

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

**IN THE MATTER OF THE PROTEST OF
OLD DOMINION FREIGHT LINES
TO THE DENIAL OF HIGH WAGE JOBS TAX CREDIT
ISSUED UNDER LETTER ID NO. L1398322480**

D&O No. 18-33

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on August 23, 2018 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Mr. David Mittle, Staff Attorney. Ms. Milagros Bernardo, Auditor, also appeared on behalf of the Department. Mr. Jeffrey Morris, CPA and his associate, Ms. Jennifer Thompson, from Think, LLP, which was representing Old Dominion Freight Lines (Taxpayer), appeared for the hearing. Ms. Michele Jones, Tax Director for the Taxpayer, also appeared by telephone. Ms. Jones, Ms. Thompson, and Ms. Bernardo testified. The Hearing Officer took notice of all documents in the administrative file. The Taxpayer's exhibits 1, 2, 3¹, and 4, and the Department's exhibits C and D were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, **IT IS DECIDED AND ORDERED AS FOLLOWS:**

¹ Exhibit 3 contains the names of other taxpayers. Due to confidentiality concerns, Exhibit 3 is sealed and sequestered from public review.

FINDINGS OF FACT

1. On June 23, 2017, the Department denied the Taxpayer's claim for the high wage jobs tax credit (HWJTC) for \$324,214.83 for 21 employees over 42 qualifying periods.
2. On September 21, 2017, the Taxpayer filed a formal protest letter.
3. On November 17, 2017, the Department filed a Request for Hearing with the Administrative Hearings Office, asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On November 20, 2017, the Administrative Hearings Office issued a notice of telephonic scheduling hearing.
5. On December 7, 2017, the Taxpayer requested a continuance of the telephonic scheduling hearing and waived the 90-day requirement of the statute.
6. The Taxpayer's request was granted. On December 11, 2017, the Administrative Hearings Office issued an amended notice of telephonic scheduling hearing.
7. The telephonic scheduling hearing was conducted on December 18, 2017. The hearing was held within ninety days of the protest.
8. On December 20, 2017, the Administrative Hearings Office issued a notice for a second telephonic scheduling hearing.
9. A second telephonic scheduling hearing was conducted on March 23, 2018.
10. On March 27, 2018, the scheduling order and notice of hearing was issued.
11. On August 1, 2018, the Department filed an objection to the Taxpayer's discovery, as the discovery deadline had already passed.
12. On August 7, 2018, the parties filed their joint prehearing statement.
13. On August 7, 2018, the Taxpayer filed a motion to continue the hearing.

14. On August 8, 2018, the Department opposed the motion to continue.
15. On August 20, 2018, the motion to continue was denied.
16. On August 21, 2018, the Taxpayer filed a motion to allow one of its witnesses to appear by telephone.
17. On August 22, 2018, the Department filed its response and did not oppose the motion.
18. On August 22, 2018, the order granting telephonic appearance was issued.
19. The Taxpayer engages in a trucking operation in New Mexico and throughout the United States. [Testimony of Ms. Jones and Exhibits 1 and 2]
20. The Taxpayer is incorporated in North Carolina. All of its invoices are generated in North Carolina or California, all of its bills are paid through its central office in North Carolina, all of its revenue is paid to and deposited in its bank accounts in North Carolina, and all of its payroll goes through its central office in North Carolina. [Testimony of Ms. Jones]
21. The Taxpayer hauls more than one customer's freight on each truckload. The Taxpayer dispatches trucks from various service centers. [Testimony of Ms. Jones]
22. When a customer requests service, the Taxpayer sends a truck to pick up the customer's freight. The truck is dispatched from the nearest service center. The freight is then hauled to the service center. Depending on the customer's needs and the ultimate destination for the freight, the freight is either loaded onto a delivery truck, or loaded onto a trailer for long hauling. [Testimony of Ms. Jones]
23. Freight loaded onto delivery trucks is delivered to its ultimate destination. Freight loaded onto a trailer is hauled to another service center, nearest to its ultimate destination. The

long-hauled freight is then loaded onto delivery trucks and delivered to its ultimate destination.

[Testimony of Ms. Jones]

24. The Taxpayer has two service centers in New Mexico. One is located in Albuquerque, and the other is located in Farmington. [Testimony of Ms. Jones and Ms. Thompson, and Exhibits 1 and 2]

25. The Taxpayer employs drivers who are specifically assigned to each service center. The drivers typically live in the local community where their assigned service center is located. [Testimony of Ms. Jones]

26. In 2013, the Taxpayer spent considerable funds and engaged in significant renovations to expand their Albuquerque service center. [Testimony of Ms. Jones and Exhibit 4]

27. The Taxpayer currently has more than 70 employees in New Mexico and provides them with wages and benefits. [Testimony of Ms. Jones]

28. In preparation for the hearing, the Taxpayer generated Exhibit 2. [Testimony of Ms. Jones, Ms. Thompson, and Exhibit 2]

29. The Taxpayer generated revenue reports based on all invoices for sales of service where the originating service center was located in Farmington and in Albuquerque. [Testimony of Ms. Jones and Exhibit 2]

30. In the revenue reports, the Taxpayer did not include any invoices for sales of service where the originating service center was located outside of New Mexico, even if the final destination for delivery was inside of New Mexico. [Testimony of Ms. Jones, Ms. Thompson, and Exhibit 2]

31. In the revenue reports, the Taxpayer did not take into consideration the final destination of the freight, whether inside or outside of New Mexico. [Testimony of Ms. Jones and Exhibit 2]

32. The revenue reports represent approximately 26,000 invoices. [Testimony of Ms. Jones, Ms. Thompson, Ms. Bernardo, and Exhibit 2]

33. The Taxpayer provided a small random sampling of invoices as part of Exhibit 2, but only one invoice was actually from one of the claimed qualifying periods. [Testimony of Ms. Jones, Ms. Thompson, Ms. Bernardo, and Exhibit 2.671]

34. The invoices track the originating service center and the destination service center by a three-letter code. The code for Albuquerque is ABQ, and the code for Farmington is FNM. [Testimony of Ms. Jones and Exhibit 2].

35. To determine if the invoices relied upon in Exhibit 2 were for out-of-state customers, the Taxpayer relied solely upon the address to which the invoice was billed. [Testimony of Ms. Jones]

36. Most of the Taxpayer's customers are nationwide businesses, with central corporate offices that handle their revenue and expenditures, much like the Taxpayer's central office does. [Testimony of Ms. Jones and Ms. Thompson]

37. The Taxpayer did not investigate any of the invoices to determine if the sale of service was performed at the request of a person who was outside of New Mexico or if the request actually came from a person inside of New Mexico whose billing address happened to be outside of New Mexico. [Testimony of Ms. Jones]

38. The sole invoice provided by the Taxpayer for the qualifying period in question reflects a request for pickup and delivery solely within New Mexico, but a billing address outside of New Mexico. [Exhibit 2.671]

39. The Taxpayer determined through its review of invoices used in Exhibit 2 that 80 percent of its sales were to customers outside of New Mexico, based solely on the location reflected in the billing address. [Testimony of Ms. Jones]

40. The Taxpayer also prepared a revenue report based on total revenue from all of its service centers for the 2014 calendar year. [Testimony of Ms. Jones and Exhibit 1]

41. The total revenue reports in Exhibit 1 and 2 should be exactly the same for the totals from New Mexico for the 2014 calendar year. [Testimony of Ms. Jones]

42. The total revenue generated from New Mexico for 2014 was \$3,211,384.13 in one column and \$3,241,713.42 in another column in Exhibit 1, and \$3,229,183.07 in Exhibit 2.

43. The Taxpayer acknowledged that there was a discrepancy between its revenue reports but felt that it was minor. [Testimony of Ms. Jones and Exhibits 1 and 2]

44. The Taxpayer believes that most of its employees would meet the criteria for taking the credit. [Testimony of Ms. Jones and Ms. Thompson]

45. Through the course of the credit audit, the Taxpayer received the Department's requests for production of documents but did not provide all of the documents requested. [Testimony of Ms. Thompson]

46. The Taxpayer was aware that the employee eligibility was also a contested issue in this protest. [Testimony of Ms. Jones, Ms. Thompson, protest letter, and Exhibit C]

47. From June 2017 until August 2018, the Taxpayer did not provide the Department with further documentation. [Testimony of Ms. Jones, Ms. Thompson, and Ms. Bernardo]

48. The documents provided by the Taxpayer in August 2018 are the exhibits submitted during the hearing. [Testimony of Ms. Jones, Ms. Thompson, and Ms. Bernardo]

DISCUSSION

The issue to be decided is whether the Taxpayer is eligible for the high wage job tax credit. *See* NMSA 1978, § 7-9G-1 (2013)². The Taxpayer argues that the Department is applying a standard for determining sales to an out-of-state person using the new 2016 amendment to the statute. The Taxpayer argues that the Department's requests for documentation on the sales and on the employees was unreasonable. The Department argues that the Taxpayer is not a New Mexico business that was intended to be allowed the credit. The Department also argues that the Taxpayer has not produced substantial evidence to support the claim.

Burden of Proof.

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.

High wage jobs tax credit.

“The purpose of the high-wage jobs tax credit is to provide an incentive for urban and rural businesses to create and fill new high-wage jobs in New Mexico.” NMSA 1978, § 7-9G-1 (B). A taxpayer who satisfies all of the statutory criteria may apply for the HWJTC. *See* NMSA 1978, § 7-9G-1 (A). To claim the HWJTC, the taxpayer must meet several criteria, including

² All references to Section 7-9G-1 are to the 2013 version unless otherwise noted.
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requirements on the employer, the employees, the qualifying periods, the new jobs, and the wages. *See* NMSA 1978, § 7-9G-1.

The Department argues that the statute limits the credit to New Mexico businesses under subsection B. The Department argues that the Taxpayer is not a New Mexico business because it incorporated and bases its operations out of North Carolina. The Taxpayer argues that the statute applies the credit to all urban and rural businesses that create new jobs in New Mexico.

The first step in statutory interpretation is to look at the plain language of the statute and to refrain from further interpretation if the plain language is not ambiguous. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, 146 N.M. 24. Statutes are to be applied as written unless a literal use of the words would lead to an absurd result. *See New Mexico Real Estate Comm'n. v. Barger*, 2012-NMCA-081, ¶ 7. If a statute is ambiguous or would lead to an absurd result, then it should be construed in accordance with the legislative intent or spirit and reason for the statute, even though it may require a substitution or addition of words. *See id.* *See also State ex rel. Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346. *See also Kewanee Indus., Inc. v. Reese*, 1993-NMSC-006, 114 N.M. 784. When a statute is ambiguous or would lead to an absurd result, it should be construed according to its obvious purpose. *See T-N-T Taxi Co. v. N.M. Pub. Regulation Comm'n.*, 2006-NMSC-016, ¶ 5, 139 N.M. 550.

Again, “[t]he purpose of the high-wage jobs tax credit is to provide an incentive for urban and rural businesses to create and fill new high-wage jobs in New Mexico.” NMSA 1978, § 7-9G-1 (B). The Department’s construction of the statute encourages a reading that transforms the prepositional phrase “in New Mexico”, which applies to the location of the new jobs created, into an adjective that restricts the types of businesses who are incentivized. The Department’s

interpretation does not conform to ordinary rules of grammatical construction regarding prepositional phrases and the clauses that they modify. *See Env'tl. Improvement Div. of N.M. Health & Env't Dep't v. Bloomfield Irrigation Dist.*, 1989-NMCA-049, ¶ 11-14, 108 N.M. 691 (interpreting a regulation according to the clause that the prepositional phrase modified). *See also State ex rel. Segó v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359 (holding that striking a prepositional phrase from a bill amounted to an alteration to its meaning and was not an appropriate exercise of the veto power to disapprove or to destroy an item). The Department's interpretation also disincentivizes large, nationwide corporations from creating new high-wage jobs in New Mexico, a result that would render the statute a nullity as to many companies who are doing business with employees in New Mexico. Such interpretation produces an absurd result in direct opposition to the stated purpose of the statute. Moreover, the statute defines who an eligible employer is, and it does not make the type of restrictive requirement that Department advocates. *See* NMSA 1978, § 7-9G-1. One would expect the definition to contain the requirements of eligibility, rather than the overall purpose of the statute. It was undisputed that the Taxpayer was an urban or rural business with employees in New Mexico. The Department's argument is not persuasive.

Lack of evidence.

The Taxpayer focused most of its evidence and argument on the issue of whether it was an eligible employer. An "eligible employer" is one who "made more than fifty percent of its sales of goods or services produced in New Mexico to persons outside New Mexico during the applicable qualifying period; or" has a certain type of certificate. NMSA 1978, § 7-9G-1 (M) (3). The Taxpayer did not have the certificate, so the Taxpayer's eligibility hinges on its percent

of sales to persons outside of New Mexico. The statute does not define who is to be considered a person outside of New Mexico. *See id.*

The Taxpayer argues that most of its customers, with whom it has negotiated rate contracts, are nationwide businesses that have their central billing offices outside of New Mexico. The Taxpayer argues that these customers are persons outside of New Mexico for purposes of the statute. The Department argues that the Taxpayer has not proven that their customers are persons outside of New Mexico because the Taxpayer's evidence consists of the revenue report that it generated specifically for the hearing. The Department argues that the Taxpayer disclosed the revenue report the week prior to the hearing and only provided a single invoice pertaining to a claimed qualifying period. The Department argues that the Taxpayer's evidence could not be investigated and challenged because it was not disclosed during the discovery period. The Department argues that the Taxpayer's evidence amounts to unsubstantiated claims.

The Taxpayer admitted that there were discrepancies between its own exhibits as to the amounts of New Mexico-generated revenue for the 2014 year but argued that the discrepancies were fairly minor in amount. The Taxpayer also admitted that it failed to provide more than one invoice from the claimed period to substantiate its revenue reports. One invoice out of approximately 26,000 is considerably less than one percent. The Taxpayer also admitted that it did not provide any further documentation on the employees and other requirements necessary to claim the credit. *See* NMSA 1978, § 7-9G-1. Given the inconsistencies in the Taxpayer's own exhibits, the failure to provide more than one substantiating document for its revenue reports, and the failure to provide evidence as to all of the necessary criteria in order to claim the credit, the Taxpayer's claim was appropriately denied by the Department.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the denial of high wage jobs tax credit issued under Letter ID number L1398322480, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer failed to provide substantial evidence to prove that it was entitled to the credit. *See* NMSA 1978, § 7-9G-1. *See also 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.

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

DATED: October 24, 2018.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, 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. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego,

P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this 24th day of October, 2018 in the following manner:

First Class Mail

Interoffice Mail

INTENTIONALLY BLANK

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