STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
MOSAIC POTASH CARLSBAD INC.
TO DENIAL OF HIGH WAGE JOB TAX CREDIT
ISSUED UNDER LETTER
ID NO. L0946274608

v. **D&O No. 18-13**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing in the above-captioned protest occurred on January 4, 2018 before Chris Romero, Hearing Officer, in Santa Fe, New Mexico. Attorneys, Mr. Wade Jackson, Esq. and Mr. Robert Johnston, Esq. (Sutin, Thayer & Browne, PC), appeared representing Mosaic Potash Carlsbad Inc. ("Taxpayer"). Mr. Steven Bartlett of Axiom Certified Public Accountants and Business Advisors, L.L.C. ("Axiom"), and Ms. Rebecca Contreras, Site Finance Manager for Taxpayer, appeared in person as witnesses for Taxpayer. Also appearing to observe, but not called to testify were Shannon Kelly of Taxpayer, and Everett Trujillo and Ron Saavedra of Axiom. Attorney, Mr. Marek Grabowski, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico ("Department"). Mr. Danny Pogan and Ms. Joan Wittig appeared in person as witnesses for the Department. Taxpayer Exhibits 1 through 9 and Department Exhibits A through E were admitted into the evidentiary record. All exhibits are more thoroughly described in the Administrative Exhibit Log. Upon Taxpayer's request, the Hearing Officer permitted the parties through February 23, 2018 to file written closing arguments, proposed findings of fact, and proposed conclusions of law. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

General Background and Procedural History

1. On December 27, 2012, Taxpayer executed a Tax Information Authorization ("TIA") allowing Axiom to represent it in matters pertinent to compensating taxes and the High Wage Jobs Tax Credit. [*See* Administrative File].

2. On December 13, 2015, Taxpayer, by and through Mr. Everett Trujillo of Axiom, executed an Authorization to Provide Tax Information by Facsimile and E-Mail. [*See* Administrative File].

3. On December 15, 2015, Taxpayer hand-delivered to the Department an Application for High Wage Jobs Tax Credit for the periods of January of 2010 through February of 2015, seeking a total high wage jobs tax credit in the amount of $2,644,923.51 for 336 periods ("Application"). [*See* Joint Prehearing Statement, Stip. 2.a; Taxpayer Ex. 1].

4. The Department partially approved the Application on October 5, 2016 under Letter ID No. L0946274608. The approved credit was $872,329.62. The disallowed credit was $1,772,593.89, which represents the amount in dispute in this protest. [*See* Joint Prehearing Statement, Stip. 2.b; Taxpayer Ex. 2; Taxpayer Ex. 3].

5. On January 5, 2017, the Department's Protest Office received Taxpayer's protest of the partial denial of the Application. Taxpayer's protest was dated December 26, 2016. [*See* Joint Prehearing Statement, Stip. 2.c; Taxpayer Ex. 2; Administrative File].

6. On January 6, 2017, the Department under Letter ID No. L0735693104 acknowledged receipt of Taxpayer protest. [*See* Administrative File].

7. On February 16, 2017, 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 other associated deadlines. [*See* Administrative File].

8. On February 17, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a telephonic scheduling hearing for March 13, 2017. [*See* Administrative File].

9. On March 13, 2017, 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* Record of Telephonic Scheduling Hearing (3/13/2017); Administrative File].

10. On March 13, 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 November 21, 2017. [*See* Administrative File].

11. On June 26, 2017, the Administrative Hearings Office entered a Notice of Reassignment of Hearing Officer for Administrative Hearing that assigned the above-captioned protest to the undersigned Hearing Officer. [*See* Administrative File].

12. On September 13, 2017, the Department filed an Unopposed Motion for a Continuance. [*See* Administrative File].

13. On October 12, 2017, the Administrative Hearing Office entered an Order Granting Continuance, Amended Scheduling Order, and Second Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, also set a hearing on the merits of Taxpayer's protest for January 4, 2018. [*See* Administrative File].

14. On October 20, 2017, Taxpayer, by and through Axiom, filed a Certificate of Service of Discovery indicating that it served its First Set of Interrogatories, Requests to Admit,

and Request for the Production of Documents on the Department. [*See* Administrative File].

15. On November 22, 2017, the Department filed a Certificate of Service indicating that it served Taxpayer with its responses to its First Set of Interrogatories, Requests to Admit, and Request for the Production of Documents. [*See* Administrative File].

16. On December 20, 2017, Taxpayer's counsel of record, entered their appearance on Taxpayer's behalf. [*See* Administrative File].

17. On December 20, 2017, the parties filed their Joint Prehearing Statement. [*See* Administrative File].

18. On January 3, 2018, the Department filed an Emergency Motion for a Continuance or to Hold Hearing Open. Taxpayer also filed Taxpayer's Response to New Mexico Taxation and Revenue Department's Emergency Motion for a Continuance or to Hold Hearing Open. [*See* Administrative File].

The Application

19. Taxpayer operates a mining and a manufacturing facility in Carlsbad, New Mexico. [*See* Joint Prehearing Statement, Stip. 2.d; Taxpayer Ex. 3.4 – 3.5].

20. Mr. Steven Bartlett is an accountant employed by Axiom. He has been an accountant for five years and has participated in the preparation of dozens of applications for the high wage job tax credit on behalf of various Axiom clients, including the Application on behalf of Taxpayer the current protest. [Testimony of Mr. Bartlett].

21. Mr. Bartlett prepared the entirety of Taxpayer's Application in reliance on the records Taxpayer provided to Axiom for that purpose. [Testimony of Mr. Bartlett; Taxpayer Ex. 1].

22. Ms. Rebecca Contreras is the Site Finance Manager for Taxpayer. In that

capacity, she has personal knowledge regarding Taxpayer's records. [Testimony of Ms. Contreras].

23. All records provided to Axiom, which were thereafter relied upon in preparing and submitting Taxpayer's Application were authentic, were kept in the ordinary course of business, and accurately reflected the records maintained by Taxpayer. [Testimony of Ms. Contreras].

24. Ms. Contreras had no involvement in the preparation of Taxpayer's Application. [Testimony of Ms. Contreras].

25. In support of its Application, Taxpayer with assistance from Axiom provided an employee list dating back to 1968, a payroll dump, and two I-9 forms. [*See* Joint Prehearing Statement, Stip. 2.f; Taxpayer Ex. 1]

26. Mr. Bartlett created the employee list from payroll and employee information provided by Taxpayer. The payroll and employee information relied upon is provided in Taxpayer Ex. 1-C.1 – 1-C.134. The resulting employee list is provided at Taxpayer Ex. 1-E.1 – 1-E.11. [Testimony of Mr. Bartlett].

27. Mr. Bartlett relied on the resulting employee list to identify those jobs for which Taxpayer would claim the credit. [Testimony of Mr. Bartlett].

28. Mr. Bartlett also utilized the employee list to generate a headcount list at Taxpayer Ex. 1-D.1 – 1-D.10. [Testimony of Mr. Bartlett].

29. The names of employees or jobs Mr. Bartlett concluded should qualify for the Credit were then identified on RPD – 41376 which was subsequently attached to Taxpayer's Application. [Testimony of Mr. Bartlett; *See* Taxpayer Ex. 1-B].

30. Mr. Bartlett's analysis concluded that all jobs claimed in the Application: (1)

satisfied the minimum wage requirements; (2) were created on or after July 1, 2004; (3) were occupied by eligible employees for the minimum duration of time; (4) were eligible employees; and (5) the Application satisfied the headcount calculation. [Testimony of Mr. Bartlett].

31. Mr. Bartlett also relied on his interpretation of the definition of "new high-wage economic-based job" provided in of NMSA 1978, Section 7-1G-1 (M) (5) (2013) in preparing Taxpayer's Application. [Testimony of Mr. Bartlett].

32. Ms. Joan Wittig is presently employed as the chief internal auditor of the administrative services division of the New Mexico department of health. She was previously employed by the Department where she most recently served as deputy director of the business credit bureau. [Testimony of Ms. Wittig].

33. During her employment with the Department, Ms. Wittig has reviewed and supervised the review of numerous business credit applications, including Taxpayer's Application. [Testimony of Ms. Wittig].

34. Ms. Wittig personally supervised and reviewed the work of Ms. Marti Rodriguez, the Department's auditor assigned to the Application. [Testimony of Joan Wittig].

35. According to the most recent federal decennial census, at the time of the Application's review, Carlsbad had a population less than 60,000. [*See* Joint Prehearing Statement, Stip. 2.e; Taxpayer Ex. 3.6]

36. Taxpayer was an "eligible employer" as defined by NMSA 1978, Section 7-9G-1 (M) (3) (2013). [*See* Joint Prehearing Statement, Stip. 2.i; Taxpayer Ex. 3.6].

37. Taxpayer provided certification required by NMSA 1978, Section 7-9G-1 (I). [*See* Joint Prehearing Statement, Stip. 2.m; Taxpayer Ex. 3.5 – 3.6]

38. Each employee for whom Taxpayer claimed credit on the Application was paid

the minimum amount of wages required by NMSA 1978, Section 7-9G-1 (M) (5) (a) (2). [*See* Joint Prehearing Statement, Stip. 2.j; Taxpayer Ex. 3.6].

39. The Department has not promulgated any rules specific to the High Wage Jobs Tax Credit, NMSA 1978, Section 7-1G-1 (2013) (hereinafter the "Act").

New High Wage Jobs

40. Essential duties in evaluating Taxpayer's Application, as well as any application under the Act, oblige the Department to scrutinize and verify whether claimed jobs are newly created or not. [Testimony of Ms. Wittig].

41. The term, "replacement analysis," refers to the method by which the Department evaluates whether a claimed position is genuinely new, or perhaps a replacement of a previous job. [Testimony of Ms. Wittig].

42. The "replacement analysis" begins with a taxpayer's employee list which enables the auditor to observe claimed jobs by various categories including job titles, names of occupying employees, hire and termination dates. [Testimony of Ms. Wittig].

43. The Department has been using the "replacement analysis," as a method of evaluating whether a job is genuinely "new," for at least the previous seven years. [Testimony of Joan Wittig].

44. The Department explains the "replacement analysis" to taxpayer-applicants. [Testimony of Joan Wittig].

45. After conducting its evaluation of the Taxpayer's Application, the Department identified sixty claimed new high-wage economic-based jobs as "replacement positions" representing ninety-two corresponding qualifying periods. [*See* Department Ex. D].

46. The Department provided draft work papers to Mr. Bartlett on August 24, 2016

who thereafter expressed disagreement with the conclusions of the auditor. [*See* Taxpayer Ex. 3.9; Department Ex. B].

47. Taxpayer was provided the opportunity to refute the Department's initial determinations by providing relevant information to establish that a particular position was genuinely new contrary to the inferences arising from the so-called "replacement analysis." [Testimony of Ms. Wittig].

48. Taxpayer did not provide additional information or documentation to refute the Department's "replacement analysis." [Testimony of Ms. Wittig].

49. The Department thereafter formalized its denial of that portion of the Application giving rise to this protest, in part due to its conclusion that several positions were not genuinely new. [Testimony of Ms. Wittig; *See* Taxpayer Ex. 3; Department Ex. B].

50. Despite his prior experience in assisting businesses seeking the New High Wage Jobs Tax Credit, and numerous conversations with Department personnel regarding the so-called "replacement analysis," Mr. Bartlett expressed confusion regarding its use. [Testimony of Mr. Bartlett].

51. No job for which Taxpayer claimed the credit on the Application was ineligible because it was created due to a business merger or acquisition or other change in business organization pursuant to NMSA 1978, Section 7-9G-1(F). [*See* Joint Prehearing Statement, Stip. 2.k].

52. No job for which Taxpayer claimed the credit on the Application was ineligible because it was created due to Taxpayer entering into a contract or becoming a subcontractor to a contract with a governmental entity that replaces one or more entities performing functionally equivalent services for the governmental entity pursuant to NMSA 1978, Section 7-9G-1(H).

[*See* Joint Prehearing Statement, Stip. 2.l].

Residency

53. The Application included two qualifying periods for employee C.E., two qualifying periods for employee J.S., and a qualifying period for W.S., which were denied because residency could not be established for these employees during the relevant periods. The qualifying periods for W.S. and C.E. were also denied because their positions were deemed to be replacement positions. [*See* Department Ex. D-004; D-009 – D-010; Taxpayer Exhibit 4-E].[1]

54. Residency is not defined in the statute. The Department evaluates residency in reliance on the employee's social security number and reference to various government databases to which the Department has access. [Testimony of Ms. Wittig].

55. If the Department is otherwise unable to verify residency, it may rely on a Form I-9 in order to establish whether the employee's address is in New Mexico. The Department has considered Form I-9 as a suitable method of verifying residency because it is a form that every employer should possess and maintain for every individual employee. [Testimony of Ms. Wittig].

56. To verify residency in the present matter, the Department requested that Taxpayer provide Forms I-9 for employees C.E., J.S., and W.S. [*See* Department Ex. C-007 – C-008].

57. Taxpayer was unable to produce I-9 forms for employees C.E., J.S., and W.S. [Testimony of Ms. Wittig; *See* Department Ex. C-009].

Previous Application

58. On or about June 13, 2013, Taxpayer submitted another application for the High Wage Jobs Tax Credit ("Previous Application"). The Previous Application sought a credit in the

[1] The full names of the employees relevant to this finding are contained in the record.

amount of $9,230,646.54 for 1,302 qualifying periods. [*See* Department Ex. A-002 – A-040].

59. The Previous Application was initially denied in its entirety on June 26, 2014. [*See* Department Ex. A-001].

60. Underlying some of the stated reasons for the complete denial of its Previous Application was the Department's determination that Taxpayer had failed to provide a complete employee listing. [Testimony of Ms. Wittig; *See* Department Ex. A-002 – A-008].

61. Since Taxpayer failed to provide a complete employee listing, the Department was unable to evaluate and verify whether the claimed jobs were newly created. [*See* Department Ex. A-007; Testimony of Ms. Wittig].

62. Some of the positions included in the Previous Application were also included, for different qualifying periods, in the Application subject of the current protest. [*See* Joint Prehearing Statement, Stip. 2.g].

63. Taxpayer's Previous Application was also initially rejected in its entirety by the Department because it failed to establish that it was an eligible employer. [*See* Department's Exhibit A].

64. Although Taxpayer protested the denial, the Previous Application was eventually resolved through a settlement in which neither party was required to concede their respective legal or factual contentions. [*See* Joint Prehearing Statement, Stip. 2.h].

65. Pursuant to a closing agreement resolving the protest of the denial of Taxpayer's Previous Application, the Department issued Letter ID No. L1426944048, dated September 9, 2015, indicating that the Previous Application was partially approved. [*See* Taxpayer Exhibit 5].

66. Pursuant to the settlement, Taxpayer received a credit of $5,538,387.92, representing 60% of the amount claimed on the Previous Application. [*See* Taxpayer Ex. 5;

Taxpayer Ex. 9].

67. Although the Taxpayer failed to provide a complete job listing to permit the Department to perform the "replacement analysis" for the Previous Application, the Department performed a full review of the new Application, testing every qualifying period against every criteria in the statute. [Testimony of Ms. Wittig].

68. Qualifying periods claimed in the Application were not automatically denied purely because they were earlier denied in the Previous Application. [Testimony of Ms. Wittig].

DISCUSSION

The issues presented in this protest concern the application of NMSA 1978, Section 7-9G-1 (2013) which establishes the High Wage Job Tax Credit (also referred to as the "Act"). Taxpayer presents three issues for consideration, each of which challenges the Department's interpretation and implementation of the Act: (1) whether the Department exceeded its statutory authority in evaluating whether individual jobs for which Taxpayer sought credit were genuinely new; (2) whether the methods by which the Department sought to verify the residency of employees offended the law, and (3) whether the Department improperly denied a portion of the Application on the basis that prior qualifying periods for claimed jobs had been earlier denied in its Previous Application.

Burden of Proof.

Although the current protest does not arise from an assessment, but rather from a partial denial of a credit application, 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 to a taxpayer 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 (internal citations omitted). 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).

High Wage Job Tax Credit – NMSA 1978, Section 7-9G-1 (2013)

Although the Act was revised in 2016 during the Second Special Session of the 52nd Legislature of the State of New Mexico, the parties do not dispute that the Application at issue in this protest is governed by the 2013 enactment, which was applicable until October 19, 2016. *See* 2016 (2nd S.S.), ch. 3, § 6.

The Act provides that "[a] taxpayer who is an eligible employer may apply for, and the taxation and revenue department may allow, a tax credit *for each new high-wage economic-based job*. The credit provided in this section may be referred to as the 'high-wage jobs tax credit'." *See* NMSA 1978, Section 7-9G-1 (A) (2013) (Emphasis Added). The Act states that "[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." *See* NMSA 1978, Section 7-9G-1 (B) (2013) (Emphasis Added).

In summary, eligible employers that create new high-wage jobs may apply for credit against gross receipts tax, compensating tax, withholding tax, Emergency 911 Service Surcharges (E911), and Telecommunications Relay Service Surcharges. *See* NMSA 1978, Section 7-9G-1 (K) and (M)

(4) (2013).

To establish its status as an eligible employer, an applicant must demonstrate that it "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 that it "is certified by the economic development department to be eligible for development training program assistance pursuant to Section 21-19-7 NMSA 1978[.]" *See* NMSA 1978, Section 7-9G-1 (M) (3) (a) and (b) (2013).

The Act thereafter permits a credit in the amount of 10 percent of wages and benefits for eligible employees that are employed in eligible high-wage jobs, not to exceed $12,000 per job per qualifying period. *See* NMSA 1978, Section 7-9G-1 (C) (2013). The number of qualifying periods for which an eligible employer may obtain credit for a new high-wage economic-based job consists of the initial one-year period beginning on the date in which the job was created, provided the date falls on or after July 1, 2004, and three consecutive one-year periods thereafter. *See* NMSA 1978, Section 7-9G-1 (D) (2013).

The Act further provides that for jobs created prior to July 1, 2015, the job must be occupied for at least 48 weeks during a qualifying period, and the eligible employee must be compensated with wages and benefits of $40,000 or more if the job is performed or established in a municipality having a population of at least 60,000 residents, or within ten miles of the external boundary of such a municipality. If the job is performed or established in an area of New Mexico not satisfying those population requirements, then the minimum wage-threshold increases to $28,000. For new high wage jobs created after July 1, 2015, the minimum compensation increases to $60,000 within a municipal area and $40,000 elsewhere in the state. *See* NMSA 1978, Sections 7-9G-1 (M) (5) and (M) (1) (2013). Eligible employees must be New Mexico residents who have no relationship to the eligible employer or to any entity owning stock in the employer. *See* NMSA 1978, Section 7-9G-1

(M) (2) (2013).

The evidence established that: (1) Taxpayer was an eligible employer under Section 7-1G-1 (M) (3); (2) each job for which Taxpayer claimed credit was created after July 1, 2004 under Section 7-9G-1 (M) (5) (2013); (3) employees subject of the protest were eligible under Section 7-9G-1 (M) (2) (2013); (4) each job for which the credit was claimed satisfied the minimum wage requirements under Section 7-9G-1 (M) (5) (a) (2013); (5) each job for which the credit was claimed was occupied for the minimum period of time necessary to establish a qualifying period under Sections 7-9G-1 (M) (5) and (6) (2013); and (6), that the total number of employees with high-wage economic-based jobs on the last day of the qualifying period at the location at which the job was performed or based increased by at least one more than the number on the day prior to the date the new high-wage economic-based job was created under Section 7-9G-1 (E) (2013).

Accordingly, Taxpayer argued that it satisfied all of the essential elements necessary to qualify for the credit, but that it was nevertheless partially denied because the Department imposed requirements that were not authorized by the Act. In fact, Taxpayer's evidence and argument did not challenge the Department's underlying conclusions that gave rise to the partial denial of its refund. Instead, Taxpayer presented what it characterized as a facial challenge to the methods employed by the Department in its evaluation, and asserted with respect to each of the three distinct issues, that the Department's methods of evaluation were not supported by law.

Consequently, the fundamental question at hand is whether the Department acted within its statutory authority with respect to each of the issues raised by Taxpayer. Those determinations turn on the question of statutory construction to determine whether the Act permits, or precludes, the Department's methods of evaluation in regards to (1) replacement analysis, (2) residency, (3) the effects of a prior application denied.

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, an 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.

"Replacement Analysis"

Applying these principles to the Act, the Hearing Officer is persuaded that it is not beyond the authority of the Department to examine whether a claimed position is newly created or a "replacement."

The Legislature has clearly stated that the purpose of the Act is to permit "a tax credit *for each new high-wage economic-based job*." *See* NMSA 1978, Section 7-9G-1 (A) (2013) (Emphasis

Added). Since permitting a credit for any other type of job under the Act would contradict the statute and the Legislature's clearly expressed intentions, it is reasonable to imply a grant of authority that empowers the Department to examine whether a high-wage job is genuinely "new" within the meaning of the statute. With regard for such an implication, "[i]t is, of course, a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom." *See Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, ¶6, 83 N.M. 757, 758, 497 P.2d 968, 969.

Notwithstanding the authority recognized in *Wimberly*, the Legislature has also expressly authorized the Department, for the purpose of enforcing any statute administered under the provisions of the Tax Administration Act, to examine and require the production of pertinent records, books, information or evidence concerning the subject matter of its inquiry. *See* NMSA 1978, Section 7-1-4 (2005). In this case, the Act clearly comes within the provisions of the Tax Administration Act. *See* NMSA 1978, 7-1-2 (A) (16). Moreover, the Legislature has also expressed its intention that taxpayers seeking the credit apply on forms and in the manner prescribed by the Department. *See* NMSA 1978, Section 7-1G-1 (J) (2013).

Nevertheless, Taxpayer correctly notes that the process by which the Department evaluates whether a high-wage job is new, has not been promulgated in conformity with the State Rules Act, NMSA 1978, Sections 14-4-1 to – 11. This raises the question of whether or not the analysis is a "rule" under NMSA 1978, Section 14-4-2. Once again, the meaning of a statute is derived from the plain meaning of the words selected by the Legislature.

The definition of "rule" is broad. *See State v. Ellis*, 1980-NMCA-187, ¶11, 95 N.M. 427, 622 P.2d 1047 *cert. denied*, 95 N.M. 426, 622 P.2d 1046 (1981). Excluding specific exceptions not

applicable to the matter at hand, a "rule" is defined as follows at NMSA 1978, Section 14-4-2 (C):

> "rule" means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency.

The Hearing Officer is not persuaded that the analysis described by the testimony comes within the definition of "rule" under the State Rules Act. Despite the informal use of a somewhat-sounding formal and technical term, "replacement analysis," the testimony described a process that was neither. Ms. Wittig testified that the auditor in this matter, consistent with all other applications for which she had personal knowledge, relied on information provided by Taxpayer in its employee list, admitted as Taxpayer Exhibit 1-E. The employee list consisted of a spreadsheet that organized, by various categories, all of Taxpayer's employees since 1968. Among the specific categories included in the employee list were employee identification numbers, names, job titles, partial social security numbers, hire dates, termination dates, and wages.

By reviewing this information, Ms. Wittig explained, the Department identified jobs that might not be new. However, identifying a job as potentially not new did not mechanically result in the denial of any credit claimed for that job. Instead, it merely identified the job as suitable for further investigation or inquiry. Only if the Taxpayer was thereafter unable or unwilling to provide additional information to substantiate its claim as to that job, did the Department deny the credit in reference to the particular job. [Testimony of Ms. Wittig]. In this case, the Taxpayer did not attempt to rebut any of the Department's specific findings that contributed to the partial denial of its Application, including its findings that various jobs were not new.

In contrast to a rule, the so-called "replacement analysis" does not explicitly or implicitly

implement or interpret law in a manner that affects one or more agencies or persons not members or employees of the issuing agency. It is merely a method utilized for evaluating data from a spreadsheet in aid of perceiving indicators of whether a high-wage job, for which a tax credit is claimed, is genuinely new or perhaps a replacement. The authority to conduct that analysis is express and implied because whether or not a high wage job is new is a threshold inquiry under the Act. In other words, even if a taxpayer satisfied all of the other conditions for eligibility, the Legislature has only permitted "a tax credit *for each new high-wage economic-based job*." *See* NMSA 1978, Section 7-9G-1 (A) (2013).

Even if there were some aspect of the Department's evaluation that came within the definition of "rule," the Department's implementation of the law in the absence of rules promulgated under the State Rules Act would not be void absent some contradiction of the controlling law. *See Dir., Labor & Indus. Div., N.M. DOL v. Echostar Communs. Corp.*, 2006-NMCA-047, ¶14, 139 N.M. 493, 134 P.3d 780, *citing Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal.4th 557, 59 Cal.Rptr.2d 186, 927 P.2d 296 (1996) ("If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with [required administrative procedures], then we would undermine the legal force of the controlling law.") Under the facts of this protest, the Hearing Officer still perceives no contradiction of the controlling law, even if there were some aspect of the Department's evaluation that required promulgation under the State Rules Act or the Taxation and Revenue Department Act, NMSA 1978, Section 9-11-1 to – 15.

Rather, scrutinizing and challenging the contents of an application, as in the present protest, is the essential function of an audit, and the responsibility of an auditor. "'To audit' means to examine and verify, as an account or accounts. In its broad sense 'audit' means to hear, examine,

and determine a claim or claims by their allowance or disallowance or rejection in toto, or in part." *See State ex rel. Heglar v. Wheeler*, 146 Wash. 513, 514, 263 P. 946 (1928); *See also Black's Law Dictionary*, 150 (9th ed. 2009) ("Audit" is "[a] formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards.").

As previously stated, Taxpayer's evidence and arguments did not attempt to rebut the Department's underlying conclusion which resulted in the partial denial of its Application. Instead, Taxpayer challenged the Department's interpretation and implementation of the law. However, Courts not only confer a greater weight to an agency's interpretation of a statute, but give a heightened degree of deference to an agency's interpretation if the statute implicates special agency expertise or reference to an agency's policies. *See Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶12, 120 N.M. 579, 904 P.2d 28. Accordingly, the Department should be entitled to a heightened degree of deference in its evaluation of Taxpayer's Application in this protest.

In this case, the Department has determined that verifying whether or not a high-wage job is new is essential for the purpose of determining whether a taxpayer is entitled to the credit. The Department's perception of its duty to verify such information is reasonable and consistent with its grant of authority provided in the statute, requiring that "an eligible employer shall apply to the taxation and revenue department *on forms and in the manner prescribed by the department*." *See* NMSA 1978, Section 7-9G-1 (J) (2013) (Emphasis Added).

Nevertheless, Taxpayer asserted that the plain language of the Act permits evaluation of "replacement" criteria in only two situations specifically enumerated in the Act, neither which are present under the facts of this protest. *See* NMSA 1978, Section 7-9G-1 (F) (2013). For that

reason, Taxpayer argues that whether a job is new within the facts of this protest should be determined by reference to the headcount calculation alone. *See* NMSA 1978, Section 7-9G-1 (E) (2013). Mr. Bartlett testified that, in his opinion, the creation of a new high-wage economic-based job was obvious if there was also an increase in headcount. The Hearing Officer was unpersuaded by Mr. Bartlett's opinion regarding the weight the Department should give to an increase in headcount while evaluating whether a particular job is new or not. Ms. Wittig credibly testified that an increase in headcount could not always be relied upon for determining whether a particular job was new and therefore eligible for the credit.

A "new high-wage economic-based job" is defined in the statute as "a *new job created* in New Mexico by an eligible employer on or after July 1, 2004 and prior to July 1, 2020 that is occupied for at least forty-eight weeks of a qualifying period by an eligible employee who is paid wages" that meet the statutory criteria. *See* NMSA 1978, Section 7-9G-1 (M) (5) (2013). "New" means "recently come into being." *Black's Law Dictionary*, p. 1141 (9th ed. 2009). "Create" means "to bring into existence." *See Merriam-Webster, n.d. Web.* (2018) at http://www.merriam-webster.com/dictionary/create. "Preexisting" means "existing at an earlier time." *See Merriam-Webster, n.d. Web.* (2018) at http://www.merriam-webster.com/dictionary/preexisting.

Therefore, a new job is one that recently came into being and did not exist at an earlier time. Meanwhile, the headcount requirement is satisfied when "the eligible employer's *total number* of employees with high-wage economic-based jobs on the last day of the qualifying period…is at least one more than the number on the day prior to the date the *new* high-wage economic-based job *was created*." *See* NMSA 1978, Section 7-9G-1 (E) (2013) (emphasis added).

Taxpayer's argument conflates the definition of a new job with two statutory limitations

on the credit. Even when a taxpayer creates new jobs, it will not be eligible for the credit unless it satisfies the headcount. *See* NMSA 1978, Section 7-9G-1 (E) (2013). This subsection is not providing the criterion for determining whether a job is new. Rather, it establishes a limitation on the credit even when there are new jobs. *See id.* Even when a taxpayer technically creates new jobs, it will not be afforded the credit if the new jobs are the result of a merger and the new jobs are actually the functional equivalent of the jobs that existed prior to the merger. *See* NMSA 1978, Section 7-9G-1 (F) (2013). However, even in a merger, if the new job is actually a new job that was created within the qualifying period surrounding the merger, the credit may nevertheless be afforded. *See* NMSA 1978, Section 7-9G-1 (G) (2013). These subsections clearly provide that the credit is for the creation of new jobs, not for preexisting jobs with new employers or new employees. *See id.*

The Department's interpretation of the law, and its method of identifying jobs that may not be new within the purpose of the law is reasonable and well within the margins of what the law provides. Interpreting the Act in a manner that restricts the Department's ability to scrutinize whether a job is genuinely new, or not, is inconsistent with the plain meaning of the statute, and would require that the Act be construed in favor of Taxpayer contrary to the directive in *Team Specialty*.

Residency

Taxpayer argued that it provided sufficient evidence to establish that the three employees occupying five qualifying periods were residents of New Mexico despite the Department's conclusions to the contrary. In evaluating residency, the Department refers to information contained in various databases to which it has access. If the information obtained from those databases is inconclusive, then it may request additional information as it did in the current

Application. In the present matter, 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 these employees.

Taxpayer argued that the Department exceeded its authority by imposing such additional requirement, because residency could be determined by the number of days an employee was physically present in New Mexico, consistent with NMSA 1978, Section 7-2-2 (S) (2014):

> **7-2-2. Definitions.**
>
> For the purpose of the Income Tax Act and unless the context requires otherwise:
>
> . . .
>
> "resident" means an individual who is domiciled in this state during any part of the taxable year or *an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year*; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during the taxable year, who, on or before the last day of the taxable year, changed the individual's place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a resident for the purposes of the Income Tax Act for periods after that change of abode[.]
>
> (Emphasis Added)

Therefore, Taxpayer argued that residency could be established from payroll records indicating that the employees were physically present in this state for 185 days or more during the taxable year. However, the definition to which Taxpayer refers also states that it is applicable to the provisions of the Income Tax Act and there is no indication that the Legislature intended this definition to apply to elsewhere.

In fact, construing "resident" as used in the Act, in the manner suggested by Taxpayer,

actually tends to render the term 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). In this case, the Legislature already imposed the requirement that the individual be physically present in New Mexico when it required that the individual be "*employed in New Mexico*[.]" *See* Section 7-1G-1 (M) (2) (2013). By adding the requirement that the individual also be a resident, the Legislature clearly intended something in addition to physical presence.

Since the definition of resident under the Income Tax Act is limited to that act, the Hearing Officer refers instead to *Hagan v. Hardwick*, 1981-NMSC-002, ¶10, 95 N.M. 517, 624 P.2d 261 which held that residence was synonymous with domicile, and that "domicile" does not require physical presence, "but rather physical presence in the state at some time in the past, and concurrent intention to make the state one's home." *See id. citing Worland v. Worland*, 1976-NMSC-027, 89 N.M. 291, 551 P.2d 981. Once domicile is established, it is presumed to continue until it is shown to have changed. *See Hagan*, 1981-NMSC-002, ¶11.

Therefore, by utilizing the terms "employed in New Mexico" and "resident," the statute embodied the Legislature's intention that employees be employed *and* domiciled *in New Mexico*. Construing "resident" to be synonymous with mere physical presence would render the term meaningless within the context of the statute which already addresses physical presence in the form of a requirement that the individual be "employed in New Mexico." This conclusion is further supported by the policy underlying the Act which is to create and fill new high wage jobs in New Mexico, which might also simultaneously provide a corresponding economic benefit to those communities in which the eligible employees reside and consume goods and services.

Moreover, interpreting the Act as suggested by Taxpayer would once again require that

the Act be construed in favor of Taxpayer contrary to the directive in *Team Specialty*, which requires that the Act be construed against it.

The Previous Application

Taxpayer asserted that the Department denied a portion of its Application solely on the basis that prior qualifying periods for jobs in the current Application had been previously denied as part of its Previous Application. [Taxpayer Ex. 3.7 – 3.8]. Taxpayer asserted error in the Department's evaluation because the Act does not require a taxpayer to claim the credit for each prior qualifying period for that job in order for a subsequent qualifying period to be eligible, because each qualifying period is independent from every other. Section 7-9G-l (D) of the Act provides:

> The high-wage jobs tax credit may be claimed by an eligible employer for each new high-wage economic-based job performed for the year in which the new high-wage economic-based job is created and for the three consecutive qualifying periods.

The Hearing Officer concurs with Taxpayer's interpretation of the Act. However, the critical issue with respect to the Application in this protest relies on the Taxpayer's inability to establish, as a matter of foundation, the date on which the relevant jobs were *created*, which in turn would establish additional qualifying periods for which the credit may also be claimed under the Act.

This analysis is aided by a brief reiteration of the facts. Taxpayer submitted its Previous Application on or about June 13, 2013 which was denied in its entirety. Among various reasons for the complete denial was the Department's determination that Taxpayer had failed to provide a complete employee listing which, consequently, precluded the Department from evaluating whether the jobs claimed were newly created or not. Therefore, as of the date the Department

denied the Previous Application, it had not found that any of the claimed jobs were newly created. Taxpayer Ex. 9 and Department Ex. A illustrate, within the column reserved for comments, that every claimed period in the Previous Application was denied because the Department was "[u]nable to determine if newly created position[.]"

Referring back to Section 7-9G-l (D) (2013), the credit may be claimed "by an eligible employer for each new high-wage economic-based job performed *for the year in which the new high-wage economic-based job is created* and for the three consecutive qualifying periods." Consequently, the statute requires that the Taxpayer establish the period in which the new high-wage economic-based job was created as a prerequisite to identifying any subsequent consecutive qualifying periods. This would include establishing that the job was also genuinely new. However, according to Department Ex. A and Taxpayer Ex. 9, and the testimony of Ms. Wittig, the Department was unable to verify at the time it considered the Previous Application whether *any* of the claimed jobs were genuinely new or not. Therefore, because the Taxpayer was unable to establish that a job was new, or when it was created, it was therefore precluded from receiving credit for subsequent periods, unless or until, the Taxpayer could establish the period in which the job was newly created.

In contrast, Taxpayer asserted that the Department actually approved all the claimed jobs by virtue of its settlement nearly 15 months after its initial denial. By referring to Taxpayer Ex. 9, Mr. Bartlett asserted that the Department assented to Taxpayer's position by approving a percentage of the credit claimed for each job within its Previous Application. Indeed, Taxpayer Ex. 5 reflects the fact that Taxpayer was awarded a credit in the amount of $5,538,387.92 representing 60 percent of the amount it originally claimed for each qualifying period corresponding with Taxpayer Ex. 9 and Department Ex. A.

However, that alone fails to establish what, if any conclusions the parties reached in reference to whether the jobs claimed therein were newly created or not, their initial qualifying periods, or any subsequent consecutive qualifying periods. Taxpayer's reliance on Taxpayer Ex. 5.1 as an indicator that the jobs subject of the Previous Application were approved is unpersuasive. Although the correspondence states that "[Taxpayer's] Application for High Wage Job Tax Credit for the periods of 2005 – 2012 has been approved[,]" Taxpayer seemed to ignore the next sentence which explained that the amount approved was determined "[p]ursuant to the Closing Agreement entered into between the Department and Taxpayer[.]" However, Taxpayer did not seek to introduce that agreement which would have established the terms and conditions of the settlement. Instead, the parties stipulated that neither party to the settlement of the Previous Application conceded its legal or factual positions. Accordingly, the Hearing Officer will not attempt to deduce how or why the parties resolved their differences as they chose to do so, nor will the Hearing Officer ascribe any legal or factual significance to a closing agreement that is not part of the record of this proceeding.

Despite the foregoing, Ms. Wittig credibly testified that the Department performed a full review of the new Application, evaluating every claimed period against every criteria in the statute, and that no period was mechanically denied purely because it was denied in the Previous Application. [Testimony of Ms. Wittig]. Instead, periods were denied because Taxpayer once again failed to establish entitlement to the credit.

As previously stated, Taxpayer did not challenge the Department's underlying factual conclusions. Instead, it mounted a "facial challenge" to the Department's interpretation of the Act, and the methodology employed in evaluating the Application. However, the Hearing Officer was persuaded that the Department acted within its statutory authority, consistent with the Act,

and properly denied the disputed credit when it determined that the Taxpayer failed to establish an entitlement to the credit.

For the reasons discussed herein, the protest should be denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's partial denial of its Application 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 March 13, 2017 that satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

C. Taxpayer did not establish entitlement to the portion of the High Wage Jobs Tax Credit that the Department denied on October 5, 2016 under Letter ID No. L0946274608, 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 failed to establish that the Department's evaluation of the Application in light of its Previous Application and subsequent settlement was contrary to NMSA 1978, Section 7-

9G-1 (D) (2013).

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

DATED: April 11, 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 April 11, 2018, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interagency Mail*