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

IN THE MATTER OF THE PROTEST OF
EMCORE CORPORATION **No. 13-20**
TO DENIAL OF APPLICATION FOR ALTERNATIVE
ENERGY MANUFACTURERS TAX CREDIT
UNDER LETTER ID NO. L0797210944

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on July 9, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Ms. Bobbi Kay Nelson, CPA, appeared representing Emcore Corporation ("Taxpayer"). Staff Attorney Susanne Roubidoux appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor Thomas Dillon appeared as a witness for the Department. Taxpayer Exhibits 1-3 and Department Exhibits A-D were admitted into the record. All exhibits are more thoroughly 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 July 24, 2011, Taxpayer, through its representative accounting firm, prepared and signed an Application for Alternative Energy Product Manufacturer's Tax Credit. [**Department Ex. A; CD 7-09-13, 19:50-57**].

2. From the one-year period beginning on July 24, 2010 through Taxpayer's July 24, 2011 signature on the Application, Taxpayer had an increase of at least one-employee. [**CD 7-09-13, 32:28-44**].

3. Taxpayer did not submit the Application for Alternative Energy Product Manufacturer's Tax Credit on July 24, 2011 because a senior partner at Taxpayer's accounting firm needed to review and approve the application. That review did not occur until December 2011. [**CD 7-09-13, 20:06-26**].

4. Taxpayer did not consult with the Department or a tax professional about the potential legal consequences of delaying the submission of the application to the Department.

5. While the Department's Instructions accompanying the Application for the Alternative Energy Credit Form and the Instructions accompanying Schedule A of that Application do not expressly state that the date of application is the date of mailing, those forms also do not expressly state the signature date is the date of application. [**Taxpayer Ex. 2**].

6. The two examples listed on the Schedule A Instructions that accompany the Department's Application form are based on the applicant's date of submission or filing of the application respectively, not on the date of signature on the application. [**Taxpayer Ex. 2.6**].

7. Taxpayer mailed its Application for Alternative Energy Product Manufacturer's Tax Credit to the Department on December 21, 2011. [**Department Ex. B.CN1; CD 7-09-13, 25:25-55**].

8. The Department received Taxpayer's application for Alternative Energy Product Manufacturer's Tax Credit on December 29, 2011. [**Department Ex. A; Department Ex. B.CN1; CD 7-09-13, 25:25-55**].

9. Upon receipt of the application, the Department conducted a Credit Audit of Taxpayer's Alternative Energy Product Manufacturer's Tax Credit. [**Department Ex. B**].

10. On January 6, 2012, the Department sent Taxpayer a letter acknowledging receipt of Taxpayer's Application for Alternative Energy Product Manufacturer's Tax Credit. In that

letter, the Department's Tax Accounts Auditor Supervisor requested from Taxpayer a copy of payroll registers "including the date the credit application was signed, and one year and one day prior to the date on which the credit application was signed." [**Taxpayer Ex. 1**].

11. At the request of the Department during the audit, Taxpayer provided payroll registers for January 7, 2010 and January 6, 2011, which showed Taxpayer's employee payroll history for years 2009 and 2010. [**Department Ex. B.CN2; Department Ex. B.CN3; CD 7-09-13, 28:00-15; CD 7-09-13, 34:39-45**].

12. From the one-year period beginning on December 21, 2010 through Taxpayer's December 21, 2011 mailing of the Application for Alternative Energy Product Manufacturer's Tax Credit, Taxpayer had a net reduction of 146 employees. [**Department Ex. B.CN3; CD 7-09-13, 32:20-28**].

13. On September 24, 2012, the Department denied Taxpayer's Application for Alternative Energy Product Manufacturer's Tax Credit because Taxpayer "had no increase in employees." [**Department Ex. D; Letter id. no. L0797210944**].

14. On October 17, 2012, Taxpayer protested the Department's denial of Taxpayer's Application for Alternative Energy Product Manufacturer's Tax Credit.

15. On November 7, 2012, the Department acknowledged receipt of Taxpayer's protest.

16. On April 18, 2013, the Department requested a hearing in this matter.

17. On April 22, 2013, the Hearing Bureau issued Notice of Administrative Hearing, scheduling the protest hearing for June 25, 2013.

18. On May 2, 2013, Taxpayer moved to continue the scheduled hearing. The Department concurred with Taxpayer's motion.

19. On May 3, 2013, the Hearing Bureau issued an Order of Continuance and Amended Notice of Hearing, rescheduling this matter for July 9, 2013.

DISCUSSION

In 2011, Taxpayer applied for the Alternative Energy Product Manufacturer's Tax Credit ("Alt. Energy Credit") codified under NMSA 1978, Section 7-9J-1 to -8 (2007). The Department denied Taxpayer's application. Taxpayer protested the Department's denial of its application. The issue in this case is which date controls the statutory one-year increase in employment look-back period under the Alt. Energy Credit: the July 24, 2011 date Taxpayer signed the application form or the December 21, 2011 date that Taxpayer mailed its application to the Department. If the starting date for the one-year increase in employment look-back period commenced from the date of signature on Taxpayer's application, then Taxpayer added at least one additional full-time equivalent employee over the previous year and was entitled to the Alt. Energy Credit. However, if the one-year increase in employment look-back period did not commence until Taxpayer mailed the application on December 21, 2011, then Taxpayer had a reduction of employees over the previous year and is therefore not entitled to the Alt. Energy Credit.

The Alt. Energy Credit allows qualifying manufacturers of alternative energy products to claim a five-percent credit of qualified expenditures from their modified combined tax liability. *See* NMSA 1978, §7-9J-4 (2007). The Department is to apply the Alt. Energy Credit consistent with the Tax Administration Act ("TAA"). *See* NMSA 1978, §7-9J-3 (2007).

In order to qualify for the Alt. Energy Credit, under NMSA 1978, Section 7-9J-5 (2007), an applicant-taxpayer must

> employ a number of full-time employees equal to one full-time employee in addition to the number of full-time employees employed *one year prior to the day on which the taxpayer applies for the credit*…

(italics for emphasis). That is, Section 7-9J-5 establishes a one-year look-back period to determine whether an applicant-taxpayer qualified for the Alt. Energy Credit by adding at least one-employee during that period.

The phrase in dispute under Section 7-9J-5 is what is meant by "one year prior to the *day on which the taxpayer applies for the credit*…" (italics for emphasis). Interpretation of any statute must begin with a plain meaning reading of the statute. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12, 149 N.M. 455, 458. 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-121, ¶ 27, 127 N.M. 120, 126 (internal citations omitted). Statutes are to be interpreted in a manner to give the entire statute effect and not render portions of the statute superfluous. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-20, ¶28, 125 N.M. 401, 411.

The disputed phrase contains only one operative verb: "applies." Black's Law Dictionary, 116 (9th ed. 2009) defines the verb "apply" as "[t]o make a formal request or motion." Simply filling out and signing an application form does not meet the definition of "apply" because the request or motion has not been made until it is formally submitted; while the application may have been signed, it was not formally made to someone or some entity with an ability to consider the application. Under a plain meaning reading of the statute, the one-year look back period under Section 7-9J-5 commences upon a taxpayer-applicant's formal submission of the application to the Department.

This interpretation is also consistent with other provisions under the TAA. The Department is required to administer the Alt. Energy Credit pursuant to the TAA. *See* § 7-9J-3. NMSA 1978, Section 7-1-29.2 (2003) of the TAA specifically addresses claims for a tax credit.

In pertinent part under Section 7-1-29.2, "[a]ny taxpayer who requests approval of a statutory tax credit is deemed to have received such approval if the request has not been granted or denied within one hundred eighty days of the date *it was filed*." (emphasis added). In other words, in the application for tax credit context, the Legislature has clearly specified that the date of filing the application, not the date of signature on the application, as the actionable date.

Further, under the TAA, the timeliness of a submission of a notice, a return, or an application is determined by the date of mailing to the Department or personal delivery on the Department, not by the date that a taxpayer signs or completes the document. *See* NMSA 1978, § 7-1-9 (1997). Under NMSA 1978, Section 7-1-13 (2007), the filing of a tax return entails both completion of the form and the filing of the form with the Department. When making a claim for refund under NMSA 1978, Section 7-1-26 (2007), a circumstance analogous to an application for investment credit, a taxpayer must timely submit the claim to the Secretary of the Department. By Regulation 3.1.9.8 (A) NMAC, a claim for refund is only timely if it is both fully completed and is "transmitted, delivered, or mailed to the department prior to the expiration of the statutory time limits." These other examples under the TAA show generally that the date of submission to the Department, either through mailing or personal delivery, is the operative date.

Two New Mexico Court of Appeals decisions also provide support to the notion that "to apply" requires a formal filing or submission of an application to the Department. In *Summers v. N.M. Water Quality Control Comm'n (In re Final Order in the Alta Vista Subdivision DP #1498 WQCC 07-11(A))*, 2011-NMCA-97, ¶1, 150 N.M. 694, 695, the New Mexico Court of Appeals had to consider what was meant by "submit" an application under the Water Quality Act. Although *Summers* addressed the submission of an application under a specific provision of the Water Quality Act, it is instructive in this tax context. After looking to the Black's Law

Dictionary for a definition of the verb "submit", the Court of Appeals in *Summers* found that under the Water Quality Act an application is not submitted until the applicant files the application with the relevant agency or at some later point if the applicant files additional information at the agency's request. *See id.* ¶20, 701. Using the rationale articulated in *Summers*, a person does not apply until they submit an application to the relevant agency.

In a second instructive case, *Carter v. N.M. Human Servs. Dep't*, 2009-NMCA-63, ¶1, 146 N.M. 422, 423, the Court of Appeals considered a broader question regarding whether an agency had to consider an applicant's submission of additional information as part of a hearing process after the initial submission of an application for Medicaid. In addressing one of the agency's delay-in-process, timeliness concerns, the Court of Appeals noted that the application date that triggered the period in which the agency had to act was the date that the applicant "completed and submitted" application to the agency. *Carter* ¶14, 426. While the *Carter* Court of Appeals was not directly addressing the legal question of when is the date of an application, it is nevertheless instructive that the Court of Appeals noted that factually the application date was the date when the application was completed and submitted to the relevant agency. The sum of *Summers* and *Carter* is that a person submits an application the day they file that completed application with the relevant agency. Extending that logic to the Alt. Energy Credit, a taxpayer-applicant does not apply for the credit until they file the application with the Department through either mailing or personal service.

Turning to the facts of this case, Taxpayer did not submit the application for the Alt. Energy Credit when it signed the application on July 24, 2011. If Taxpayer had mailed its application on that date, it would have qualified for the Alt. Energy Credit because the evidence shows an increase in the number of full-time equivalents employees over that period. However,

Taxpayer chose to wait to mail the application form until a Senior Partner at Taxpayer's accounting firm reviewed it sometime in December. Taxpayer postmarked its application for the Alt. Energy Credit to the Department on December 21, 2011. In accord with the above-discussed statutory interpretation, provisions of the TAA, and case law, this December 21, 2011 date was that date that Taxpayer applied for the Alt. Energy Credit under Section 7-9J-5. Taxpayer did not have an increase in full time employees in the one year period from December 21, 2010 through December 21, 2011. In fact, Taxpayer had a decrease in full time employees over that one-year look back period.

Taxpayer argued the Department's acknowledgement of receipt of application letter, **Taxpayer Ex. 1**, supports Taxpayer's interpretation of the Section 9-9J-5. In that letter, after acknowledging receipt of Taxpayer's application for the credit, the Department's Tax Accounts Supervisor asked Taxpayer for a copy of employment records for the one-year before "the date on which the credit application was signed." Because of this request, Taxpayer claims that some Department employees agreed with Taxpayer's interpretation that the one-year look back period commenced from the date of signature rather than the date of mailing or filing of the application.

Accepting Taxpayer's substantive argument regarding the Department's acknowledgement letter as correct for the purposes of further discussion, such written assurances that the Department interprets a statute in a particular manner might be the basis for the claim of either statutory estoppel under NMSA 1978, Section 7-1-60 (1993) or equitable estoppel. However, case law makes the application of estoppel against the Department in the tax context difficult. *See generally Kilmer v. Goodwin*, 2004-NMCA-122, ¶26-8, 136 N.M. 440, 447 (providing an overview of case law and the estoppel doctrine in the tax context). One of the essential elements of any estoppel analysis is whether the complaining party relied upon the

representations of the other party to its detriment. *See Gallegos v. Pueblo of Tesuque*, 2002-NMSC-12, ¶24, 132 N.M. 207, 216.

In this case, Taxpayer could not have possibly relied upon that January 6, 2012 Department letter in making its decision to delay sending the application from the July 24, 2011 signature date until the date of mailing on December 21, 2011 because the Department's letter was not mailed until after Taxpayer's submission of the application to the Department. As the Department's Mr. Dillon pointed out, the Department's acknowledgement of receipt of application was incorrectly dated January 6, 2011 rather than January 6, 2012; this is a common mistake that occurs shortly after the change of any new year. Since Taxpayer did not sign the application until July 24, 2011, mail that application until December 21, 2011, and the Department did not receive the application until December 29, 2011, the Department could not have possibly acknowledged receipt of the application in January of 2011. Moreover, the letter itself references a March 20, 2012 deadline to submit materials, which is more consistent with the letter being mailed on January 6, 2012 rather than January 6, 2012. Under the preponderance standard, the Department's Acknowledgement Letter was in fact mailed on January 6, 2012. Therefore, Taxpayer did not have access to the disputed Department letter until after Taxpayer had made its decision to delay submission of the completed application.

Moreover, Taxpayer could not establish that it consulted with the Department in any other manner before delaying the mailing of the application until December 21, 2011. Without establishing that the Department made any representations to Taxpayer before the mailing of the application that the date of signature on the application controlled the look-back period, Taxpayer cannot show it relied on the Department's advice to its own detriment. Therefore,

neither statutory estoppel under Section 7-1-60 nor equitable estoppel compels the Department to grant Taxpayer relief in this protest.

Taxpayer also argued that the Department's Instructions accompanying the Application for the Alt. Energy Credit and the Schedule A instructions supports its contention that the date of signature on the application, not the date of mailing the application, is the operative date under Section 7-9J-5. However, there is nothing in the instructions that references the signature date on the application as the operative date for the one-year look back period. Most of the instructions simply reference the date of application, the day the credit is applied for, or the day taxpayer applied for the credit. Moreover, as the Department highlighted, there are two examples on Schedule A Instructions that support the interpretation that the date of application under the statute is the date that taxpayer-applicant submits the application to the Department. *See* **Taxpayer Ex. 2.6**. In Example (1), the operative date for the one-year look-back period is the date the applicant submits the application. *See id.* In Example (2), the operative date is the date that the applicant filed the second application. *See id.* The words "submit" and "file" used in the examples in Schedule A Instructions require more than simply a signature on the application.

In conclusion, Taxpayer did not apply for the Alt. Energy Credit until it mailed the completed application to the Department on December 21, 2011. In the one-year period from December 21, 2010 until the mailing of its application on December 21, 2011, Taxpayer had a decrease in full time employees. Consequently, the Department properly denied Taxpayer's application for the Alt. Energy Credit because Taxpayer did not satisfy the eligibility requirements under Section 7-9J-5. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial of Taxpayer's application for Alt. Energy Credit. Jurisdiction lies over the parties and the subject matter of this protest.

B. Under NMSA 1978, Section 7-9J-5 (2007), Taxpayer did not apply for the Alt. Energy Credit until it mailed its completed application to the Department on December 21, 2011. *See Summers*, ¶20, 701; *See also Carter*, ¶14, 426.

C. Taxpayer was not eligible for an Alt. Energy Credit under NMSA 1978, Section 7-9J-5 (2007) because it did not establish an increase in full-time equivalent employees over the one-year period before the date it mailed its application to the Department. In fact, Taxpayer had less full-time equivalent employees on the December 21, 2011 date it mailed its application than it had the previous year.

D. Neither statutory estoppel under NMSA 1978, Section 7-1-60 (1993) nor equitable estoppel are applicable to this protest because there is no evidence that Taxpayer relied on Department advice to its detriment before making the decision to delay mailing the application for Alt. Energy Credit. *See Gallegos*, ¶24, 216; *See also Kilmer*, ¶27, 447.

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

DATED: August 6, 2013.

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