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

**IN THE MATTER OF THE PROTEST OF**
**RAYTHEON COMPANY**
**TO PARTIAL DENIAL OF APPLICATION FOR HIGH WAGE JOB TAX CREDIT**
**ISSUED UNDER LETTER ID Nos. L1537893936 & L0929752624**

**v.** **D&O No. 18-20**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

## DECISION AND ORDER

A hearing in the above-captioned protest occurred on May 14, 2018 before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. Attorney, Mr. Eric Anderson, Esq. (Andersen Tax) appeared representing Raytheon Company (Taxpayer) and was accompanied by Ms. Catherine Kauffelt, Esq. and Ms. Jacqueline Orea, Esq. Ms. Mary Rice, Ms. Mary Clum, and Ms. Angelina Montoya appeared as witnesses for Taxpayer. Ms. Kelsey Cooley was also present on behalf of Taxpayer, but was not called upon to testify in the matter.

Attorney, Mr. David Mittle, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (Department). Auditors, Mr. Steven Valenzuela, Ms. Elizabeth Florence, and Ms. Milagros Bernardo appeared as witnesses for the Department. Several employees of the Department were also present to observe the hearing for training purposes. Department employees present for training purposes were Ms. Pauline Romero, Mr. Hector Gomez, Ms. Marcy Coca, Ms. Linda Montoya, and Ms. Carla Phillips.

Taxpayer Exhibits 1.1 through 1.17 and Department Exhibits A through F were admitted into the evidentiary record. All exhibits are 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 December 22, 2015, Taxpayer executed an Application for High Wage Jobs Tax Credit seeking a total high wage jobs tax credit in the amount of $1,059,437.09 for 120 periods between June 11, 2013 and June 10, 2014 ("Application 1"). [*See* Administrative File; Taxpayer Exhibit 1.1; Taxpayer Exhibit 1.14].

2. On December 22, 2015, Taxpayer executed an Application for High Wage Jobs Tax Credit seeking a total high wage jobs tax credit in the amount of $906,347.66 for 101 periods between June 22, 2013 and June 10, 2015 ("Application 2"). [*See* Administrative File; Taxpayer Exhibit 1.4; Taxpayer Exhibit 1.13].

3. On June 15, 2016, the Department denied Application 1 in the entire amount of $1,059,437.09 under Letter ID No. L1537893936. [*See* Administrative File; Taxpayer Exhibit 1.14].

4. On June 15, 2016, the Department partially approved Application 2 in the amount of $102,098.87 under Letter ID No. L0929752624, and denied the remaining amount of $804,248.79. [*See* Administrative File; Taxpayer Exhibit 1.13.].

5. On September 20, 2016, the Department's Protest Office received Taxpayer's protest of the Department's denials of Applications 1 and 2 (collectively "Applications"). [*See* Administrative File; Taxpayer Exhibit 1.12].

6. On September 30, 2016, the Department acknowledged receipt of Taxpayer's protest under Letter ID No. L1171652912. [*See* Administrative File].

7. On October 5, 2016, the Department filed a Hearing Request in which it requested a scheduling hearing for the purpose of setting a date for a hearing on the merits of Taxpayer's protest and establishing associated prehearing deadlines. [*See* Administrative File].

8. On October 6, 2016, the Administrative Hearings Office entered a Notice of

Telephonic Scheduling Conference that set a telephonic scheduling hearing for November 4, 2016. [*See* Administrative File].

9. On November 4, 2016, a telephonic scheduling hearing occurred at which time the parties did not object that the hearing was within 90 days of the date of Taxpayer's protest and that the hearing satisfied the 90-day hearing requirement. [*See* Administrative File].

10. On November 7, 2016, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, set a hearing on the merits of Taxpayer's protest for August 1, 2017. [*See* Administrative File].

11. On February 13, 2017, counsel for the Department filed a Notice of Substitution of Counsel for the Department. [*See* Administrative File].

12. On June 30, 2017, the Department filed Department's Unopposed Motion to Convert Hearing on the Merits into Scheduling Conference. [*See* Administrative File].

13. On July 12, 2017, the Administrative Hearings Office entered an Order Converting to Scheduling Hearing and Notice of Telephonic Scheduling Hearing setting a telephonic scheduling hearing for August 1, 2017 in lieu of a hearing on the merits of the protest. [*See* Administrative File].

14. On August 1, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, set a hearing on the merits of Taxpayer's protest for February 27, 2018. [*See* Administrative File].

15. On January 3, 2018, the parties filed a Joint Motion to Convert Hearing on the Merits into Scheduling Conference. [*See* Administrative File].

16. On January 19, 2018, the Administrative Hearings Office entered a Notice of Telephonic Status Hearing that set a telephonic scheduling hearing for February 2, 2018 in lieu of a hearing on the merits of the protest.

17. On February 5, 2018, the Administrative Hearings Office entered a Continuance Order, Scheduling Order, and Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, also set a hearing on the merits of Taxpayer's protest for May 14, 2018. [*See* Administrative File].

18. On April 20, 2018, counsel for Taxpayer, Mr. Anderson, entered his appearance which was accompanied by an Affidavit of Non-Admitted Lawyer and Registration Certificate of Non-Admitted Lawyer. [*See* Administrative File].

19. On April 27, 2018, the parties filed their Joint Prehearing Statement. [*See* Administrative File].

20. On May 11, 2018, the Administrative Hearings Office entered a Notice of Reassignment of Hearing Officer for Administrative Hearing in which the above-captioned protest was assigned to the undersigned Hearing Officer. [*See* Administrative File].

21. As of 2011, Ktech Corporation was engaged in the business of pulse power, directed energy, information technology and controls, and advanced manufacturing. [*See* Taxpayer Ex. 1.9, Page 3, Para. 1.13] and was significantly involved in providing staff augmentation services in the operation of pulse power facilities at Sandia National Laboratory. [Testimony of Ms. Rice].

22. During the same period of time, Taxpayer was primarily engaged in the manufacture and sale of goods, primarily in the fields of defense and homeland security. [Testimony of Ms. Rice; Department Ex, C].

23. On or about March 15, 2011, Ktech Corporation and Taxpayer executed an Asset

Purchase Agreement recognizing that Ktech Corporation owned various assets and interests in contracts that Taxpayer wished to procure through purchase and assignment. [Testimony of Ms. Rice; *See* Taxpayer Ex. 1.9 (Recitals)].

24. The Asset Purchase Agreement was comprehensive and addressed various facets of Taxpayer's acquisition of Ktech Corporation, including matters relevant to employees of Ktech Corporation who would be affected by the acquisition. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

25. The Asset Purchase Agreement provided in relevant part that Taxpayer would be "solely responsible for all liabilities and obligations of any kind with respect to all past and present employees of [Ktech Corporation] for matters occurring prior to and as of" the date of closing, subject to various exceptions. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

26. The Asset Purchase Agreement further provided that Ktech Corporation would terminate any employee who had received and accepted an offer of employment from Taxpayer. Such employees were considered to be "Continuing Employees" under the agreement. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

27. With concern for its obligations to Continuing Employees, Taxpayer assented to treating their service with Ktech Corporation as a service to Taxpayer for the purposes of employee leave, FMLA, and for purposes of vesting in any retirement plan, pension plan, or employee pension benefit plan. [*See* Taxpayer Ex. 1.9 (Para. 5.9)]

28. Taxpayer assented to providing Continuing Employees with benefits under a 401 (k) plan which were "as close as reasonably feasible to those provided under the Ktech Corporation 401 (k) Profit Sharing Plan[.]" [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

29. Taxpayer assented to providing Continuing Employees with benefits under a flexible benefits plan "as close as reasonably feasible to those provided under Ktech Corporation

Flexible Benefits Plan[.]" [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

30. Taxpayer assented to providing that Continuing Employees would be subject to "other personnel and compensation policies and practices of [Taxpayer] in the same manner as [Taxpayer's] similarly situated employees based on their date of hire through the first anniversary of the Closing Date[.]" [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

31. Taxpayer assented to establishing an "excess paid time off" account for Continuing Employees under Ktech Corporation's sick leave policy. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

32. Taxpayer notified Ktech Corporation that it expected to extend offers of employment to "substantially all of the Employees" and that it would use its best efforts to assure that each offer of employment was for a position with a "similar job function" to the employee's position with Ktech Corporation, at the same location, at a similar rate of compensation, and with similar benefits. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

33. Taxpayer assented to establishing or designating a qualified defined contribution plan capable of accepting rollovers from Continuing Employees participating in Ktech Corporation's plan, subject to various exceptions. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

34. Taxpayer, acknowledging itself as "successor employer," assented to preparing and filing Forms W-2 for each Continuing Employee reflecting wages paid and taxes withheld for the portion of the calendar year beginning with the closing date of the agreement. Ktech Corporation, as acknowledging itself as "predecessor employer," agreed to provide the same for the previous year through the date of closing. [*See* Taxpayer Ex. 1.9 (Para. 5.9)].

35. Ktech Corporation agreed to use its best efforts to terminate employment agreements, effective as of the time of closing, and the effective time of any "Retention Agreement" between Taxpayer and Continuing Employees. [*See* Taxpayer Ex. 1.9 (Paras. 1.85,

5.9, 6.1g].

36. Although Taxpayer agreed to retain Continuing Employees in positions having similar job functions, some Continuing Employees experienced varying degrees of modification in their job functions or duties. [Testimony of Ms. Rice; Testimony of Ms. Clum; Testimony of Ms. Montoya].

37. Taxpayer did not acquire all of Ktech Corporation's assets. In Taxpayer's Form 10-K addressing the fiscal year ending December 31, 2012, Taxpayer reported that it "acquired … substantially all of the assets of Ktech Corporation" and that the "Ktech Corporation acquisition is part of [its] strategy to extend and enhance [its] Missile Systems (MS) offerings." [*See* Department Ex. B-00002].

38. Taxpayer further acknowledged the value of its various acquisitions, including the value of the accompanying workforce. [*See* Department Ex. B-00002].

39. A press release announcing the acquisition of Ktech Corporation acknowledged the acquisition of its assets, as well as its expertise in directed energy and pulsed power. It stated "Ktech brings world-class people, technology and strong relationships with the U.S. Air Force Research Laboratory and Sandia National Laboratories to [Taxpayer] and its customers." [*See* Department Ex. C-00001].

40. Assets which were not conveyed as part of the Asset Purchase Agreement were retained by KTP Holding Company, Inc. [Testimony of Ms. Rice; *See* Taxpayer Ex. 1.7 – 1.8].

41. Ms. Rice, Ms. Clum, and Ms. Montoya are presently employed by Taxpayer. They have resided in New Mexico at all times relevant to the protest and were formerly employed by Ktech Corporation. [Testimony of Ms. Rice, Testimony of Ms. Clum; Testimony of Ms. Montoya].

42. Approximately 120 Ktech Corporation employees were terminated from

employment with Ktech Corporation and subsequently rehired by Taxpayer. [Testimony of Ms. Rice].

43. Continuing Employees were required to participate in orientation and training programs in similar manner to other new employees. [Testimony of Ms. Montoya].

44. The Department denied Application 1 because it determined that all employees representing the claimed periods did not occupy newly created jobs, because those jobs resulted from the acquisition of Ktech Corporation's assets. [*See* Taxpayer Ex. 1.14; Joint Prehearing Statement].

45. In Application 1, seven employees were also denied because Taxpayer was unable to provide proof of residency. Two of those seven employees testified at the hearing: Ms. Clum; and Ms. Montoya. [*See* Taxpayer Ex. 1.14; Joint Prehearing Statement].

46. The Department denied substantial portions of Application 2 because 91 employees representing the claimed periods did not occupy newly created jobs, because those jobs resulted from the acquisition of Ktech Corporation's assets.

47. Other periods in Application 2 were similarly rejected as follows:

a. Four employees were determined to be non-residents;

b. Taxpayer was unable to provide an I-9 form for one employee;

c. Two employees did not meet the job-increase requirement;

d. Taxpayer was unable to provide I-9 forms for two employees whose positions resulted from the acquisition of Ktech Corporation's assets.

[*See* Taxpayer Ex. 1.13; Joint Prehearing Statement].

## DISCUSSION

The issues presented in this protest concern the application of NMSA 1978, Section 7-9G-

1 which establishes the High Wage Job Tax Credit (also referred to as the "Act"). Taxpayer presents five issues for consideration: (1) whether Taxpayer's Applications are governed by the Act as it existed at the time Taxpayer allegedly created the new jobs subject of its Applications (2011), or the Act as it existed at the time it submitted its Applications (2015); (2) whether the transaction represented by the Asset Purchase Agreement was an acquisition, merger, or other change in business organization; (3) whether the new jobs were the same jobs or their functional equivalent; (4) whether certain employees were New Mexico residents; and (5) whether Taxpayer should be entitled to recover fees and costs as prevailing party under NMSA 1978, Section 7-1-29.1 (A).

**Whether the protest is controlled by the 2013 or 2008 version of the Act.**

As a preliminary issue, the Hearing Officer will address the question of which version of the statute should apply to the facts underlying the protest. Taxpayer asserts that the Applications should be governed by the version of the statute in effect when the jobs were purportedly created, that being NMSA 1978, Section 7-9G-1 (2008) (or "2008 enactment"). It argues that application of the 2013 enactment should be limited to jobs created on or after its effective date. In contrast, the Department asserts that NMSA 1978, Section 7-9G-1 (2013) (or "2013 enactment") should govern because that was the version of the statute in effect at the time the Applications were filed. For the purpose of this protest, the principal difference arises from the 2008 enactment's silence in reference to jobs created by virtue of a business merger or acquisition or other change in business organization, which is an issue central to the present dispute.

The starting point for addressing this preliminary inquiry resides in the plain wording of the relevant statutes. It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶28, 125

N.M. 401, 962 P.2d 1236. In *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d 881 (internal quotations and citations omitted), the New Mexico Court of Appeals stated:

> the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.

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-021, ¶27, 127 N.M. 120, 978 P.2d 327; *See also Amoco Prod. Co. v. N.M. Taxation & Revenue Dep't*, 1994-NMCA-086, ¶8 & ¶14, 118 N.M. 72, 878 P.2d 1021. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473, 212 P.3d 361. Because this case also involves a tax credit, which is an act of legislative grace, the language of the credit statute must be narrowly construed. *See Team Specialty Prods*, 2005-NMCA-020, ¶9.

Taxpayer relies on *Wilson v. N.M. Lumber & Timber Co.*, 1938-NMSC-040, 42 N.M. 438, 81 P.2d 61 and *Sovereign Camp, W. O. W. v. Casados*, 21 F.Supp. 989 (D.N.M. 1938), cautioning that statutes should not be applied retrospectively unless the language of the statute is so clear, strong and imperative that no other meaning can be inferred or the Legislature's intention cannot otherwise be satisfied. Although not cited by Taxpayer, its position is analogous to NMSA 1978, Section 12-2A-8 which provides that "[a] statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its context requires that it operate retrospectively."

Adhering to the foregoing, the Hearing Officer finds that the Legislature's intentions were clearly embodied in the language used in the 2013 enactment, particularly in Section 14 (E) of 2013

N.M. Ch. 160, which neither party cited, but which is nevertheless dispositive on the Legislature's intentions. It explicitly states, "Section 10 of this act *applies to credit claims received on or after the effective date of Section 10 of this act* and to reporting periods beginning on or after that date." *See* 2013 N.M. Ch. 160, Sec. 14. (Emphasis Added). Section 10 of the act contains the 2013 enactment. *Id*. at Sec. 10

Although the Hearing Officer will not speculate regarding arguments either party could have asserted in reference to 2013 N.M. Ch. 160, Sec. 14, the Hearing Officer might anticipate the assertion that Section 14 restricts the application of the 2013 enactment to facts in which both the submission of the claim *and* the relevant reporting periods are subsequent to the enactment's effective date. However, the rules of statutory construction efficiently resolve such claim because that interpretation would require that the Legislature's reference to "credit claims received on or after the effective date of Section 10 of this act" be disregarded as superfluous because, had that been the Legislature's intention, it would have simply stated the 2013 enactment was applicable only to "reporting periods beginning on or after" the effective date. This approach would have been sufficient had that result been intended because nothing in the 2013 enactment otherwise permits a credit to be claimed in advance of a reporting period.

The plain language of the remaining portions of the 2013 enactment is similarly persuasive. It retained a high-wage jobs tax credit to provide an incentive for urban and rural businesses to create and fill new high-wage jobs in New Mexico. *See* NMSA 1978, Sections 7-9G-1 (A) and (B) (2013). Eligibility for the credit was established to commence in the year the job was created and continue for three additional consecutive qualifying periods. *See* NMSA 1978, Section 7-9G-1 (D) (2013). Equally significant was the Legislature's unambiguous expression of intent that the term, "new high-wage economic based job," would mean a "new job created in New Mexico . . . *on or after July 1,*

*2004*[.]" *See* NMSA 1978, Section 7-9G-1 (M) (5) (2013) (Emphasis Added).

Therefore, contrary to Taxpayer's arguments, any finding that the Legislature intended the 2013 enactment to apply only to new jobs created after its effective date would require that the Hearing Officer disregard significant portions of the statute as surplusage or superfluous contrary to the rules of statutory construction. *See Katz v. N.M. Dep't of Human Servs., Income Support Div.*, 1981-NMSC-012, ¶18, 95 N.M. 530, 624 P.2d 39 (a statute must be construed so that no part of the statute is rendered surplusage or superfluous). It would also require that the Hearing Officer read language into the statute which the Legislature has not included. However, that would also contradict the rule of statutory construction that 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*, 1999-NMSC-021, ¶27.

The next issue is whether application of the 2013 enactment is an improper retrospective application of the law to the facts in this protest, considering Taxpayer's argument that the jobs were purportedly created in 2011. Our courts have acknowledged that "[a]lthough the presumption of prospectivity appears straightforward, confusion often arises as to what retroactivity means in particular contexts." *See Gadsden Fed'n of Teachers v. Bd. of Educ.*, 1996-NMCA-069, ¶14, 122 N.M. 98, 920 P.2d 1052. A statute is considered retroactive if it impairs vested rights or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. *See GEA Integrated Cooling Tech. v. State Taxation & Revenue Dep't*, 2012-NMCA-010, ¶18, 268 P.3d 48. "[A] statute does not operate retroactively just because it is applied to facts and conditions existing on its effective date, even though the condition results from events that occurred prior to its enactment." *Id. citing State v. Morales*, 2010-NMSC-026, ¶9, 148 N.M. 305, 236 P.3d 24.

In *GEA*, the New Mexico Court of Appeals considered whether a 2007 amendment to the

statute establishing the rate at which tax penalty was to be calculated and assessed should be applied to liabilities arising prior to its effective date, but assessed subsequent to its effective date, and whether such application gave the amendment an improper retroactive effect. *GEA* acknowledged that the Supreme Court's holding in *Crane v. Cox*, 1913-NMSC-089, ¶6, 18 N.M. 377, 137 P. 589 was dispositive, having addressed an analogous issue in which it considered whether there was an impermissible retrospective application of a new law providing for collection of delinquent taxes outstanding as of the enactment of that statue.

In its discussion, *GEA* recognized the long-standing presumption against the retroactive application of a statute, but nevertheless held that the application of a new law to pre-existing facts did not automatically give the statute retroactive effect. Relying on the reasoning in *Crane*, it agreed that "[a] statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law [is] intended to affect transactions which occurred . . . before it became operative . . . and which ascribes to them affects not inherent in their nature in view of the law in force at the time of their occurrence." *See GEA*, 2012-NMCA-010, ¶20 *quoting Crane*, 1913-NMSC-089, ¶6.

*GEA* summarized the holding in *Crane*, stating "the new act . . . did not operate retroactively because the operation of the statute did not affect any right the taxpayer possessed under prior law, did not change the taxpayer's status, and did not impose a consequence that was not already anticipated." *See GEA*, 2012-NMCA-010, ¶20.

Comparable to *GEA* and *Crane*, the 2013 enactment did not affect any right Taxpayer possessed under prior law. At this stage, it is important to acknowledge that the New Mexico Court of Appeals has described tax credits as legislative grants of grace that must be narrowly interpreted and construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't*,

2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4.

Considering *Team Specialty* at this juncture is necessary because *GEA* and *Crane* both make specific reference to *rights* under prior law. However, our courts have not expressly perceived tax credits as rights, and Taxpayer presents no authority to suggest that an act of legislative grace is equivalent to a *right* under law. Nevertheless, as similarly observed in *GEA*, because the Legislature could amend the relevant statute at any time, and the prior statute did not necessarily bestow a right on either party, the application of the 2013 enactment to jobs purportedly created approximately four years prior to the 2013 enactment taking effect did not impose consequences that could not be anticipated. *See GEA*, 2012-NMCA-010, ¶21.

In this regard, 2013 N.M. Ch. 160, Sec. 14 notified the public that it would apply to claims made after its effective date, thereby providing an opportunity for potential claimants, including Taxpayer, to submit applications before that date, in order for them to be evaluated under the prior law. This observation is significant because had there been genuine concern for the effect of the 2013 enactment, Taxpayer had ample opportunity to submit its Applications under the previous version of the Act, but did not do so.

As *GEA* concluded, "Taxpayer's case is an example of a statute applying prospectively to conditions in existence at the time of its effective date." *See GEA*, 2012-NMCA-010, ¶25.

The 2013 enactment clearly controls this protest because the jobs at issue were purportedly created on or after July 1, 2004 and the relevant applications were submitted on or about December 22, 2015, after it became effective.

**Burden of Proof**

Having considered which version of the Act should apply to the protest at hand, it is now appropriate to discuss the burden of proof. Although the current protest does not arise from an

assessment, but rather from a partial denial of one credit application and a complete denial of another, Taxpayer bears the burden of establishing entitlement to the credit central to its protest. The New Mexico Court of Appeals has found that tax credits are legislative grants of grace that must be narrowly interpreted and construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't,* 2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4. Accordingly, Taxpayer carries the burden of proving that it is entitled to the claimed credit.

Although, pursuant to *Team Specialty*, a credit must be narrowly interpreted and construed against a taxpayer, the credit must also be construed in a reasonable manner consistent with legislative language. *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶9, 107 N.M. 540, 760 P.2d 1306 (although construed narrowly against a taxpayer, deductions and exemptions—similar to credits—are still to be construed in a reasonable manner).

**Whether the transaction that occurred pursuant to the Asset Purchase Agreement is an acquisition, merger, or other change in business organization.**

Neither party asserts that the Asset Purchase Agreement represented a merger or change in business organization for Taxpayer. Consequently, the Hearing Officer will focus on the primary term in contention at the hearing, "acquisition".

Whether or not the Asset Purchase Agreement represented an "acquisition" is significant because the Act expressly disqualifies new high-wage economic based jobs under the following circumstances: (1) the new high-wage economic-based job is created due to a business merger or acquisition or other change in business organization; (2) the eligible employee was terminated from employment in New Mexico by another employer involved in the business merger or acquisition or other change in business organization with the taxpayer; and (3) the new high-wage economic-based job is performed by: (a) the person who performed the job or its functional equivalent prior to the

business merger or acquisition or other change in business organization; or (b) a person replacing the person who performed the job or its functional equivalent prior to a business merger or acquisition or other change in business organization. *See* NMSA 1978, Section 7-9G-1 (F) (2013).

Although Taxpayer disputed that the new jobs it claimed in its Applications were created due to an acquisition, instead characterizing its transaction as a purchase of assets, the scenario central to this protest falls directly within the language of the statute. The term "acquisition" is defined to mean "[t]he gaining of possession or control of something" which is what occurred in the present case. *See* Black's Law Dictionary, 26 (9th ed. 2009)

Taxpayer's aversion to the term "acquisition" was apparent. It claimed that it did not "acquire" Ktech Corporation because it merely purchased some, but not all, of Ktech Corporation's assets. In contrast, the evidence demonstrated that Taxpayer acquired those portions of Ktech which it desired for the purposes of expanding its operations. The fact that Taxpayer did not acquire 100 percent of Ktech Corporation was not persuasive or dispositive.

The totality of the evidence established that Taxpayer's intentions were not only to acquire Ktech Corporation's assets, but also the expertise of its personnel. This was clearly the message conveyed to the public as Taxpayer announced its acquisition stating, "Ktech's expertise in directed energy and pulsed power make it a natural fit with [Taxpayer's] Advanced Security and Directed Energy Systems product line" and "Ktech brings world-class people, technology and strong relationships with the U.S. Air Force Research Laboratory and Sandia National Laboratories to [Taxpayer] and its customers." *See* Department Ex. C-00001.

This view remained consistent when Taxpayer filed its Form 10-K for the fiscal year ending December 31, 2012 when it stated "we acquired [other entities] and substantially all of the assets of Ktech Corporation[.]" It went on to explain that, "[i]n connection with these acquisitions, we recorded

$112 million of goodwill, primarily related to expected synergies from combining operations and the value of the existing workforce, and $26 million of intangible assets, primarily related to customer relationships, trade names and technology with an initial estimated weighted-average life of seven years."

These pronouncements are significant because they represent the public statements of the Taxpayer, and its perception that it received significant value not only in the form of Ktech Corporation's assets, but also from its workforce.[1] When Taxpayer referred to expertise, world-class people, or customer relationships, it was referring to employees as people, not assets which are incapable of possessing experience or establishing or maintaining relationships.

However, Taxpayer argued that "because [it] was not obligated to hire any employees, it deemed the former Ktech employees eligible for a high wage jobs credit." *See* Joint Prehearing Statement. Taxpayer's perception of it obligation is problematic. According to Taxpayer Exhibit 1.9, Taxpayer represented to Ktech Corporation that "it expects to offer employment, as of the Effective Time of Closing, to substantially all of the Employees employed on the date hereof in the Business[.]" *See* Taxpayer ex. 1.9, Sec. 5.9 (b), Page 44. The Asset Purchase Agreement also established in significant detail the benefits to which Ktech Corporation employees would be entitled upon assuming employment with Taxpayer. For example, employees would receive service credit for purposes of accruing leave, FMLA, and for acquiring a vested interest in relevant savings plans. Taxpayer also agreed to provide comparable benefits to 401 (k) and flexible benefits plan offered by Ktech

[1] The Department also proffered Department Exhibits D, E, and F which were admitted without objection. The Hearing Officer gives those statements no weight because those statements consist of media reports or statements by non-parties, and the Hearing Officer was not satisfied that the party propounding the evidence established the reliability of the statements. Department Exhibit C, in contrast, represents the statement of a party, which unlike a media report, does not rely on the ability of a third party to accurately perceive an event or correctly report the event to its audience.

Corporation, and provide an "excess paid time off" account. *See* Taxpayer Ex. 1.9, Sec. 5.9 (a), Page 43 – 44.

Consequently, although Taxpayer may not have been strictly obligated to hire all Ktech Corporation employees, it was clear from the Asset Purchase Agreement that significant consideration had been provided to encourage most, if not all Ktech Corporation employees, to transition to Taxpayer's employment with minimal disruption, and that Taxpayer viewed the acquisition of those employees as having significant value to its business.

Although Ms. Clum, Ms. Rice, and Ms. Montoya testified that the actual transition from employment with Ktech Corporation to Taxpayer did not strictly adhere to the terms of the Asset Purchase Agreement, the Hearing Officer finds that the Asset Purchase Agreement remains the best evidence of the manner through which the acquisition of Ktech Corporation assets was accomplished, and there was no reliable evidence to suggest that the agreement did not continue to be the best evidence of the parties intentions and subsequent actions.

Accordingly, the Hearing Officer was persuaded that the Asset Purchase Agreement represented not only the desire and intention to acquire certain assets of Ktech Corporation, but also the objective to benefit from the additional procurement of the knowledge and experience vested in its workforce.

**Whether new jobs with Taxpayer were the same jobs or their functional equivalent to jobs with Ktech Corporation.**

In this protest, the claimed new high-wage economic-based jobs were created due to an acquisition in which the eligible employees were terminated from employment by Ktech Corporation and rehired by Taxpayer. The next question is whether those employees or their replacements were hired to perform the same job or their functional equivalent prior to the acquisition. *See* NMSA 1978,

Section 7-9G-1 (F) (2013).

Taxpayer presented the testimony of Ms. Clum, Ms. Rice, and Ms. Montoya to assert that the positions they assumed with Taxpayer were so vastly different that they could not be considered to be the functional equivalent of the positions they previously occupied with Ktech Corporation.

The evidence on this issue was unpersuasive. All three witnesses testified that their job duties had been modified in various respects, but none of the witnesses presented compelling evidence that the positions they occupied after the acquisition were not the functional equivalent of positions they previously held with Ktech Corporation. In fact, the substance of their testimony focused primarily on differences in procedures or managerial structures, training and orientation requirements, or in the difference between the core missions of Ktech Corporation and Taxpayer. To the extent there were material differences in job descriptions, those differences were speculative and unsupported by reference to any other evidence, such as written job descriptions.

Referring once again to the Asset Purchase Agreement, Taxpayer agreed to utilize its best efforts to assure that offers of employment to Ktech Corporation employees would be extended for positions having similar functions to the employee's position immediately prior to the closing of the transaction. Testimony at the hearing that few, if any, employees actually occupied positions with similar job functions, or equivalent job functions, contradicts the Taxpayer's obligations under the Asset Purchase Agreement, which the Hearing Officer finds to be the best evidence of Taxpayer's intentions and subsequent conduct in reference to the employment of Ktech Corporation employees.

**Whether certain denied employees were residents of New Mexico.**

The issue of employee residency is germane in this matter because the Act specifically requires that an individual reside and be employed in New Mexico in order for a taxpayer to receive a credit for the position occupied by that individual. *See* NMSA 1978, Section 7-9G-1 (M) (2)

(2013).

In evaluating residency, the Department refers to information contained in various databases to which it has access. *See* Taxpayer Exhibits 1.13 and 1.14. If the information obtained from those databases is inconclusive, then it may request additional information as it did in the relevant applications. Consequently, in reference to all employees whose residency in New Mexico could not be determined, the Department requested federal Forms I-9 (Employment Eligibility Verification) which would indicate the employee's place of residence. However, Taxpayer did not produce Forms I-9 for those employees whose residency could not be verified. Two of those employees were Ms. Clum and Ms. Montoya, who both credibly testified that they were residents of New Mexico during all relevant periods of time.

However, the testimony of Ms. Clum and Ms. Montoya was sufficient to establish their own New Mexico state residency. Yet, finding that Ms. Clum and Ms. Montoya are residents will not necessarily entitle Taxpayer to a corresponding credit unless it can satisfy the remaining requirements for eligibility. In other words, if their jobs were created as a result of the acquisition, then they are disqualified under NMSA 1978, Section 7-9G-1 (F) (2013).

**Whether Taxpayer is entitled to recovery of costs and fees pursuant to NMSA 1978, Section 7-1-29.1 (A).**

Taxpayer argued that it was entitled to attorney's fees and costs in this protest. Under NMSA 1978, Section 7-1-29.1, when a taxpayer is the prevailing party in an administrative proceeding before the Department, the taxpayer shall be awarded reasonable administrative costs, including attorney's fees. The taxpayer is a "prevailing party" if it has substantially prevailed with respect to (a) the amount in controversy or (b) most of the issues involved in the case or the most significant issue or set of issues involved in the case. *See* NMSA 1978, Section 7-1-29.1 (C) (1). The taxpayer will not be

treated as a prevailing party if the Department "establishes that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case." *See* NMSA 1978, Section 7-1-29.1 (C) (2).

In this case, Taxpayer did not prevail on the major issue. Even if Taxpayer had prevailed, the Department's position in this proceeding would still have been based on a reasonable application of the law to the facts of this protest. Taxpayer's request for attorney's fees and costs is denied under Section 7-1-29.1 (C) (2).

## CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denial and partial denial of its Applications for high wage jobs tax credit, and jurisdiction lies over the parties and the subject matter of this protest.

B. A scheduling hearing occurred on November 4, 2016 that satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

C. Taxpayer did not establish entitlement to the High Wage Jobs Tax Credit that the Department denied on June 15, 2016 under Letter ID Nos. L0929752624 and L1537893936, or otherwise establish that the Department's interpretation or implementation of the Act was not in accordance with the law. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't*, 2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4 (Tax credits are legislative grants of grace to a taxpayer that must be narrowly interpreted and construed against a taxpayer).

D. Taxpayer did not establish entitlement to the credit under the Act where it failed to substantiate that the jobs claimed were newly created as required by NMSA 1978, Section 7-9G-1 (2013).

E. Taxpayer did not establish entitlement to the credit under the Act where it failed to

substantiate that claimed employees were eligible as residents of the state as required by NMSA 1978, Section 7-9G-1 (M) (2013).

F. Taxpayer did establish the residency of Ms. Clum and Ms. Montoya as required by NMSA 1978, Section 7-9G-1 (M) (2013).

For the foregoing reasons, Taxpayer's protest **IS DENIED** except as follows: if but for the issue of residency for Ms. Clum and Ms. Montoya, their positions would have otherwise qualified for a high wage job tax credit, then such credit shall be granted for those positions in an amount to be determined by the Department subject to the requirements of the Act.

DATED: July 5, 2018

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

## NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have 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. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

## CERTIFICATE OF SERVICE

On July 5, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

*First Class Mail* *Interdepartmental Mail*