

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

**IN THE MATTER OF THE PROTEST OF
TEAM SPECIALTY PRODUCTS, INC.
ID NO. 02-124490-00 1
DENIAL OF APPLICATION FOR TECHNOLOGY
JOBS TAX CREDIT FOR TAX YEAR 2001**

No. 04-02

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on February 10, 2004, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General. Team Specialty Products, Inc. was represented by James Lawrence Sanchez with the law firm of Rael and Sanchez. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In November 2001, Robert Sachs and Daniel Sachs ("Owners") purchased Team Specialty Products, Inc. ("TSP").
2. Two employees of TSP were retained by the Owners: Barbara Blanton and her assistant, Jeff Hurley.
3. Ms. Blanton and Mr. Hurley were responsible for paying bills, filing tax returns, and performing general accounting tasks for TSP.
4. For the first six months after the Owners purchased TSP, Ms. Blanton maintained that she was unable to provide them with any financial information because the

computer system was being updated. The Owners received their first financial statement in May 2002.

5. In June 2002, Ms. Blanton resigned without giving notice. Mr. Hurley then took over her duties.

6. After Ms. Blanton's departure, TSP's cash flow improved, but then the Owners began to receive notices that TSP's vendors were not being paid.

7. About the same time, Mr. Hurley told the Owners that he had lost TSP's credit card and that someone had run up unauthorized charges. After the Owners contacted the stores at which the charges were made, they determined that it was Mr. Hurley himself who made the "unauthorized" purchases.

8. The Owners fired Mr. Hurley and began to review TSP's bookkeeping and accounting records.

9. The Owners discovered that bills and taxes had not been paid.

10. The Owners also discovered that Mr. Hurley forged a company check written to himself in the amount of \$67,000. Criminal charges were subsequently brought against Mr. Hurley.

11. In February 2003, the Owners hired a certified public accountant to help them straighten out their accounting problems.

12. The CPA discovered two letters concerning a tax credit available from the State of New Mexico under the provisions of the Technology Jobs Tax Credit Act, NMSA 1978, §§ 7-9F-1 through 7-9F-12.

13. The first letter was dated December 26, 2001 from Neff & Ricci LLP, TSP's former accounting firm, to Barbara Blanton reminding her that TSP's application for the technology jobs tax credit for the period July 4, 2000 through December 31, 2000 had to be mailed "no later than December 31, 2001."

14. The second letter was dated July 29, 2002 from the New Mexico Taxation and Revenue Department to Barbara Blanton notifying her that TSP's application for the technology jobs tax credit for 2000 had been approved. A copy of this letter was faxed to TSP on February 11, 2003.

15. TSP's Owners were not aware of the existence of the technology jobs tax credit until their CPA came across these letters.

16. The Owners subsequently determined that neither Barbara Blanton nor Jeff Hurley had filed an application for the tax credit for the period January through December 2001.

17. TSP's new CPA completed an application for the basic and additional technology jobs tax credits for the 2001 calendar year and submitted it to the Department in September 2003.

18. On September 19, 2003, the Department denied the application because it was not filed within one year following the end of the calendar year in which the qualified expenditures were made.

19. On October 15, 2003, TSP filed a written protest to the Department's denial.

DISCUSSION

The issue to be decided is whether TSP's failure to submit its application for the basic and additional technology jobs tax credits within the one-year period provided in NMSA 1978, § 7-9F-9(A) bars the Department from approving the credit.

The Technology Jobs Tax Credit Act was enacted by Laws 2000 (2nd S.S.), ch. 22, §§ 1-12, and became effective on July 3, 2000. The Act, which is codified at NMSA 1978, §§ 7-9F-1 through 7-9F-12, allows a taxpayer that conducts qualified research at a facility in New Mexico to claim a basic credit equal to four percent of qualified expenditures, which are defined to include rent, equipment, software, payroll, technical manuals and materials, and operation and maintenance of facilities. The taxpayer may qualify for an additional four percent credit by raising the annual payroll expense at its qualified facility by at least \$75,000 over base payroll for every \$1,000,000 in qualified expenditures claimed by the taxpayer in a taxable year in the same claim. NMSA 1978, § 7-9F-9(A) states that a taxpayer "may apply for approval of a credit within one year following the end of the calendar year in which the qualified expenditure was made."

In this case, TSP filed an application for the technology jobs tax credit in September 2003, claiming both the basic and additional credits for the period January through December 2001. The application was denied by the Department because it was not filed within one year following the end of the calendar year in which the qualified expenditures were made. TSP is challenging this denial, arguing that the Legislature's use of the word "may" in § 7-9F-9(A) makes the time limit set out in the statute optional rather than mandatory. TSP also maintains that the Department has discretion to extend the time within which an application for the

technology jobs tax credit may be filed when the taxpayer has good cause for delay. In contrast, the Department interprets the word “may” in § 7-9F-9(A) to mean that a taxpayer has the right, but not the obligation, to apply for the credit provided under the Technology Jobs Tax Credit Act. If a taxpayer chooses to apply for the credit, then the taxpayer’s application must be filed within the one-year time frame set out in the statute.

Application of the Rules of Statutory Construction. It is a fundamental rule of statutory construction that all provisions of a statute, together with other statutes in *pari materia*, must be read together to ascertain legislative intent. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). In support of its position concerning the correct interpretation of § 7-9F-9(A), TSP points out that the limitations period set out in NMSA 1978, § 7-9A-8(A) of the Investment Credit Act uses the word “shall” rather than “may”, and states that a taxpayer “shall apply for approval for a credit within one year following the end of the calendar year in which the qualified equipment for the manufacturing operation is purchased or introduced into New Mexico.” TSP argues that the Legislature’s use of the word “shall” in the Investment Credit Act indicates that its use of the word “may” in § 7-9F-9(A) of the Technology Jobs Tax Credit Act was intended to make that limitations period permissive rather than mandatory.

The weakness in TSP’s argument is that the Investment Credit Act was enacted twenty years earlier than the Technology Jobs Tax Credit Act. Before resorting to a comparison of the language used in similar, but unrelated, pieces of legislation, it is first necessary to look at other sections of the Technology Jobs Tax Credit Act itself. As the New Mexico Supreme Court noted in *State v. Davis*, 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064: “The rule that statutes in *pari materia* should be construed together has the greatest probative force in

the case of statutes relating to the same subject matter passed at the same session of the legislature. 2B Norman J. Singer, *Statutes and Statutory Construction* § 51.03, at 237 (6th ed., rev. 2000).” When § 7-9F-9(A) of the Technology Jobs Tax Credit Act is read in conjunction with other provisions of the same Act, it becomes apparent that compliance with the time requirements set out in § 7-9F-9 is a mandatory prerequisite to qualifying for the credit.

As discussed earlier, a taxpayer that has qualified for the basic four percent credit provided in the Technology Jobs Tax Credit Act may qualify for an additional four percent credit by raising its annual payroll expense at the qualified facility by at least \$75,000 over base payroll for every \$1,000,000 “in qualified expenditures claimed by the taxpayer in a taxable year in the same claim.” § 7-9F-6(B). For purposes of claiming the additional credit, the term “annual payroll expense” is defined as “the wages paid or payable by the taxpayer for the one-year period ending on the day the taxpayer applies for an additional credit....” § 7-9F-3(B). The term “base payroll expense” is defined as “the wages paid or payable by the taxpayer for the one-year period ending on the day one year prior to the day the taxpayer applies for an additional credit....” § 7-9F-3(C).

In this case, TSP filed its initial application for the technology jobs tax credit at the end of December 2001. Pursuant to the limitations period set out in § 7-9F-9(A), TSP should have filed its application for qualified expenditures made during the year 2001 on or before December 31, 2002. If this had been done, the base payroll expense used to measure increased payroll for purposes of the additional technology jobs tax credit would correspond to wages paid during the period for which the base credit was claimed. The annual payroll expense would correspond to

wages paid during the subsequent year, ending on the day the application was filed. Allowing a taxpayer's application to be filed beyond the one-year period set out in § 7-9F-9(A) disrupts the symmetry of the statutory scheme by severing the interrelationship between qualified expenditures and the increase in payroll needed to qualify for the additional technology jobs tax credit.¹

Based on TSP's argument that the limitations period set out in § 7-9F-9(A) is merely precatory, taxpayers could wait years after expenses were incurred to claim the technology jobs tax credit. As the Department points out, this would substantially limit the value of the reporting requirement set out in § 7-9F-12, which states:

In October 2003 and each year thereafter, the department shall report to the legislative finance committee and the revenue stabilization and tax policy committee on the fiscal and economic impacts of the Technology Jobs Tax Credit Act using the most recently available data for the two prior fiscal years. The report shall include the number of taxpayers who have received basic credits or additional credits under the...Act, the amounts of the basic credits and additional credit, the geographic locations of the qualified facilities and the payroll increases of taxpayers related to additional credits....

This section indicates that the Legislature intends to closely monitor the effect of the tax credit on the economic development of technology-based businesses engaging in research in New Mexico. Allowing taxpayers to wait an indefinite period of time before applying for accrued credits on qualified expenditures would undermine the Legislature's ability to assess the credit's impact on this kind of economic development. It would also make it extremely difficult for the Legislature to determine the actual cost of the credit or the state's potential liability for

¹ TSP's application illustrates the problem created by late filing. Statement 4 of the application lists TSP's annual payroll expense as wages paid during the period August 15, 2001 through August 15, 2002; Statement 4-1 lists TSP's base payroll expense as wages paid during the period August 15, 2000 through August 15,

unclaimed credits. When § 7-9F-9(A) is read in conjunction with the stated purpose of the reporting requirement in § 7-9F-12, it seems clear that the one-year limitation period set out in § 7-9F-9(A) was intended as a mandatory prerequisite for approval of the technology jobs tax credit.

New Mexico courts have held that tax credits, along with tax exemptions and deductions, “are strictly matters of legislative grace and are to be construed against the taxpayer.” *Murphy v. Taxation and Revenue Department*, 94 N.M. 90, 93, 607 P.2d 628, 631 (Ct. App. 1979), *aff’d*, 94 N.M. 54, 607 P.2d 592 (1980). There is no common law right to a tax credit. In this case, the only section of the Technology Jobs Tax Credit Act that addresses the manner in which the credit may be claimed is § 7-9F-9(A), which states that a taxpayer “may apply for approval of a credit within one year following the end of the calendar year in which the qualified expenditure was made.” There is no provision of the Act that would allow a taxpayer to apply for the credit during any other period. In the absence of such authorization, the Department has no statutory basis for accepting the Taxpayer’s September 2003 application.

Extension of Time. TSP maintains that the Department has discretion to grant TSP an extension of time to file its application for the technology jobs tax credit because TSP had good cause for the delay. There is no provision, however, in the Technology Jobs Tax Credit Act or the Tax Administration Act that allows the Department to extend the deadline set out in § 7-9F-9(A).

In *Maxwell Land Grant Co. v. Jones*, 28 N.M. 427, 213 P. 1034, 1035 (1923), the New Mexico Supreme Court recognized that the “state tax commission is a creature of statute, and

2001. In each case, the wages listed are for a period one year earlier than that required by the definitions of

it has only such powers as are conferred upon or granted to it by the statute under which it assumed to act, and must be able to support its action by statutory authorization.” *See also, Chalamidas v. Environmental Improvement Division*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App.1984) (“Administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them”). The only statutory authority for the Department to grant extensions is found in NMSA 1978, § 7-1-13(E), which gives the Department’s cabinet secretary discretion to grant a taxpayer or a class of taxpayers up to twelve additional months to file or pay taxes due to the state. The statute does not give the secretary authority to grant an extension of time within which to file an application for tax credits.

Finally, TSP argues that the Department’s refusal to grant TSP a retroactive extension of time to file its application allows the state to benefit from a crime. This argument fails for two reasons: first, while Mr. Hurley’s acts of embezzlement and forgery were clearly crimes, his failure to file TSP’s application for tax credits was merely negligent; second, TSP’s owners—not the Department—must bear responsibility for this negligence. As stated by the New Mexico Court of Appeals in *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989):

"[e]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]." *Tiffany Constr. Co. v. Bureau of Revenue*, 90 N.M. at 17, 558 P.2d at 1156. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters.

annual and base payroll in § 7-9F-3.

Here, TSP's owners had the duty to supervise the employees assigned to handle the company's tax accounts. Unfortunate as the facts of this case may be, they do not provide grounds for the Department to extend or waive the time limit for filing TSP's application for the technology jobs tax credit.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of its claim for the technology jobs tax credit, and jurisdiction lies over the parties and the subject matter of this protest.

2. The one-year limitation period set out in NMSA 1978, § 7-9F-9(A) is mandatory and not discretionary.

3. TSP's failure to submit its application for the basic and additional technology jobs tax credits within the one-year period provided in NMSA 1978, § 7-9F-9(A) bars the Department from approving the credit.

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

DATED February 16, 2004.