

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

**IN THE MATTER OF THE PROTEST OF
EMCORE SOLAR NEW MEXICO, LLC
TO DENIAL OF CREDIT TRANSFER
ISSUED UNDER LETTER ID NO. L1408457776**

No. 16-21

**DECISION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT**

A formal hearing on the above-referenced protest was held on May 2, 2016 at 1:00 p.m. before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") through its attorney of record, Elena Morgan, and Encore Solar New Mexico, LLC ("Taxpayer") through its employee, Jeff Brauer, Esq., appeared at the appointed time. The Department filed a Motion for Summary Judgment with exhibits A-F1 attached thereto and Taxpayer filed Taxpayer's and Protestor's Opposition to Department's Motion for Summary Judgment and filed Amendment One to Taxpayer's and Protestor's Opposition to Department's Motion for Summary Judgment with exhibits 1-13. The only exhibit objected to was Taxpayer's Exhibit 12, Fiscal Impact Report, which was objected as to relevancy. The Fiscal Impact Report was admitted even though it was for 2009. In essence, the hearing held was on the Department's Motion for Summary Judgment.

In attendance were employees of the Department: Joan Witting, Tax Auditor Supervisor, Bobbie Marquez, Tax Examiner Advanced, and Milagros Bernardo, Protest Auditor.

In addition to the pleadings and filings referred to in the Findings, the record contains the Notice of Reassignment of Hearing Officer for Administrative Hearing issued on April 20, 2016, Department's Notice of Errata filed on April 20, 2016, and Taxpayer's letter dated April 18, 2016.

Based on the evidence in the record, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 18, 2013, the New Mexico Environment Department granted Taxpayer a Certificate of Eligibility, certificate #5417, for Taxpayer's qualifying generating facility. **[Exhibit 1]**.
2. Taxpayer is listed as the only financial entity holding an interest in its qualifying generating facility. **[Exhibits 1 and 4]**.
3. Taxpayer is a limited liability company formed in New Mexico.
4. Taxpayer submitted an application for approval with the Department for an advanced energy combined reporting tax credit on October 1, 2014 in the amount of \$677,883.07. **[Exhibit C-1 through C-2]**.
5. On July 13, 2015, the Department partially approved Taxpayer's request in the amount of \$675,444.07 ("credit"). **[Letter ID No. L0250486832]**.
6. The Department denied the remainder of the credit because the expenditures Taxpayer listed were not "qualified expenditures." **[Exhibit C-2]**.
7. Taxpayer did not protest the denial of the partial refund. **[Amendment one Taxpayer's Opposition to Motion for Summary Judgment, page 5]**.

8. Between October 9, 2015 and November 24, 2015, Taxpayer's consultant, Mr. Brauer discussed with Bobbie Marquez the possibility of selling a portion of the ownership interest in Taxpayer to a third party for the sole purpose of allowing the third party to utilize the credit. **[Exhibit 5]**.

9. Taxpayer has not sold any interest of its business to a third party. The sale is speculative or hypothetical in nature.

10. Taxpayer has not merged with any corporation; nor has Taxpayer changed its organizational structure.

11. On November 24, 2015, the Department denied Taxpayer's request to allocate the credit because the third party entity did not have an ownership interest in Taxpayer at the time it applied for the credit with the New Mexico Environment Department. **[Letter ID No. L1408457776]**.

12. The Department stated in its denial that, "any allocation of this credit should have been done at the time of applying for the credit." **[Letter ID No. L1408457776]**.

13. On February 1, 2016, Taxpayer protested the denial of the transfer of the credit to a hypothetical third party.

14. The Department acknowledged the protest on February 4, 2016. **[Letter ID No. L0032756272]**.

15. On February 15, 2016, the Department requested a hearing in this matter.

16. On February 16, 2016, the Administrative Hearings Office mailed a Notice of Administrative Hearing setting the hearing for May 2, 2016.

DISCUSSION

The sole issue presented is whether a taxpayer may protest a denial of a transfer of the credit, which has not occurred yet, to a third party of its already approved advanced energy combined reporting credit.

Burden of Proof and Standard of Review

Pursuant to regulation 3.1.8.10(A) NMAC, Taxpayer has the burden of proof in this matter. Taxpayer has the burden to prove that the hypothetical sale of Taxpayer's business assets in exchange for the transfer of Taxpayer's credit is ripe and properly before this Hearing Officer. It is undisputed that there has been no sale of Taxpayer's assets to a third party. There is no genuine dispute as to any material fact. The relevant facts are set out in both the Department's and Taxpayer's exhibits.

Ripeness

As a jurisdictional matter, ripeness must be addressed prior to any consideration of the merits. *Manning v. Mining & Minerals Div.*, 2006-NMSC-027, ¶54, 140 N.M. 528, 144 P.3d 87, (Minzner, J. dissenting) ("Lack of ripeness, like lack of standing, is a potential jurisdictional defect, which 'may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court.'") (quoting *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008). *Manning*, 2006-NMSC-027 at ¶54. The basic purpose of ripeness law is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems. *N.M. Indus. Energy Consumers v. N.M. Publ. Serv. Comm'n.*, 1991-NMSC-018, ¶25, 111 N.M. 622, 808 P.2d 592. The courts avoid rendering advisory opinions. *City of Las Cruces v. El Paso Elec. Co.*, 1998-

NMSC-006, ¶18, 124 N.M. 640, 954 P.2d 72. “The ripeness doctrine exists ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.’” *City of Sunland Park v. Macias*, 2003-NMCA-098, ¶23, 134 N.M. 216, 75 P.3d 816 (quoting *US West Communications, Inc. v. N.M. State Corp. Comm’n*, 1998-NMSC-032, ¶8, 125 N.M. 798, 965 P.2d 917).

Ripeness involves a two pronged analysis. *American Federation of State, County & Municipal Employees, Council 18, AFL-CIO, Locals 1461, 2260 and 2499 v. Board of County Commissioners of Bernalillo County*, No. S-1-SC-35248, slip op. at 19 (N.M. Sup. Ct. May 23, 2016). Fitness and hardship are the two prongs of the analysis. *Id.* at 19. “Fitness is concerned with “whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all.” *Id.* at 20 (quoting 15 Moore’s Federal Practice §101.76[1] [a] at 101-312.2).

In this case, Taxpayer has not met the fitness prong because there are two contingencies associated with the third party claiming the credit that have not occurred. Taxpayer is proposing to sell a portion of its business to a third party and assuming the sale occurs, the third party will not qualify for the credit under the Department’s regulations. First, there has been no sale of a portion of Taxpayer’s business to a third party. Secondly, without information related to what the organizational structure of Taxpayer’s business is once it is sold, there is no way to interpret whether the organizational structure will meet the Department’s regulation 3.13.8.12(B) NMAC which permits some transfer of the credit under certain circumstances. In this case, Taxpayer has not met the fitness prong of the ripeness doctrine.

Advanced Energy Combined Reporting Tax Credit

Generally speaking, the advanced energy combined reporting tax credit is a relatively new credit. The advanced energy combined reporting tax credit was enacted by the Legislature in 2007. 2007 N.M. Laws, ch. 229, §1. The purpose of the credit is to spur the development and construction of a qualified new solar thermal electric generating facility, a geothermal electric generating facility or a solar photovoltaic electric generating facility or the development and construction of a new or re-powered coal-based electric generating unit and an associated coal gasification facility. **[Exhibit A-1].**

The process to obtain the credit from the Department is that a taxpayer must apply for a certificate of eligibility from the New Mexico Environment Department, who must issue a certificate within 180 days. NMSA 1978, §§7-9G-2(K) and (L)(2009); **[Exhibit A-2].** Once a taxpayer has received the certificate, the taxpayer must apply, by submitting a RPD-41333 form, to the Department, but no later than one year following the end of the calendar year in which the eligible costs are incurred. NMSA 1978, §§7-9G-2(K) and (N)(2009); **[Exhibit A-2].**

The framework for the credit is that a taxpayer who has been granted a certificate from the New Mexico Environment Department and then has obtained approval from the Department for the advanced energy combined reporting tax credit may claim the advanced energy combined reporting tax credit. The general provision is that the taxpayer(s) applying for certification from the New Mexico Environment Department is the entity who may claim the credit. Section 7-9G-2(G) provides that:

A taxpayer having applied for and been granted approval to claim an advanced energy combined reporting tax credit by the department pursuant to this section may claim an amount of available credit against the taxpayer's gross receipts tax, compensating tax or withholding tax due to the state.

There are a few situations in which the Department has taken the position that the credit may be transferred, but these situations are the exception. Again, the Department's regulation 3.13.8.12(B) NMAC prohibits the transfer of the credit to any other person, including an affiliate. The Department's publication, FYI-106, *Claiming Tax Credits for CRS Taxes and Business-Related Income*, (Rev. 5/2016) provides that a pass-through entity may not claim the credit. **[Exhibit A-2]**. However, regulation 3.13.8.12(B) NMAC provides that if two or more corporations merge or if an entity changes its organizational form to a different form, and if the resultant entity is a continuation of the predecessor corporation, then the resultant entity may claim the credit.

In this case, the facts are too speculative and hypothetical in nature that may or may not involve a change in Taxpayer's structure as a company and therefore, it is impossible to issue a Decision either granting or denying the Department's Motion. Without an actual sale of Taxpayer's business, and knowing the change in Taxpayer's business structure, this matter is not ripe for the Hearing Officer.

Summary Judgment

The Department has moved for summary judgment. 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 NM 713, 242 P.3d 280. 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, 825 P.2d 1241. The Hearing Officer does not rule on the Motion for Summary Judgment because there is no subject matter jurisdiction.

Secretary Ruling

Mr. Brauer is seeking some guidance prior to structuring a potential sale of Taxpayer's business or assets to a third party. While this matter is not ripe for this protest, there is a process within the Department which allows for a taxpayer to seek guidance or request the state tax consequences of a transaction prior to the transaction. NMSA 1978, §9-11-6.2(B)(2)(2015) provides that the Secretary of the Department may issue a directive or a ruling on a prospective transaction. Section 9-11-6.2(B)(2) states that the:

rulings shall be written statements of the secretary, of limited application to one or a small number of persons, interpreting the statutes to which they relate, ordinarily issued in response to a request for clarification of the consequences of a specified set of circumstances.

Taxpayer may seek clarification from the Secretary of the tax consequences of its contemplated transaction prior to the transaction occurring. To initiate the process, Taxpayer must request a ruling in writing from the Secretary and the request must include the taxpayer's identification number and the details of Taxpayer's situation. The Department will not approve a ruling request by a taxpayer who is undergoing an audit. <http://www.tax.newmexico.gov/rulings.aspx>. THEREFORE, this matter is dismissed for lack of ripeness and subject matter jurisdiction.

CONCLUSIONS OF LAW

- A. Taxpayer filed a timely written protest to the Department's denial of credit transfer issued under Letter Id No. L1408457776, and jurisdiction lies over the parties.
- B. The hearing was timely set as required by NMSA 1978, Section 7-1B-8(A) (2015).

C. The Certificate of Eligibility issued by the New Mexico Environment Department only lists Taxpayer as the owner of the generating facility.

D. Taxpayer has been granted by the Department the advanced energy combined reporting credit in the amount of \$675,444.07.

E. The Department partially denied Taxpayer's request for credit, but Taxpayer is not protesting the denial.

F. Taxpayer has not sold any part of its business to a third party.

G. This matter is not ripe and the Hearing Officer does not have jurisdiction over the subject matter of this protest.

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

DATED: May 26, 2016

Monica Ontiveros

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the Taxpayer has 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. See NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is

not filed within 30 days, this Decision and Order will become final. A party filing an appeal shall file a courtesy copy of the Notice of Appeal with the Administrative Hearings Office contemporaneously with the filing of the Notice with the Court of Appeals so that the Administrative Hearings Office may prepare the record proper. The Notice of Appeal should be mailed to John Grieg, Administrative Hearings Office at P.O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.