

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
KRISTIN ERICKSEN,
TO THE DENIAL OF CREDIT TRANSFER
ISSUED UNDER LETTER ID NO. L0796089392**

No. 16-37

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on June 16, 2016 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Ms. Milagros Bernardo, Auditor, and Ms. Bobbie Marquez also appeared on behalf of the Department. Ms. Kristin Ericksen (Taxpayer) appeared for the hearing and represented herself. The Hearing Officer took notice of all documents in the administrative file.

The Taxpayer objected to the hearing because various employees from the Department were not present. The Taxpayer requested to continue the hearing so she could call those Department employees as witnesses. The request was denied and the objection was overruled. The Taxpayer did not file a witness list and did not request that any witnesses be subpoenaed. *See* NMSA 1978, § 7-1B-6 (2015). Moreover, the Department conceded that their employees' testimonies would substantially comport with the Taxpayer's representations and did not object to hearsay. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

FINDINGS OF FACT

1. On November 18, 2015, the Department denied the Taxpayer's request to transfer a portion of her sustainable building tax credit to another person.

2. On January 6, 2016, the Taxpayer filed a formal protest letter.
3. On February 8, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On February 9, 2016, the Hearings Office issued a notice of hearing. The hearing date was set within ninety days of the protest.
5. On March 23, 2016, the Taxpayer filed a request to continue the hearing.
6. On March 25, 2016, the Taxpayer's request was granted, and the delay of hearing was attributable to her.
7. On March 25, 2016, the Hearings Office sent amended notices of hearing.
8. In 2009 and 2010, the Taxpayer engaged in construction that qualified for the sustainable building tax credit.
9. The Taxpayer was issued the appropriate certificate and subsequent Department documentation for claiming the credit.
10. The Taxpayer's credit was in excess of the Taxpayer's income tax liability, and the remainder of the credit was eligible to be carried forward for up to seven years.
11. The Taxpayer claimed the sustainable building tax credit for the next few years, but there was still a substantial amount that could be carried forward.
12. For the 2014 tax year, the Taxpayer requested that a portion of her available sustainable building tax credit be transferred to her fiance.
13. The Taxpayer spoke to an employee of the Department. The employee was a supervisor in the office that reviewed credit transfers. The employee told the Taxpayer that the partial assignment of her credit was permissible.

14. The Department granted the transfer of a portion of the Taxpayer's sustainable building tax credit for 2014 to the Taxpayer's fiance.
15. Both the Taxpayer and her fiance claimed a portion of the credit available for 2014.
16. For the 2015 tax year, the Taxpayer again requested that a portion of her available sustainable building tax credit be transferred to her fiance.
17. The request was reviewed by Ms. Marquez. Ms. Marquez was familiar with the credit transfer process, but had never before seen a request for a partial transfer of a credit. Ms. Marquez had only seen the transfer of the whole credit.
18. Ms. Marquez read the statute and regulations, consulted with the Tax Policy Director, and spoke to the Department's Chief Legal Counsel.
19. The Taxpayer's request to transfer a portion of her sustainable building tax credit to her fiance in 2015 was denied.

DISCUSSION

The issue to be decided is whether the Department properly denied the transfer of the sustainable building tax credit. The Taxpayer argues that the statute allows for the transfer of the credit and that her request should have been granted as it was in 2014. The Taxpayer argues that the statute is ambiguous at best and should be interpreted to the benefit of taxpayers and to the encouragement of construction of sustainable buildings. The Department argues that its previous position was erroneous and that a more careful reading of the statute revealed that the document granting the credit is what may be transferred. The Department argues that the statute allows for the building owner to either use the document his/herself or to transfer it to someone else. The Department argues that the statute does not allow the Taxpayer to make use of the document in

some years and then to transfer a portion of the remaining credit granted by the document in other years.

Burden of Proof.

The burden is on the taxpayer to prove that he/she is entitled to an exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. “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.” *Sec. Escrow Corp. v. State Taxation and Revenue Dep't.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v. Taxation and Revenue Dep't.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v. Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. Credits are similar to deductions and are considered legislative graces that should be construed narrowly. *See Team Specialty Prods. v. N.M. Taxation and Revenue Dep't.*, 2005-NMCA-020, 137 N.M. 50. *See also Murphy v. Taxation and Revenue Dep't.*, 1979-NMCA-065, 94 N.M. 90. Therefore, the burden is on the Taxpayer to show that the sustainable building tax credit should have been transferred as she requested.

Sustainable building tax credit.

The sustainable building tax credit is available for the construction of a sustainable building or for the renovation of an existing building into a sustainable building. *See NMSA 1978, § 7-2-18.19.* The credit was created in 2007, and has been revised twice; once in 2009 and once in 2014. *See id.* The pertinent parts of the statute have remained virtually the same from

2009, although their subsection designations have changed. *See id.* For ease of reference, the current statute will be cited.

To be eligible for the credit, the taxpayer must be the building owner, must provide a certificate of eligibility from the energy, mineral, and natural resources department, and must provide any other information requested by the Department. *See* NMSA 1978, § 7-2-18.19 (I) (2014). If all of those requirements are met, then the Department must “issue to the building owner a document granting a sustainable building tax credit.” NMSA 1978, § 7-2-18.19 (J). A taxpayer may claim the credit by submitting “a document issued pursuant to Subsection J of this section with the taxpayer’s income tax return.” NMSA 1978, § 7-2-18.19 (C). If the amount of the credit “exceeds the taxpayer’s income tax liability for that taxable year, the excess may be carried forward for a period of up to seven years.” NMSA 1978, § 7-2-18.19 (L).

The following facts were undisputed. The Taxpayer became eligible to claim a sustainable building tax credit in 2010. The Department issued a document granting the sustainable building tax credit to the Taxpayer at that time. The Taxpayer’s credit was in excess of her tax liability and could be carried forward for seven years. The Taxpayer claimed the credit for the first few years, until she transferred a portion of her remaining credit to her fiance in 2014. The Department was regularly allowing the partial transfer of sustainable building tax credits.¹ The Department did not warn taxpayers that it would be changing its position on partial transfers. The Taxpayer would have transferred all of her remaining credit to her fiance in 2014 if she had known that future requests for transfer would be denied.

¹ The Taxpayer submitted Exhibit #1 as proof of the Department’s approval of the transfers of the carryforward credit after the original taxpayer claimed the credit in the first tax year. Exhibit #1 was another taxpayer’s return. The Department objected to Exhibit #1’s admission, but stipulated that the Department was approving such transfers at the time. Exhibit #1 was admitted to the administrative record, but it is sealed and sequestered from the public record due to confidentiality requirements. *See* NMSA 1978, § 7-1-8.

The primary goal in interpreting a statute is to give it the effect that the Legislature intended. *See State v. Davis*, 2003-NMSC-022, 134 N.M. 172. Statutory construction begins by looking at the plain meaning of the language. *See id.* *See also Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 12, 149 N.M. 455. *See also State v. Maestas*, 2007-NMSC-001, 149 P.3d 933. *See also Johnson v. NM Oil Conservation Com'n*, 1999-NMSC-021, 127 NM 120. The word “or” is given its ordinary disjunctive meaning unless the context of the statute demands otherwise. *See State v. Ramos-Arenas*, 2012-NMCA-117, ¶ 10. *See also State v. Block*, 2011-NMCA-101, ¶ 21, 150 N.M. 598. Tax credits are strictly matters of legislative grace and are to be construed against the taxpayer. *See Team Specialty Prods.*, 2005-NMCA-020, ¶ 9. *See also Murphy*, 1979-NMCA-065, ¶ 20.

The document granting the sustainable building tax credit that is issued by the Department to the building owner “may be submitted by the building owner with that taxpayer’s income tax return, if applicable, *or may be sold, exchanged, or otherwise transferred* to another taxpayer.” NMSA 1978, § 7-2-18.19 (J) (emphasis added). The parties must also notify the Department of the transfer within 10 days. *See id.* If the credit for the taxable year “exceeds the taxpayer’s income tax liability for that taxable year, the excess may be carried forward for a period of up to seven years.” NMSA 1978, § 7-2-18.19 (L). However, the statute only allows certificates of eligibility to claim the credit to be issued if the aggregate amount of the certificates issued is not in excess of an annual cap. *See* NMSA 1978, § 7-2-18.19 (G). The statute also limits eligibility for the certificate to the owner of the building at the time of certification is awarded or to the subsequent purchaser of the building “with respect to which *no tax credit has been previously claimed.*” NMSA 1978, § 7-2-18.19 (F) (emphasis added). Therefore, it is clear from the statute that the legislature did not mean for the credit to be an unlimited advantage to taxpayers. It appears that the

legislature did not intend to extend the credit to others when the credit had been previously claimed. The Department's interpretation of the statute as requiring a taxpayer to choose to either use the credit or to transfer the credit is reasonable given the context of the statute as a whole and the statute's use of the disjunctive or. Consequently, the Department's denial of the credit transfer was justified.

CONCLUSIONS OF LAW

- A. The Taxpayer filed a timely written protest to the denial of credit transfer issued under Letter ID number L0796089392, and jurisdiction lies over the parties and the subject matter of this protest.
- B. The Taxpayer was entitled to use her sustainable building tax credit or to transfer it to another taxpayer when the document granting the credit was issued to her. *See* NMSA 1978, § 7-2-18.19.
- C. The Taxpayer was entitled to carry forward the excess credit for up to seven years. *See id.*
- D. The Taxpayer was not entitled to transfer her credit to another taxpayer after she had previously claimed the credit herself, and the Department's denial of the credit transfer was appropriate. *See id.*

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

DATED: July 15, 2016.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office

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