STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
WELLS FARGO EQUIPMENT FINANCE, **No. 17-09**
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1644621872
AND TO THE RETURN ADJUSTMENT NOTICE
ISSUED UNDER LETTER ID NO. L0852652080

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 27, 2017 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. Marek Grabowski, Staff Attorney. Ms. Suzanne Bruckner and Mr. Andrew Simons, attorneys for Wells Fargo Equipment Finance (Taxpayer), appeared for the hearing. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 1, 2015, the Department issued a Return Adjustment Notice to the Taxpayer for the tax year ending December 31, 2011.
2. On September 8, 2015, the Department formally assessed the Taxpayer for corporate income tax and interest for the tax year ending December 31, 2011. The assessment was for $249,314.32 tax and $3,688.48 interest. No penalty was assessed.
3. On December 14, 2015, the Taxpayer filed a formal protest letter.
4. On February 18, 2016, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

5. On February 22, 2016, the Hearings Office issued a notice of hearing. The hearing date was set within ninety days of the protest.

6. On March 11, 2016, a telephonic scheduling hearing was conducted. Another scheduling hearing was set for October 28, 2016 at the request of the parties.

7. On October 14, 2016, the Taxpayer filed a motion for summary judgment.

8. The second telephonic scheduling hearing was conducted on October 28, 2016. The parties requested that an in-person hearing be set to argue the motion for summary judgment.

9. On November 15, 2016, the Department filed its response to the motion for summary judgment.

10. On January 27, 2017, the hearing on the motion for summary judgment was conducted. The parties agreed that there were no issues of material fact. The parties agreed that the outcome of the motion for summary judgment was dispositive and that a final order either granting or denying the protest could be issued.

11. Throughout September and December 2011, the Taxpayer acquired five energy-producing facilities (the facilities).

12. Prior to the Taxpayer's acquisition, the facilities submitted application packages for the renewable energy production tax credit (the energy credit).

13. The application packages were submitted to the Energy, Minerals and Natural Resources Department (the Energy Division).

14. All five of the facilities' application packages were approved in March 2011.

15. The approval of the application packages is a preliminary approval that will not become final until the facilities show that they have generated qualified energy and sold it to an unrelated party.

16. The Taxpayer acquired title to three of the facilities in September 2011, and to the remaining two facilities in December 2011.

17. The facilities began producing qualified renewable energy and selling it to unrelated parties in 2011.

18. The Taxpayer filed an application for a certificate of eligibility with the Energy Division in December 2011 for the three facilities that it acquired in September 2011.

19. The certificate of eligibility for these three facilities was issued to the Taxpayer by the Energy Division in January 2012.

20. The Taxpayer filed an application for a certificate of eligibility with the Energy Division in April 2012 for the two facilities that it acquired in December 2011.

21. The certificate of eligibility for these two facilities was issued to the Taxpayer in April 2012.

22. The Taxpayer's corporate tax return for the 2011 tax year was due on March 15, 2012. The Taxpayer's deadline was extended by six months to Monday, September 17, 2012.

23. The Taxpayer filed a timely corporate income tax return for the 2011 tax year.

24. In April 2013, the Taxpayer filed an amended corporate income tax return for the 2011 tax year and claimed a refund. The refund request resulted from the Taxpayer claiming the energy credit for all five of the facilities.

25. On January 26, 2015, the Department issued a refund check to the Taxpayer for the 2011 tax year.

26. There was no explanation presented for how or why the Department took action on the claim for refund more than 210 days after the claim for refund was made in April 2013.

27. In September 2015, the Department continued to review the Taxpayer's claims and determined that it had issued the refund for the tax year 2011 in error. Therefore, the Department issued the assessment and return adjustment.

DISCUSSION

The issue to be decided is when the Taxpayer is eligible to claim the energy credit. The Department argued that the Taxpayer is eligible to claim the energy credit only after the certificate of eligibility is issued by the Energy Division. The Department argued that the Taxpayer was eligible to claim the energy credit in 2012 and subsequent years since the Taxpayer received the certificate of eligibility in 2012. The Department argued that the initial application package approval merely secures the Taxpayer's priority in line to claim the energy credit, especially since the application package can be approved before construction of a facility has begun. The Taxpayer argued that it could claim the energy credit at any time after the facilities began producing qualified energy after the initial application package was approved. The Taxpayer argued that the facilities received approval of the application packages in 2011 and began producing qualified energy in 2011. For those reasons, the Taxpayer argued that it should be able to claim the energy credit for the 2011 tax year. The Taxpayer argued that the energy credit is effective from the date of the application package.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, §

7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement. 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 it was entitled to claim the credit.

Motions for summary judgment are appropriate when there is no genuine issue of material fact and the judgment is a matter of law. *See Elane Photography, LLC v. Willock,* 2013-NMSC-040, ¶ 12. *See also Roth v. Thompson*, 1992-NMSC-011, 113 N.M. 331. *See also Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 1967-NMSC-086, 77 N.M. 730. The parties agreed that there were no disputes as to the material facts. The parties also agreed that the outcome of the summary judgment motion would be dispositive to the issues of the hearing and that a final decision and order either granting or denying the protest could be issued. The Department indicated that it was willing to go forward with a hearing on the merits and explained that its witnesses could give a more detailed description of how the credit is administered by the Department. A hearing on the merits was determined not to be necessary as the proffer did not involve any material facts in dispute. Again, if the facts are not in dispute and only their legal effect remains to be determined, summary judgment is appropriate. *See Roth*, 1992-NMSC-011 at ¶ 17.

Claiming the energy credit.

"A taxpayer may claim the renewable energy production tax credit by submitting to the taxation and revenue department the certificate issued by the energy, minerals and natural resources department" and other required documents. NMSA 1978, § 7-2A-19 (J) (2007). If the requirements of the statute have been met, the credit may be deducted from the "corporate income tax liability for the taxable year for which the credit is claimed." NMSA 1978, § 7-2A-19 (K). A taxpayer may request a certificate of eligibility from the Energy Division, and the Energy Division has the authority to govern the procedure for granting a certificate. *See* NMSA 1978, § 7-2A-19 (G). The Energy Division requires taxpayers to submit application packages and will approve the application packages if the criteria are met. *See* 3.13.19.10 NMAC (2006). An application may be approved prior to the facility even beginning construction, but construction is required within 12 months of the approval and qualified energy production is required within 24 months of the approval. *See* 3.13.19.8 NMAC (2006). After a facility's application package has been approved and the facility has produced qualified energy, the facility "may request certification". 3.13.19.12 (A) NMAC (2006). To claim the credit, a taxpayer must submit the certificate of eligibility and other documents to the Department. *See* NMSA 1978, § 7-2A-19 (J). *See also* 3.13.19.13 NMAC (2006).

Again, credits are strictly matters of legislative grace and are to be construed against a taxpayer. *See Murphy*, 1979-NMCA-065 at ¶ 20. All provisions of the statute granting a credit should be read together to ascertain the legislative intent. *See Team Specialty*, 2005-NMCA-020 at ¶ 9. When the language of the statute allows for the approval of a credit only after certain qualified expenditures are met, the qualifications should be understood to be necessary pre-conditions for claiming a credit even when the language of the statute uses the permissive "may". *See id.* at ¶ 12. Requiring certain qualifications demonstrates a legislative intent to limit a credit;

therefore, the credit is not open-ended, unrestricted, or unconditional. *See id.* The credit in this case is similar to the credit in *Team Specialty* in that the credit in both cases required that certain qualifications be met before the credit may be claimed. *See id. See also* NMSA 1978, § 7-2A-19. Therefore, a taxpayer may claim the energy credit only after the statutory conditions have been satisfied. The statutory condition in this case is the certification from the Energy Division. *See* NMSA 1978, § 7-2A-19. In order to claim the energy credit, a taxpayer must have a certification of eligibility from the Energy Division. *See id.*

The Department's argument is persuasive. The approval of the application package does not entitle a taxpayer to claim the energy credit at that time. The approval of the application package can occur months or years before the facility actually begins to produce qualified energy. This approval is too aspirational to entitle a taxpayer to claim the energy credit at that time. The Taxpayer's argument that the final certification should revert back to the application approval is not persuasive. The energy credit may be deducted "for the taxable year for which the credit is claimed." *See* NMSA 1978, § 7-2A-19 (K). Since the energy credit cannot be claimed until the certification is issued, this section necessarily means the taxable year of the certification, and subsequent years, if the qualifications continue to be met. *See* NMSA 1978, § 7-2A-19. The statute does not explicitly allow for a taxpayer to reach back to the initial approval date to claim the energy credit; rather, the statute merely guarantees that a taxpayer's initial approval date will be used to determine a taxpayer's priority over others in claiming the energy credit. *See id.*

The Ten-Year Limit.

The Taxpayer argues that by limiting the availability of the energy credit to the ten year after the facility initially produces qualified energy, the legislature must have intended that a

taxpayer be eligible to claim the energy credit in the first year that the qualified energy was produced. The Taxpayer argues that its case is a special circumstance since it applied initially in the same year that it began producing qualified energy. Otherwise, the Taxpayer may not receive the full benefit of the energy credit for the full ten years. The Department argues that the statute does not guarantee that all taxpayers will be able to claim the energy credit for a full ten years since there are limits on the total cumulative credit, there are priorities granted, and there is a limit on how long the energy credit may be claimed after production began. *See id.* Again, this credit is not open-ended, unrestricted, or unconditional. *See id.* A taxpayer may claim the energy credit for ten consecutive years, beginning on the date that the facility begins producing the qualified energy. *See id.*

The Department pointed out that since the ten years begins on the date of initial production, the credit could potentially span eleven tax years. This would be the case if the Taxpayer were allowed to claim the credit beginning in 2011, since the ten years would be up in 2021. Therefore, the Department advised that it interpreted the ten-year limitation to be on consecutive tax returns for the ten-year period following initial production. Consequently, since the Taxpayer cannot claim the credit for 2011, the Taxpayer will still be eligible to claim the credit for the 2021 tax year.

Assessment of Interest.

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish

taxpayers, but to compensate the state for the time value of unpaid revenues. Therefore, interest was properly assessed.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Notice of Assessment issued under Letter ID number L1644621872 and to the Return Adjustment Notice issued under Letter ID number L0852652080, and jurisdiction lies over the parties and the subject matter of this protest.

B. There was no genuine dispute as to material facts, and a judgment based on the application of the law to the facts is appropriate without a hearing on the merits. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 12. *See also Roth v. Thompson*, 1992-NMSC-011, 113 N.M. 331. *See also Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 1967-NMSC-086, 77 N.M. 730.

C. The Taxpayer could not claim the energy credit until the tax year in which the certification was issued, and the effect of the application approval was merely to guarantee the Taxpayer's priority in claiming the energy credit. *See* NMSA 1978, § 7-2A-19. *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.

D. Therefore, the Taxpayer failed to overcome the presumption, and the Department's assessment and return adjustment were appropriate. *See* NMSA 1978, § 7-1-17.

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

DATED: February 23, 2017.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office

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