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

**IN THE MATTER OF THE PROTEST OF**
**PRECHECK INC.**
**TO DENIAL OF REFUND ISSUED UNDER**
**LETTER ID NO. L0248636208**

**v.**

**D&O No. 18-29**
**AHO Case No. 18.01-003R**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

# DECISION AND ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Administrative Hearings Office, Chris Romero, Esq., Hearing Officer, on the Taxation and Revenue Department's Motion for Summary Judgment and Memorandum in Support (hereinafter "Motion"). The Taxation and Revenue Department (hereinafter "Department") filed its Motion on June 22, 2018, by and through its counsel of record, Ms. Tonya Noonan Herring, Esq. Precheck, Inc. (hereinafter "Taxpayer"), by and through its counsel of record, Mr. Timothy R. Van Valen, Esq. (Askew & Mazel, L.L.C.) filed Precheck's Response to Department Motion for Summary Judgment (hereinafter "Response") on July 9, 2018.

Having reviewed the Motion and Response, having duly considered the undisputed material facts, and otherwise being fully informed in the premises, IT IS DECIDED AND ORDERED AS FOLLOWS:

## FINDINGS OF FACT

### *Procedural History*

1. On November 17, 2017, the Department notified Taxpayer that it reviewed and denied its claim for Combined Reporting System (CRS) refund in the amount of $178,341.46 for

the calendar years 2011 to 2015 (hereinafter "Refund Denial"). The Refund Denial was issued under Letter ID No. L0248636208 and stated that the denial was "due to denial of the High Wage Tax Credit as per Letter ID number L0515257648." [*See* Administrative File].

2. On November 20, 2017, Taxpayer, by and through Axiom Certified Public Accountants and Business Advisors, L.L.C. (hereinafter "Axiom") submitted a formal written protest of the Department's Refund Denial. [*See* Administrative File].

3. Taxpayer's written protest was accompanied by a copy of its Application for Refund, dated October 24, 2017, a Tax Information Authorization, and Authorization to Provide Tax Information by Facsimile and E-Mail. [*See* Administrative File].

4. On December 4, 2017, the Department acknowledged Taxpayer's formal written protest under Letter ID No. L1152783152. [*See* Administrative File].

5. On January 3, 2018, the Department filed a Hearing Request in which it requested that the Administrative Hearings Office set a scheduling hearing for the purpose of scheduling matters pertinent to Taxpayer's protest. [*See* Administrative File].

6. On January 3, 2018, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a scheduling hearing in reference to Taxpayer's protest for January 24, 2018. [*See* Administrative File].

7. On January 10, 2018, Taxpayer, by and through Mr. Wryan Capps, CPA, of Axiom, filed a Motion to Reschedule Telephonic Scheduling Conference. [*See* Administrative File].

8. On January 16, 2018, the Administrative Hearings Office entered an Amended Notice of Telephonic Scheduling Conference that set a scheduling hearing in reference to Taxpayer's protest for February 2, 2018. [*See* Administrative File].

9. On February 5, 2018, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing that set a hearing on the merits of Taxpayer's protest for October 29, 2018. [*See* Administrative File].

10. On June 22, 2018, the Department filed Taxation and Revenue Department's Motion for Summary Judgment and Memorandum in Support. [*See* Administrative File; Motion].

11. On July 9, 2018, Taxpayer's attorney of record, Mr. Van Valen, filed an Entry of Appearance. [*See* Administrative File].

12. On July 9, 2018, Taxpayer filed Precheck's Response to Department Motion for Summary Judgment. [*See* Administrative File].

13. On July 10, 2018, Taxpayer filed a Corrected Certificate of Service and Filing. [*See* Administrative File].

14. On August 24, 2018, the Department filed a Notice of Completion of Briefing and Motion Requesting Ruling on the Department Motion for Summary Judgment. Taxpayer opposed the relief requested therein. [*See* Administrative File].

*Stipulated or Undisputed Material Facts*

15. Taxpayer has been registered with the Department since June 15, 2006. [*See* Motion, Ex. A-001 – A-003; Response, Sec. I].

16. Taxpayer was established in 1983 and provides criminal background checks and investigation services. [*See* Motion, Ex. B-001; Response, Sec. I].

17. On December 19, 2016, Taxpayer, by and through Axiom, submitted an Application for High Wage Jobs Tax Credit (hereinafter "Tax Credit Application"). [*See* Motion, Ex. C-001-002; Response, Sec. I].

18. Taxpayer's Tax Credit Application sought a High Wage Jobs Tax Credit in the amount of $186,140.03 for periods from 2011 to 2015. [*See* Motion, Ex. B-001 and C-001; Response, Sec. I].

19. On June 12, 2017, under Letter ID No. L0515257648, the Department partially approved Taxpayer's Tax Credit Application in the amount of $7,798.57. Consequently, the Department disallowed the difference of the total credit requested and the total credit approved in the amount of $178,341.46 (hereinafter "Partial Denial" in reference to amount of credit application not approved). [*See* Motion Ex. D; Response, Sec. I].

20. The Partial Denial directed Taxpayer to a publication providing information on "claiming your approved credit" identified therein as Credit Approval # 555393024. [*See* Motion Ex. D; Response, Sec. I].

21. The Partial Denial further stated "If you disagree with the partial denial of this credit, enclosed is a copy of the FYI 402 TAXPAYER REMEDIES that details the procedures to protest the partial denial of the credit." [*See* Motion Ex. D].

22. FYI 402 TAXPAYER REMEDIES states "You may dispute a tax liability or certain actions the department might take against you under the Tax Administration Act in one of two ways: 1) file a written protest with the Secretary of Taxation and Revenue without making payment, or 2) pay the tax liability and then file a refund claim." [*See* Motion Ex E].

23. FYI 402 TAXPAYER REMEDIES further provides, "If you choose to protest, you must do so in writing within 90 days of the date of the event you are protesting." [*See* Motion Ex E-001]

24. On or about, June 14, 2017, Axiom submitted a High-Wage Jobs Tax Credit Claim Form to the Department to redeem $2.00 of the credit under Credit Approval #555393024 and requested a refund of the remaining approved tax credit in the amount of $7,796.57. [*See* Motion Ex. F-001; Response, Sec. I].

25. On or about June 19, 2017, the Department issued a check to Taxpayer for the approved tax credit in the amount of $7,796.57, which was subsequently negotiated by Taxpayer on or about June 26, 2017. [*See* Motion Ex. G; Response, Sec. I].

26. Taxpayer did not protest the Partial Denial of its Tax Credit Application on or before Monday, September 11, 2017, which represented the first business day after the 90th day from the date of the Partial Denial (the 90th day fell on Sunday, September 10, 2017).

27. On or about October 24, 2017, Axiom submitted an Application for Refund to the Department in the amount of $178,341.46 (hereinafter "Refund Application"). [*See* Motion Ex. H, Response, Sec. I].

28. The amount of the refund requested in Taxpayer's Refund Application was the same amount as the tax credit previously denied in Department's Partial Denial. [*See* Motion Ex. B, Response, Sec. I].

**DISCUSSION**

The principal issue in this protest is whether Taxpayer, after declining the right to protest the Partial Denial of its Tax Credit Application under NMSA 1978, Section 7-1-24, is entitled to a second

opportunity to protest same the determination by filing a Refund Application, asserting entitlement to the previously denied credit, and then protesting the eventual denial of the Refund Application under NMSA 1978, Section 7-1-26.

For the reasons explained herein, the answer is no. The Tax Administration Act does not provide more than one opportunity for a taxpayer to protest an adverse determination of the Department in reference to the denial, or partial denial, of a High Wage Jobs Tax Credit application. Holding otherwise would produce absurd results not intended by the Legislature, and require that certain terms and provisions of Section 7-1-24 be rendered surplusage and superfluous in order to comport with the Taxpayer's view of the law.

**Summary Judgment Standard.**

Summary Judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to prevail as a matter of law. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶7, 148 N.M. 713, 242 P.3d 280. In controversies involving a question of law, or application of law where there are no disputed facts, summary judgment is appropriate. *See Koenig v. Perez*, 1986-NMSC-066, ¶10-11, 104 N.M. 664, 726 P.2d 341. The Hearing Officer perceives the matter herein as suitable for summary judgment since there are no disputed issues of material fact and the rights of the parties may be determined by merely resolving the question of law presented above.

The facts establish that Taxpayer did not initiate a protest of its Partial Denial of its Tax Credit Application under Section 7-1-24, and the opportunity to do so closed on September 11, 2017. Rather, Taxpayer filed a Refund Application on October 24, 2017 in which it requested a refund equivalent to the amount subject of the Partial Denial, or in other words, asserting

entitlement to the previously disallowed tax credit. When the Refund Application was subsequently denied, due to the previous denial of the claimed tax credit, Taxpayer filed its protest under Section 7-1-26, asserting a right to protest the underlying Partial Denial because that formed the basis for the denial of if Refund Application. *See* Motion, Ex. J.

Accordingly, the question of law presented by this protest requires the construction of NMSA 1978, Sections 7-1-24 and 7-1-26, of the Tax Administration Act. The first establishes the right of a taxpayer to dispute adverse determinations of the Department with respect to assessments, the application of any provision of the Tax Administration Act, "the denial of or failure either to allow or to deny" a credit or rebate, or a "claim for refund made in accordance with Section 7-1-26[.]" *See* NMSA 1978, Section 7-1-24 A.

The latter establishes the mechanism through which a taxpayer may request a refund and subsequently dispute an adverse determination with respect to that refund. Similar to the prior statute, the latter also refers to denial of a "credit or rebate claimed." *See* NMSA 1978, Section 7-1-26. It is by virtue of this commonality of subject matter that the current dispute arises.

**Rules of Statutory Construction.**

Questions of statutory construction begin with the plain-meaning rule. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d 881. In *Wood*, the Court of Appeals stated "that 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." *Id*. A statutory construction analysis begins by examining the words chosen by the legislature and the plain meaning of those words. *See State v. Hubble*, 2009-NMSC-014, ¶13,

146 N.M. 70, 206 P.3d 579. 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-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333.

In this case, Taxpayer contends that it was not required to protest the denial of its Tax Credit Application under Section 7-1-24 because Section 7-1-26 provided a separate, additional right of protest when it similarly referred to "credit." Section 7-1-26 (A) (2015) provides in part:

> A. A person who believes that an amount of tax has been paid by or withheld from that person in excess of that for which the person was liable, *who has been denied any credit or rebate claimed* or who claims a prior right to property in the possession of the department pursuant to a levy made under authority of Sections 7-1-31 through 7-1-34 NMSA 1978 may claim a refund by directing to the secretary, within the time limited by the provisions of Subsections F and G of this section, a written claim for refund. At the time the written claim is submitted, except as provided in Subsection K of this section, a refund claim shall include:
>
> …
>
> (2) the type of tax for which a refund is being claimed, *the credit or rebate denied* or the property levied upon;
>
> …
>
> (Emphasis Added)

The application of Section 7-1-26 is significant to Taxpayer because it allegedly provides an alternative method of protesting the Department's underlying Partial Denial of its Tax Credit Application. Accordingly, if the law permits Taxpayer to protest the Partial Denial through the subsequent Refund Denial, then its protest is timely, having been filed within 90 days of the date of the Refund Denial. If not, then its right of protest closed on September 11, 2017, 44 days before it filed its Refund Application.

The Department contends that Taxpayer's reliance on Section 7-1-26 is misplaced because the law applicable to Taxpayer's Tax Credit Application is Section 7-1-24, which in relevant part provides:

> D. A protest by a taxpayer shall be filed *within ninety days* of the date of the mailing to or service upon the taxpayer by the department of the notice of assessment or other peremptory notice or demand, the date of mailing or filing a return, the date of the application to the taxpayer of the applicable provision of the Tax Administration Act, the date of denial of a claim pursuant to Section 7-1-26 NMSA 1978 or the last date upon which the department was required to take action on the claim but failed to take action.

Resolution of the dispute requires no more than referring to the plain meaning of the words used by the Legislature. The plain language of Section 7-1-26 reveals the Legislature's intentions that it relate to claims for refund in which the State, as a result of an overpayment or denial of a credit or rebate, becomes "*indebted* to the taxpayer for a specified amount" of money. (Emphasis Added). This proposes that when the legislature utilized the term "credit," in this context, it was not necessarily referring to a statutory tax credit, such as the High Wage Jobs Tax Credit, but rather the plain meaning of that word "credit": "2a: the balance in a person's favor in an account" or "f: a deduction from an amount otherwise due[.]" *See* https://www.merriam-webster.com/dictionary/credit.

The conclusion that the Legislature intended a plain meaning for the word, "credit," in Section 7-1-26 is supported by the fact that Section 7-1-24 makes specific reference to the category of credit it is intended to encompass. It states that "[e]very protest shall identify the taxpayer and the *tax credit*, rebate, property or provision of the Tax Administration Act involved and state the grounds for the taxpayer's protest and the affirmative relief requested." *See* NMSA 1978, Section 7-1-24 B. Reference to "credit" in Section 7-1-26 omits such description, referring merely to "credit" rather than "tax credit." Accordingly, the Legislature intended that Section 7-1-24 govern the protest of

adverse determinations relating to "tax credits." A review of NMSA 1978, Section 7-9G-1, the statute under which Taxpayer's underlying Tax Credit Application arose, reveals no less than a dozen references to the term "tax credit" or "high-wage jobs *tax credit*." Had the Legislature intended otherwise, it would have similarly utilized the term "tax credit" in Section 7-1-26. It did not, and 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-21, ¶ 27.

This conclusion is additionally reinforced by the fact that the Legislature, in enacting Section 7-1-26, intended that the denial of a credit concurrently give rise to the state's indebtedness to Taxpayer. In other words, it intended Taxpayer to establish that a balance, or approved credit, actually exists in its favor, which should reduce its liability if appropriately credited to its account, and but for the appropriate credit, the state was indebted to Taxpayer.

For instance, Section 7-1-26 F (2) contemplates that disputes may indeed arise with concern for the sum or expenditure of an approved credit. It refers to various tax credit statutes, all of which place conditions on applying previously-approved credits toward tax liabilities. In other words, disputes arising from Section 7-1-26 F (2) concern how an approved credit is to be applied toward a tax liability, rather than disputes regarding a taxpayer's underlying eligibility for the credit. *See e.g.* NMSA 1978, Section 7-9A-8 B ("A taxpayer having applied for and been granted approval for a credit…"); NMSA 1978, Section 7-9E-5 and Section 7-9E-8 (eligibility must be established prior to claiming credit); NMSA 1978, Section 7-9F-9 B ("A taxpayer having applied for and been granted approval for a credit…"); NMSA 1978, Section 7-2E-1.1 G ("The holder of a tax credit document may apply all or a portion of the rural job tax credit granted by the department…"). With concern for the specific tax credit underlying the issue in this protest, the High Wage Jobs Tax Credit provides

"an *approved* high-wage jobs tax credit shall be claimed against the taxpayer's modified combined tax liability…" *See* NMSA 1978, Section 7-9G-1 M.

In this case, the Department has not approved the Taxpayer's tax credit, at least with respect to the amount in controversy, and the Department is not indebted to Taxpayer in that amount. The Department *expressly denied* the amount of the High Wage Jobs Tax Credit which Taxpayer now requests be refunded. However, the Department is simply not indebted to Taxpayer for the amount of a tax credit it never approved.

Therefore, the plain meaning of Section 7-1-26 clearly illustrates that Taxpayer's position is misplaced. The Legislature did not intend to create two separate and distinct opportunities for taxpayers to challenge the denial of a tax credit. In fact, the Legislature expressly rejected the notion that taxpayer's could circumvent the obligation to file a protest by refiling a claim, similar to the approach Taxpayer took in this case. *See* NMSA 1978, Section 7-1-26 D (1) and E (prohibiting a denied refund claim from being refiled and providing 90 days to protest under Section 7-1-24). Incidentally, even if the Hearing Officer was slightly in agreement with Taxpayer's interpretation of Section 7-1-26, its protest of the underlying denial would still be untimely under Section 7-1-26 (D) (1) requiring that a protest be filed within 90 days of a claim being denied.

The Hearing Officer is also unpersuaded by Taxpayer's recitation of legislative history and its ensuing argument. In summary, Taxpayer asserts that NMSA 1978, Section 7-1-24 (2013) did not specifically provide a right to protest the denial of a tax credit, and before its amendment, Section 7-1-26 provided the only mechanism for protesting such denial. Accordingly, Taxpayer claims the intent of Section 7-1-26 has always been to provide for the protest of denials of tax credits, even before the current version of Section 7-1-24 was enacted. Taxpayer's argument fails to persuade

because it relies on the premise that Section 7-1-24 (2013) did not permit the right to protest the denial of a tax credit. However, that statute always provided a right of protest stating that any taxpayer could dispute through an administrative protest "the application of any provision of the Tax Administration Act[.]" *See* NMSA 1978, Section 7-1-24 A (2013). Under NMSA 1978, Section 7-1-2 A (16), that expressly included the High Wage Jobs Tax Credit.

The accuracy of this conclusion easily withstands further scrutiny when viewed in the light of well-settled law prohibiting statutes from being construed in a manner that renders any of their terms superfluous or surplusage. "We are to read the statute in its entirety and construe each part in connection with every other part to produce a harmonious whole." *See Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶14, 121 N.M. 764, 918 P.2d 350 *citing General Motors Acceptance Corp. v. Anaya*, 1985-NMSC-066, ¶15, 103 N.M. 72, 703 P.2d 169. Accordingly, "all provisions of the act will be considered in relation to one another, *with the attempt to render no part surplusage or superfluous*." *See Nat'l Union of Hosp. & Health Care Emples. Dist. No. 1199 N.M., AFL-CIO, CLC v. Bd. of Regents of the Univ. of N.M.*, 2010-NMCA-102, ¶23, 149 N.M. 107, 245 P.3d 51 (Emphasis Added).

In this case, construing Section 7-1-26 as affording a separate opportunity, and perhaps a second chance, to protest the denial of a tax credit, when that taxpayer previously declined the opportunity to protest under Section 7-1-24, would render all provisions of the latter, at least with respect to tax credits, superfluous, surplusage, and meaningless contrary to the rules of statutory construction. Taxpayers would consequently be entitled to entirely disregard Section 7-1-24, and its mandated deadlines, in favor of other, perhaps more favorable deadlines, under Section 7-1-26. This would conceivably permit taxpayers to benefit from any advantages that might be derived from the

passage of time, such as Department turnover, without providing any counterbalancing benefit to the state. It is irrational to conclude that the Legislature's deliberative process would intend such an absurd result.

The Department's Motion should be, and hereby is GRANTED . Taxpayer's protest is DENIED.

## CONCLUSIONS OF LAW

A. Taxpayer did file a timely, written protest of the Department's Refund Denial and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978, Section 7-1-26.

B. The subject matter of the protest arising from the Department's Refund Denial is limited to consideration of the question of law presented herein. *See* NMSA 1978, Section 7-1-24; NMSA 1978, Section 7-1-26.

C. A hearing was held within 90 days of Taxpayer's protest. *See* NMSA 1978, Section 7-1B-6 (D).

D. There is no genuine dispute as to any material fact and summary judgment is appropriate. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 148 NM 713.

E. NMSA 1978, Section 7-1-26 does not provide an alternative right of protest for the denial of the high wage jobs tax credit in addition to, or in lieu of the right provided by NMSA 1978, Section 7-1-24.

F. The right of protest to the denial of the high wage jobs tax credit is contained exclusively in NMSA 1978, Section 7-1-24.

G. The opportunity to protest the Department's Partial Denial of the Tax Credit Application expired on September 11, 2017. *See* NMSA 1978, Section 7-1-24; *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139 N.M. 498, 134 P.3d 785.

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

DATED: September 14, 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 September 14, 2018, a copy of the foregoing Decision and Order Granting Summary Judgment was mailed to the parties listed below in the following manner:

*First Class Mail* *Interdepartmental Mail*

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