version of the High Wages Jobs Tax Credit Act applied to Taxpayer's application for that credit. If the 2013 version applies, then Taxpayer would likely be entitled to the credit. However, if the 2016 version applies, then Taxpayer's application would be untimely and thus not qualify for the credit. Ultimately, after making findings of fact and discussing the issue in more detail throughout this decision, the hearing officer finds that the 2016 version of the act applies and consequently, Taxpayer's protest must be denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer produces glass-based electronic packaging and micro-components using patented photosensitive glass materials. [Administrative Record, Hearing Request Packet, Protest Letter p. 1; Ex. #1].

2. On December 31, 2019, Taxpayer filed an application for the High Wages Jobs Tax Credit ("Application") in the amount of $32,337.81. [Taxpayer MSJ Ex.#1].

3. Taxpayer's Application was for five eligible employees. [Taxpayer MSJ Ex. #1.3[1]; Taxpayer MSJ Ex. #3.1].

4. The five claims in the Application were for three jobs that had various first qualifying periods between 2014 and 2016:

   a. Engineering & Production Manager Position, first qualifying period on 4/1/2016;

   b. CFO Position, first qualifying period on 6/2/2014;

[1] Taxpayer MSJ Ex. #1.3 is extremely difficult to read; however, Taxpayer MSJ Ex. #3.1 is legible and clarifies the information contained in #1.3.

c. Senior FAB Technician 10027 Position, first qualifying period on 6/10/2014, claimed for three qualifying periods on the Application.

[Taxpayer MSJ Ex. #1.3; Taxpayer MSJ Ex. #3.1].

5. On January 8, 2020, the Department sent Taxpayer a letter requesting additional supporting documentation to substantiate Taxpayer's Application. [Taxpayer MSJ Ex. #2].

6. On January 10, 2020, Taxpayer provided the Department a Microsoft Excel workbook containing the list of qualifying periods claimed for the five claimed positions and supporting payroll data. [Taxpayer MSJ Ex. #3].

7. Supporting its Application, Taxpayer's workbook shows the respective employee names, their job position numbers, the date the qualifying position was created, the current qualifying period claimed, the number of qualified periods previously claimed by Taxpayer, the number of weeks the job was occupied during the qualifying period, the total number of employees with threshold jobs on the day prior to the job creation date and on the last day of the qualifying period, the employee's wages earned during the qualifying period, and the employee's locations for purposes of the High Wage Jobs Tax Credit Act. [Taxpayer MSJ Ex. #3].

8. Taxpayer learned that its Application would require additional review by the Department's Legal Services Bureau for the qualifying periods claimed.

9. Taxpayer requested, and the Department approved, a waiver extending the deadline for Taxpayer to submit supporting documentation until June 18, 2020.

10. On August 27, 2020, the Department partially denied the Application, and partially approved the Application in the amount of $6,049.99. [Taxpayer MSJ Ex. #4].

11. As a basis for the partial denial of Taxpayer's Application, the Department explained as follows:

> The Taxation and Revenue Department has denied your application due to not meeting the requirements pursuant to NMSA 1978, §7-9G-1(D)(2018) which provides:
>
> D. To receive a high-wage jobs tax credit, a taxpayer shall file an application for approval of the credit with the department once per calendar year on forms and in the manner prescribed by the department. The annual application shall contain the certification required by Subsection K of this section and shall contain all qualifying periods that closed during the calendar year for which the application is made. Any qualifying period that did not close in the calendar year for which the application is made shall be denied by the department.
>
> The application for a calendar year shall be filed no later than December 31 of the following calendar year. If a taxpayer fails to file the annual application within the time limits provided in this section, the application shall be denied by the department. The department shall make a determination on the application within one hundred eighty days of the date on which the application was filed.
>
> …
>
> The 2016 New Mexico Legislature enacted the requirement for a single annual application limited to all qualifying periods ending in the calendar year for which the application is made. N.M. Laws 2016 (2nd S.S.) ch. 3, §6. The requirement applies to all applications submitted on or after January 1, 2017:
>
> SECTION 8. APPLICABILITY.—The provisions of Section 6 of this 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.
>
> N.M. Laws 2016 (2nd S.S) ch. 3, §8.
>
> While NMSA 1978, § 7-9G-1 (2013), allowed applications for up to four qualifying periods in a single year, that ended with the 2016 amendment, regardless of when the first qualifying period ended. To the extent to which you may rely upon the nonprecedential Administrative Hearing Officer Decision and Order in The Protest of Harris Corporation, No. 18-35 (Nov. 2, 2018)("Harris"), the Department's position is that the Decision and Order incorrectly stated in dicta that under some circumstances on or after January 1, 2017 one could submit an application based upon qualifying periods ending in more than one calendar year. The error was to conclude that application of the 2016 amendment was tied to the single year when a new high wage economic base job was created, ignoring the numerous places in which the statute refers to applications based upon a "new high wage job" in multiple successive years following the year of creation.

[Taxpayer MSJ Ex. #4].

12. On September 9, 2020, Taxpayer timely protested the Department's partial denial of the Application. [Administrative Record, Hearing Request Packet, Protest Letter].

13. Still in dispute under Taxpayer's protest is the credit related to four of the five claimed qualifying periods, totaling $26,285.83.

14. On September 28, 2020, the Department acknowledged receipt of Taxpayer's valid protest. [Administrative Record, Hearing Request Packet].

15. On December 7, 2020, Taxpayer requested a hearing on its protest before the Administrative Hearings Office. [Administrative Record, Hearing Request Packet].

16. It does not appear in the Administrative Record that the Department ever filed its answer in response to Taxpayer's protest, as required within 30-days of Taxpayer's request for hearing under NMSA 1978, Section 7-1B-8 (D) (2019).

17. On December 7, 2020, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Hearing, assigning the case to Hearing Officer Chris Romero. [Administrative Record].

18. On December 7, 2020, the Department filed its Notice of Peremptory Excusal of Hearing Officer Romero pursuant to NMSA 1978, Section 7-1B-8 (F) (2019). [Administrative Record].

19. On December 7, 2020, the Administrative Hearings Office reassigned this case to the undersigned Chief Hearing Officer. [Administrative Record].

20. On January 22, 2021, a telephonic scheduling hearing occurred in the above-captioned matter, where the parties agreed that the hearing met the 90-day hearing requirement and the parties requested additional time to complete discovery before conducting the hearing in this matter. [Administrative Record].

21. On June 16, 2021, in accord with the deadlines set under the applicable scheduling order, Taxpayer moved for summary judgment in this protest. In support of its motion, Taxpayer provided four summary judgment motion exhibits.

22. On June 16, 2021, in accord with the deadlines set under the applicable scheduling order, the Department moved for summary judgment in this protest. In support of its motion, the Department cited Taxpayer's protest letter and hearing request packet to assert undisputed facts.

23. On June 30, 2021, both parties filed their respective responses in opposition to the opposing party's motions for summary judgment.

24. On July 14, 2021, a summary judgment motion hearing occurred. At that hearing, the hearing officer asked a series of questions related to appropriateness of considering fiscal impact reports or other contemporaneous material that might shed light on the Legislature's intent on the applicability of the 2016 amendment. In light of these questions, the parties asked for an opportunity for additional briefing and closing argument at a later date. Consequently, a briefing schedule and an additional summary judgment hearing date was set.

25. On August 20, 2021, in accord with the deadlines set under the applicable order, Taxpayer submitted its supplement summary judgment brief, with supporting brief exhibit numbers 1-3.

26. On August 20, 2021, in accord with the deadlines set under the applicable order, the Department submitted its supplement summary judgment brief.

27. On September 2, 2021, the second summary judgment motion hearing occurred in this matter.

28. During the Second Special Session of the 52nd Legislature, 2016, Senators John Arthur Smith and Carlos Cisneros introduced Senate Bill 6, a tax bill that made numerous changes, clarifications, and amendments to various tax programs. In pertinent parts (Sections 9, 10, and 11), Senate Bill 6 made changes to the High Wage Jobs Tax Credit. [Taxpayer Brief Ex. #1; *See* S. B. 6, 52nd Leg., 2nd Special Sess. (N.M. 2016), *available* at https://www.nmlegis.gov/Sessions/16%20Special/bills/senate/SB0006.pdf].

29. As originally proposed, Senate Bill 6 included two specific applicability clauses in Section 11:

> (A) The provisions of Section 9 of this act apply to applications for a high wage jobs tax credit for a new high-wage economic-based job filed with the tax and revenue department on or after January 1, 2017.
> (B) The provisions of Section 10 of this act apply to all applications for a high-wage jobs tax credit filed with the taxation and revenue department on or after the effective date of this act.

[Taxpayer Brief Ex. #1.54; *See* S. B. 6, Section 11, 52nd Leg., 2nd Special Sess. (N.M. 2016), *available* at https://www.nmlegis.gov/Sessions/16%20Special/bills/senate/SB0006.pdf].

30. The final adopted version of Senate Bill 6 struck the proposed Section 10 out of the bill, including eliminating the subparagraph B of the applicability clause. [Taxpayer Brief Ex. #2.31; Taxpayer Brief Ex. #3.56; Taxpayer Brief Ex. #4; *See* S. B. 6, Section 8, 52nd Leg., 2nd Special Sess. (N.M. 2016), *available* at https://www.nmlegis.gov/Sessions/16%20Special/final/SB0006.pdf].

31. Nevertheless, the final adopted version of Senate Bill 6 retained the following applicability clause: "[t]he provisions of Section 6 [renumbered changes to high-wage jobs tax act qualifications] of this 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. [Taxpayer Brief Ex. #3.56; *See* S. B. 6, Section 8, 52nd Leg., 2nd Special Sess. (N.M. 2016), *available* at https://www.nmlegis.gov/Sessions/16%20Special/final/SB0006.pdf].

32. The Fiscal Impact Report of Senate Bill 6, as amended by the House Ways and Means Committee and on the House Floor, indicated that the all provisions related to the high-wage jobs tax credit apply to credit applications filed on or after January 1, 2017. [See Fiscal Impact Report, p. 4, available at https://www.nmlegis.gov/Sessions/16%20Special/firs/SB0006.PDF].

DISCUSSION

Taxpayer in this protest challenges the Department's partial denial of its Application for the High Wage Jobs Tax Credit Act. The legal issue in dispute in the competing summary judgment pleadings is whether the 2013 or 2016 amendments to the High Wages Jobs Tax Credit Act apply to Taxpayer's Application filed on December 31, 2019. The amount in dispute under the partial denial is $26,285.83, the claimed credit against the wages of the four of five claimed positions/qualifying periods in Taxpayer's Application denied by the Department. While $26,285.83 at issue here is relatively small, there are many related cases held in abeyance pending resolution of the substantive question at issue in this protest.

Summary Judgment Standard

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

to the opposing party to show evidentiary facts that would require a trial on the merits. *See Roth v. Thompson*, 1992-NMSC-011, ¶17, 113 N.M. 331. The respective summary judgment pleadings of both parties establish general agreement as to the central facts in this matter, with only a few minor and largely immaterial discrepancies. The controversary here is one of law rather than law, making this protest ripe for summary judgment. *See Koenig*, ¶10-11.

Burden of Proof and Principles of Statutory Construction

Although in some respects similar to deductions and exemptions, credits generally involve more favorable tax treatment than either a deduction or an exemption. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶8, 107 N.M. 540, 760 P.2d 1306. *See also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649. *See also Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

Because of the more favorable tax treatment of a credit over a deduction or exemption, 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 (internal citations omitted). Under the rationale of *Team Specialty Prods*., Taxpayer carries the burden of proving that it is entitled to the claimed credit. Nevertheless, although a credit must be narrowly interpreted and construed against a taxpayer, it still should be construed in a reasonable manner consistent with legislative language. *See Sec. Escrow Corp.*, 1988-NMCA-068, ¶9, 107 N.M.

540 (although construed narrowly against a taxpayer, deductions and exemptions—similar to credits—are still to be construed in a reasonable manner); *see generally Chavez v. Comm'r of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97, 476 P.2d 67 (statutory constructions requires "a fair, unbiased, and reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered).

When undertaking statutory construction, the "main goal of statutory construction is to give effect to the intent of the legislature." *See Dell Catalog Sales L.P. v. Taxation & Revenue Dep't*, 2009-NMCA-0001, ¶ 19, 145 N.M. 419, 199 P.3d 863 (internal citations omitted). As such, a court may need to consider the disputed statutory language in the context of the statute's history and background. *See Valenzuela v. Snyder*, 2014-NMCA-061, ¶16, 326 P.3d 1120. A statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. *State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. 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-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333. In *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12 (internal quotations and citations omitted), the Court of Appeals stated "that 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."

It is also a principle of statutory construction that statutes should be read in harmony with other statutory provisions dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-

012, ¶22, 146 NM 14. *See also Hayes v. Hagemeier*, 1963-NMSC-095, ¶9, 75 N.M. 70 ("All legislation is to be construed in connection with the general body of law."). *See also N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533 (The Legislature is presumed to be aware of knowledge of relevant statutes and the common law and thus statutes must be read in harmony with other statutes *in pari materia*). Statutes are also interpreted with the assumption that the Legislature was in full knowledge of relevant statutory and common law. *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573 (internal citations omitted).

Only if adherence to the plain language would result in ambiguity, error, an absurdity, or a conflict among statutory provisions does the court deviate from the plain meaning rule. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-20, ¶28, 125 N.M. 401. "Tax statutes, like any other statutes, are to be interpreted in accordance with the legislative intent and in a manner that will not render the statutes' application absurd, unreasonable, or unjust." *City of Eunice v. State Taxation & Revenue Dep't*, 2014-NMCA-085, ¶8 (internal citations and quotations emitted). If the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose it is 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.

The 2016 Amendment applies to Taxpayer's Application

The Department denied Taxpayer's Application in this case as untimely under the 2016 version of the High-Wage Jobs Tax Credit Act. However, as Taxpayer argues, Taxpayer's Application in this case would likely[2] have been timely and viable under the 2013 version of the

[2] Taxpayer does not assert sufficient uncontested facts or supporting exhibits to reach a final conclusion on this question as part of its summary judgment pleading. However, for purposes of resolving the disputed legal issue in

High-Wage Jobs Tax Credit Act. Under that 2013 version of the 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]." NMSA 1978, Section 7-9G-1 D (2013) (emphasis added). Thus, the 2013 version of the act allowed a taxpayer to wait to apply for multiple qualifying periods in previous years all at once, for a year after the final qualifying period closed.

Unlike the 2013 version, the 2016 amendment required that a taxpayer file one application per calendar year listing all qualifying periods that closed during that calendar year or the Department was required to deny the application. *See* NMSA 1978, Section 7-9G-1 (D) (2016). During the Second Special Session of 2016 of the 52nd Legislature, the Legislature passed Senate Bill 6 (SB 6)[3], described as a tax package and addressing numerous statutory tax provisions. After passage, the bill was signed into law. In pertinent part, SB 6 contained a section described in the title as "PROVIDING ADDITIONAL REQUIREMENTS TO BE ELIGIBLE TO CLAIM A HIGH-WAGE JOBS TAX CREDIT." As will be addressed in greater detail, part of the purpose of the 2016 version of the act was to narrow the availability of the credit, require annual filing for the credit, and reduce the dramatic swings in potential credit liability seen under the previous versions of the act. In Section 8 of the final version of chaptered SB 6, the additional eligibility requirements under the act applied "to applications for a high-wage jobs tax credit for a new high-wage economic-based job filed… on or after January 1, 2017."

In its motion for summary judgment, the Department claims that a plain language reading of this applicability clause means that the 2016 amendment applies to Taxpayer's December 30,

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the competing motions for summary judgment, it is clear from the positions of the parties that Taxpayer may have a viable claim under the 2013 version of the act, subject to presentation of sufficient, persuasive evidence during a protest hearing.

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

2019, Application for the credit. As such, the Department argues that Taxpayer's Application fails under NMSA 1978, Section 7-9G-1 (M) (2016) because the qualifying periods at issue did not close in the calendar year when the Application was filed.

In contrast, Taxpayer argues in its motion for summary judgment that this agency's previous decision in the protest of *Harris Corporation to Denial of High Wage Job Tax Credit Issued Under Letter Id Nos. L1924638000, L0597968176 and L0850896176 v. New Mexico Taxation and Revenue Department*, 2018 WL 5911494 (AHO No. 18-35, Nov. 2, 2018) (non-precedential) (hereinafter *Harris Corporation*) is controlling of the statutory interpretation question disputed here. In light of the rationale of *Harris Corporation*, Taxpayer argues that the 2013 version of the statute applies.

While the hearing officer agrees that *Harris Corporation* has some relevance to the outcome of this protest, the hearing officer does not find that case squarely on point and controlling for multiple reasons. First, there are important legal and factual differences between this protest and *Harris Corporation*. The legal issue in *Harris Corporation* was whether that taxpayer had to follow the 2016 amendment's requirement for an annual application for the credit rather than the previous, more-open ended claim period tied to the closing of the final qualifying job period in the 2013 version of the statute. *See Harris Corporation*, p. 9-11. In *Harris Corporation*, that taxpayer seeking the High-wage Jobs Tax Credit filed its application for the credit on December 22, 2016. *See Harris Corporation*, F.O.F. #8. That means in *Harris Corporation*, that taxpayer's application was filed nine days before the January 1, 2017, applicability date contained in SB 6. Thus, in *Harris Corporation*, that taxpayer's application was filed when the previous 2013 statutory provisions still applied, including determining when

a qualifying period closed. However, in this protest, Taxpayer did not apply for the credit until December 31, 2019, nearly three years after the January 1, 2017, applicability date of SB 6.

The second distinction is that while *Harris Corporation* was consistent with this agency's understanding of statutory construction at that time, recent decisions of the Court of Appeals have reemphasized the importance of searching for and effectuating Legislative intent, including looking beyond arguably unclear or arguably contradictory statutory language towards the statute's history, background, and purpose. *See High Desert Recovery, LLC, v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-___, ¶8, 2021 WL 5815749, (No. A-1-CA-37852, N.M. Ct. App. Dec. 6, 2021), quoting *Sacred Garden, Inc. v. New Mexico Taxation & Revenue Dep't*, 2020-NMCA-038, ¶5, ¶15-16, 495 P.3d 576, cert. quashed granted (No. S-1-SC-38164, February 23, 2022); *see also Golden Services Home Health & Hospice v. Taxation & Revenue Dep't*, No. A-1-CA-36987, 2020 WL 2045956 (Unpublished, non-precedential opinion, N.M. Ct. App. Apr. 20, 2020). Because the hearing officer in *Harris Corporation* found the plain language clear, he did not feel it necessary to consider the history, background, and purpose.

In this case, the parties dispute whether the plain language of the applicability clause if clear on its face. On the one hand, similar to the decision in *Harris Corporation*, Taxpayer claims that the reference to "a new high-wage economic-based job" in the applicability clause, in conjunction with the case law definition of that term by the Court of Appeals in *Par Five Services, LLC v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-025, 489 P.3d 983, meant that the 2016 amendment only applied to new jobs created on or after the January 1, 2017, effective date.

On the other hand, the Department claims that the reference to "new high-wage economic-based job" is simply a reference to that statutorily defined term rather than a reference

to a date of job creation for purposes of the applicability clause. In pertinent part, the statute defines a "new high-wage economic-based job" as "a new job created in New Mexico by an eligible employer on or after July 1, 2004 and prior to July 1, 2020..." NMSA 1978, §7-9G-1 (Q)(11). The positions at issue in Taxpayer's Application in this case were newly created between 2014 and 2016, satisfying the statutory definition of a "new high-wage economic-based job." As such, the Department claims that Taxpayer's proposed construction of the applicability clause requires reading an additional word—a second "new"—into the statutory language in order to read the provision as applying only to new job created on or after January 1, 2017. Additionally, the Department points out that if the Legislature in fact only wanted the 2016 changes to apply to jobs created on or after January 1, 2017, it could have said so like it did in the later 2019 amendment to the High Wages Jobs Tax Credit Act. Under the applicability clause of the 2019 amendment[4], "[t]he provisions of this act apply to qualifying periods beginning on or after January 1, 2019," the applicability date was tied to the qualifying period commencement date (which is equivalent to the new job creation date or anniversary date under the definition of qualifying period[5]) rather than to the application submission date.

Given these competing readings of the statutory language and the with the recent reemphasis from the Court of Appeals about effectuating legislative purpose when constructing arguably unclear language, the undersigned hearing officer feels compelled to consider the fiscal impact reports prepared contemporaneously with passage of the disputed amendments to the High Wage Jobs Tax Credit in order to consider the history, background, and purpose of the act. *See High Desert Recovery, LLC*. Turning to that Fiscal Impact Report associated with the

[4] H.B. 165, 54th Legislature, 1st session, §2, https://www.nmlegis.gov/Sessions/19%20Regular/final/HB0165.pdf
[5] *See* NMSA 1978, Section 7-9G-1 (Q)(15) (definition tying qualifying period to the new job start date or anniversary date).

relevant bill, SB 6, it is clear that the Legislature intended the amendments to the High Wages Jobs Tax Act contained in SB 6 to apply to any application filed on or after January 1, 2017: "[t]he provisions of the bill adding a cap to the credit becomes effective immediately, but all other provisions related to the high-wage jobs tax credit *apply to credit applications filed on or after January 1, 2017*." *See* F.I.R.[6], p. 4, (emphasis added). Although the F.I.R. alone does not resolve the question, that language in conjunction with the pertinent portion of the bill title and the bill's applicability clause language evince a legislative intent to have the amendments to the High Wages Jobs Tax Act apply to any application (regardless of job creation date of qualifying period beginning date) filed on or after the applicability date. While the undersigned hearing officer understands and appreciates *Harris Corporation's* focus on the phrase "for a new high-wage economic based job," an analysis undertaken without the context provided by the F.I.R.[7] or the subsequent 2019 amendment's applicability language, the F.I.R. clarifies that the Legislature intended the new qualification requirements to apply to all applications filed as of the applicability date regardless of the date of job creation.

Returning to Taxpayer's proposed statutory construction, Taxpayer again argues that the inclusion of the phrase "for a new high-wage economic-based job" meant that the Legislature did not intend the 2016 amendments to apply to all applications after the applicability deadline but only to jobs created after the applicability deadline. As support of this argument, Taxpayer points to *Par Five Services, LLC*. In *Par Five*, the Court of Appeals found that the term "new job" for purposes of the High Wage Jobs Tax Credit Act means a job "brought into being for purposes of

[6] https://www.nmlegis.gov/Sessions/16%20Special/firs/SB0006.PDF

[7] Again, at the time the hearing officer was applying a more literal plain-language analysis consistent with this agency's practice at the time of issuance of the *Harris Corporation* decision, and thus understandably found no need to dive into the F.I.R. However, recent Court of Appeals decisions have suggested that this agency's statutory construction analysis focused on more literal plain-language analysis may have been too narrow to effectuate Legislative purpose. The Court of Appeals has turned to the F.I.R.s to help ascertain and effectuate Legislative intent in various tax statutes.

the HWJTC when a new job position that did not previously exist is created." *Id*. ¶ 1; ¶10. Based on this meaning, Taxpayer argues that the relevant applicability deadline only applies to new jobs created on or after the applicability date.

Taxpayer's argument on this point is similar to the legal analysis in *Harris Corporation*. However, the F.I.R. not considered in *Harris Corporation* contradicts Taxpayer's construction because the contemporaneous F.I.R. makes clear that the 2016 amendment applies to an *application* filed after the applicability date. In other words, the F.I.R. indicates the Legislature's intent in the bill was to tie the effective date of the amendment to the application date rather than a new job creation date or qualifying period beginning date. While Taxpayer argues the fact that the Legislature stripped out the annual cap and removed the additional applicability clause contained in the original version of SB 6 as further support of its proposed statutory construction, the applicability clause remaining in the 2016 amendment stated that the amendments applied to applications filed on or after January 1, 2017. Even with the stripping of the other applicability clause out of the bill, the remaining portion of the applicability clause in conjunction with the FIR affirms the view that the Legislature did not intend to tie the 2016 amendments to a job creation or qualifying period beginning date, but to the application submission date.

As the Department argued in its response to Taxpayer's motion for summary judgment and again in the Department's supplementary briefing, the Legislature's action during the 2016 special session was part of a general intent to significantly narrow the scope of the credit, require annual filing for the credit, and reduce the dramatic swings in potential credit liability. Consistent with the Department's argument, the F.I.R. states that

> [t]his bill changes the eligibility requirements to qualify for the high-wage jobs tax credit and requires annual filing, whereas current statute allows filing for multiple qualifying periods at once, leading to dramatic swings in the amounts of credits and refunds paid out in a particular fiscal year. The bill's primary purpose is to close loopholes in existing statute that allowed the cost of the tax credit to increase by well over an order of magnitude within a few years…

F.I.R., p. 4, https://www.nmlegis.gov/Sessions/16%20Special/firs/SB0006.PDF

To effectuate this purpose of promoting annual filing, reducing filing multiple qualifying periods at once, and stabilizing predictability in the amount of credits and refunds, it makes sense that the Legislature would tie the effective date to applications on or after January 1, 2017 rather than a new job creation date or qualifying period beginning date.

Moreover, as the Department persuasively argues, if the Legislature wished its 2016 amendments to only apply to new jobs created after the effective date of the amendment, it could have used the language it did in the applicability clause of the 2019 amendments, where it tied the applicability clause date to the beginning qualifying period date (which is essentially the new job creation date or anniversary date under the statutory definition). Given that credits are acts of Legislative grace to be construed narrowly, and the Department's proffered statutory construction effectuates the Legislative intent of the 2016 amendment articulated in the statutory language and accompanying F.I.R., the hearing officer finds the Department's statutory construction argument persuasive.

The 2016 Amendments do not amount to an impermissible retroactive application.

Taxpayer argues that applying the 2016 version of the statute here would result in an impermissible retroactive application and deprive it of the opportunity to obtain the credit. While there is a presumption that a statute only applies prospectively, whether a statute in fact applies retroactively is an area of confusion. *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 relied on the Supreme Court's holding in *Crane v. Cox*, 1913-NMSC-089, ¶6, 18 N.M. 377, 137 P. 589 in stating 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. Returning to the principal that tax credits are acts of Legislative grace, taxpayers could reasonably anticipate that the Legislature has the prerogative to change the qualifications for credit for applications filed on or after a specific date, even if the conditions related to antecedent events.

This is not the scenario the hearing officer was concerned about in *Harris Corporation*. Taxpayer still had an opportunity to file an application for the qualifying periods from the three positions with commencement dates in 2014 before the January 1, 2017, applicability deadline.

And if those 2014 qualifying periods did not close before that applicability deadline, Taxpayer could also still have claimed the credit for those qualifying periods from 2014, and for the 2016 position, within the year of when those periods in fact closed even under the 2016 amendment. Instead, Taxpayer waited until nearly three years after the January 1, 2017, applicability deadline to file its Application. As such, there is no impermissible, retroactive change of the 2016 amendments as applied to Taxpayer's Application.

Estoppel Does Not Bar the Department's Denial of the Application.

As the Court of Appeals recently indicated, neither stare decisis nor collateral estoppel apply to unappealed decisions of the Administrative Hearings Office. *See Golden Services Home Health & Hospice*, A-1-CA-32020, ¶29, WL 2045956 (non-precedential). An agency is permitted to correct mistakes of law in previous decisions. *Alexander v. Anderson*, 1999-NMCA-021, ¶¶ 19-21, 126 N.M. 632, 638, 973 P.2d 884, 890. "[O]rdinarily the doctrine of collateral estoppel should not bar a state agency from arguing a point of law on the ground that it lost on that issue in prior litigation with a different party." *Antillon v. New Mexico State Highway Dept.*, 1991-NMCA-093, ¶ 5, 113 N.M. 2, 4, 820 P.2d 436, 438. Thus, even though the Department did not appeal *Harris Corporation*, it is allowed to argue that *Harris Corporation's* statutory construction was incorrect.

The Administrative Hearings Office does value and seeks to promote consistency in the application of law in resolving tax protest hearings. Yet the value of consistency must also be balanced with the statutory charge that each hearing officer has decisional independence. *See* NMSA 1978, § 7-1B-6 (B) (2019). As discussed repeatedly above, there are important factual and legal distinctions at play between this protest and *Harris Corporation*. And the *Harris Corporation* hearing officer did not have the benefit of the Legislature's subsequent 2019

amendment, which made clear the Legislature knew how to tie the applicability date to the qualifying period beginning date (equivalent to job creation date) rather than the application submission date, if that's what the Legislature intended. Under that rubric of those distinctions and looking closely at the F.I.R. in conjunction with the disputed statutory language, the 2016 version of the statute applies to all applications, including Taxpayer's Application, filed on or after January 1, 2017.

CONCLUSIONS OF LAW

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

B. The hearing was timely set and held within 90-days of the acknowledged receipt of valid protests under NMSA 1978, Section 7-1B-8 (2019).

C. There are no genuine, material disputes of fact in this case, and therefore summary judgment is appropriate in this matter to resolve the question of law. *See Koenig,* 1986-NMSC-066, ¶ 10 ("If the facts are not in dispute, but only the legal effect of the facts is presented for determination, then summary judgment may properly be granted").

D. Taxpayer bears the burden of proving entitlement to the claimed credit, as a credit is an act of Legislative grace. *See Team Specialty Prods.*, 2005-NMCA-020, ¶9, 137 N.M. 50 (internal citations omitted).

E. Although a credit must be narrowly interpreted and construed against the taxpayer, it still should be construed in a reasonable manner consistent with legislative intent. *See Sec. Escrow Corp.*, 1988-NMCA-068, ¶9, 107 N.M. 540.

F. The "main goal of statutory construction is to give effect to the intent of the legislature." *Dell Catalog Sales L.P.* 2009-NMCA-0001, ¶ 19 (internal citations omitted).

Provisions must be read in "a fair, unbiased, and reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the legislative intent is effectuated and the public interests to be subserved thereby are furthered." *Chavez*, 1970-NMCA-116, ¶ 7, (internal citations omitted).

G. To effectuate legislative intent of unclear or arguably conflicting statutory provisions, it is appropriate to look beyond the statutory language to the statute's history, background, and purpose. *See High Desert Recovery, LLC, v. New Mexico Taxation & Revenue Dep't*, 2021-NMCA-___, ¶8, 2021 WL 5815749, (No. A-1-CA-37852, N.M. Ct. App. Dec. 6, 2021).

H. Construing the statutory language of the applicability clause of 2016's SB 6 in conjunction with the relevant F.I.R., the Legislature intended to narrow the credit at issue by having the 2016 amendment apply to all credit applications filed on or after January 1, 2017, regardless of the job creation date or initial qualifying period at issue.

I. Because Taxpayer filed its credit Application after the January 1, 2017, applicability date, the 2016 amendment applied to Taxpayer.

J. Taxpayer's Application was untimely under the 2016 amendment, requiring the Department to deny the Application under NMSA 1978, Section 7-9G-1 (M) (2016).

K. The Department is not estopped from denying the Application in this case because of the *Harris Corporation* decision. *Harris Corporation* is not precedential and distinguishable from the facts and legal issue of this protest. *See Golden Services Home Health & Hospice*, A-1-CA-32020, ¶29, WL 2045956 (non-precedential). An agency is permitted to correct mistakes of law in previous decisions. *See Alexander*, 1999-NMCA-021, ¶¶ 19-21. "[O]rdinarily the doctrine of collateral estoppel should not bar a state agency from arguing a point of law on the

ground that it lost on that issue in prior litigation with a different party." *Antillon*, 1991-NMCA-093, ¶ 5.

For the foregoing reasons, summary judgment for the Department is appropriate and is so ordered. Taxpayer's protest **IS DENIED**.

DATED: February 28, 2022.

Brian VanDenzen
Chief 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 February 28, 2022, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

E-Mail *E-Mail*

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