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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

Court of Appeals of New Mexico
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Mark Reynolds

4 **No. A-1-CA-39170**

5 **ELITE WELL SERVICE, LLC,**

6 Protestant-Appellant,

7 v.

8 **NEW MEXICO TAXATION &**
9 **REVENUE DEPARTMENT,**

10 Respondent-Appellee.

11 **APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE**

12 **Dee Dee Hoxie, Hearing Officer**

13 Joe Lennihan
14 Santa Fe, NM

15 for Appellant

16 Raúl Torrez, Attorney General
17 Kenneth E. Fladager, Special Assistant Attorney General
18 Santa Fe, NM

19 for Appellee

1 **OPINION**

2 **HANISEE, Judge.**

3 {1} Elite Well Services, LLC, (Taxpayer) appeals the decision and order of the
4 Administrative Hearings Office (AHO) in which the AHO (1) granted the New
5 Mexico Taxation and Revenue Department’s (the Department) motion for summary
6 judgment, and (2) denied Taxpayer’s protest arising from its application for a high-
7 wage jobs tax credit and subsequent application for refund, both of which were
8 denied by the Department. This appeal presents a matter of first impression as to
9 whether, as Taxpayer argues, a taxpayer may elect to dispute the Department’s
10 denial of an application for a high-wage jobs tax credit by filing *either* an
11 administrative protest, pursuant to NMSA 1978, Section 7-1-24 (2019), *or* an
12 application for a refund, pursuant to NMSA 1978, Section 7-1-26 (2021).¹ By
13 contrast, the Department contends that Section 7-1-24 is the sole remedy available
14 for taxpayers to dispute the denial of an application for a high-wage jobs tax credit.
15 Concluding that the relevant statutes do not preclude a taxpayer from electing to seek
16 relief under either Section 7-1-24 or Section 7-1-26, we reverse and remand for
17 proceedings consistent with this opinion.

¹While previous versions of these and other relevant statutes were in effect during the proceedings below, this opinion refers to the current versions of each statute given that amendments resulting in the current versions did not substantively affect the applicability of the statutes to the issues raised in the instant case.

1 **BACKGROUND**

2 {2} In December 2016, Taxpayer submitted an application for a high-wage jobs
3 tax credit (credit application), pursuant to NMSA 1978, Section 7-9G-1 (2021), in
4 the amount of \$3,287,058.23. The Department denied Taxpayer’s credit application
5 in June 2017. In an attachment to the denial letter titled, “FYI-402 TAXPAYER
6 REMEDIES” (FYI-402), the Department instructed that a taxpayer may dispute the
7 Department’s denial of a credit application in one of the following two ways: “[1]
8 file a written protest with [the Department] without making payment of the protested
9 amount,” within ninety days of the Department’s denial, “or [(2)] pay the tax liability
10 and then file a refund claim. Please note that [a taxpayer] cannot protest an
11 assessment or partial assessment that [a taxpayer has] already paid. [A taxpayer]
12 must first apply for a refund.”

13 {3} Taxpayer did not file a written protest to the Department’s denial of its credit
14 application within ninety days. Rather, in June 2018, Taxpayer filed an application
15 for refund (refund application), pursuant to Section 7-1-26, in the amount of
16 \$3,287,058.23, based on its original credit application. The Department denied
17 Taxpayer’s refund application, stating that its claim for refund was denied “because
18 the [c]redit [a]pplication had been previously denied.” Thereafter, pursuant to
19 Section 7-1-24, Taxpayer filed a written protest in response to the denial of its refund
20 application, as instructed by Section 7-1-26. Following the Department’s receipt of

1 Taxpayer’s protest and multiple telephonic hearings before the AHO on various
2 motions, the Department filed its motion for summary judgment.

3 {4} The AHO conducted a telephonic hearing on the Department’s motion for
4 summary judgment, and subsequently issued the decision and order at issue here. In
5 it, the AHO found that “the appropriate and only available remedy for a denial of an
6 application for a tax credit in this case was to file a protest within [ninety] days of
7 the denial, pursuant to” Section 7-1-24, and that Taxpayer’s failure to file such a
8 protest rendered the Department’s denial “indisputable.” The AHO found that, under
9 Section 7-9G-1, “approval of [a] high-wage jobs tax credit [application] is a
10 condition precedent to claiming the tax credit against one’s tax liability.” In granting
11 the Department’s motion for summary judgment, the AHO found in pertinent part
12 that “claims for refund [under Section 7-1-26] are meant to address how a credit
13 claimed is to be applied toward a tax liability, not to address a taxpayer’s underlying
14 eligibility for a tax credit that requires approval prior to being claimed.” The AHO
15 further stated that “[i]t is generally true that a taxpayer will claim a credit at the same
16 time that it claims a refund,” but found that under Section 7-9G-1, “the taxpayer’s
17 right to claim the [high-wage jobs] tax credit is not contemporaneous to and
18 synonymous with the right to claim the refund” because “[t]he high-wage jobs tax
19 credit statute requires that the tax credit be approved prior to being claimed.” The
20 AHO made the following conclusions of law: (1) “[t]he right to claim the high-wage

1 jobs tax credit requires that the application for the tax credit be approved by the
2 Department”; (2) “[t]he right to protest a denial of an application for the high-wage
3 jobs tax credit is contained exclusively in Section 7-1-24”; and (3) “[t]he right to
4 claim a refund for the denial of a claimed credit [under Section 7-1-26] does not
5 provide an alternative method to protest the denial of the tax credit application.”

6 Defendant appeals.

7 **DISCUSSION**

8 {5} Taxpayer argues that the AHO misinterpreted Sections 7-9G-1, 7-1-24, and
9 7-1-26, and thus erred in granting the Department’s motion for summary judgment
10 and dismissing Taxpayer’s protest. Specifically, Taxpayer contends that it is
11 permitted to dispute the Department’s denial of its credit application by either one
12 of the two methods provided by Sections 7-1-24 and 7-1-26, respectively. The
13 Department answers that the AHO properly granted summary judgment in its favor,
14 asserting that Taxpayer’s sole method for disputing the denial of its credit
15 application would have been through the administrative protest method provided by
16 Section 7-1-24. The Department reasons that in order to “obtain the benefits of” a
17 high-wage jobs tax credit under Section 7-9G-1, “a taxpayer must successfully
18 complete a two-step process. The first step is to *apply* for the high[-]wage job[s] tax
19 credit . . . , and the second step is to *claim* the credit after it has been approved.”

1 {6} Whether Section 7-1-24 provides the sole remedy for a taxpayer to dispute the
2 Department’s denial of a high-wage jobs tax credit is a question requiring statutory
3 interpretation, and we therefore review this matter de novo. *Tucson Elec. Power Co.*
4 *v. Tax’n & Revenue Dep’t*, 2020-NMCA-011, ¶ 6, 456 P.3d 1085. We are not bound
5 by the AHO’s interpretation of the relevant statutes, *id.*, and we will set aside the
6 AHO’s decision if such decision is: “(1) arbitrary, capricious or an abuse of
7 discretion; (2) not supported by substantial evidence in the record; or (3) otherwise
8 not in accordance with the law.” NMSA 1978, § 7-1-25(C) (2015). “Even when we
9 review for an abuse of discretion, our review of the application of the law to the facts
10 is conducted de novo. Accordingly, we may characterize as an abuse of discretion a
11 discretionary decision that is premised on a misapprehension of the law.” *Helmerich*
12 *& Payne Int’l Drilling Co. v. N.M. Tax’n & Revenue Dep’t*, 2019-NMCA-054, ¶ 17,
13 448 P.3d 1126 (internal quotation marks and citation omitted).

14 {7} “The guiding principle in statutory construction requires that we look to the
15 wording of the statute and attempt to apply the plain meaning rule, recognizing that
16 when a statute contains language which is clear and unambiguous, we must give
17 effect to that language and refrain from further statutory interpretation.” *Tucson*
18 *Elec. Power Co.*, 2020-NMCA-011, ¶ 8 (internal quotation marks and citation
19 omitted). “[P]lain language of a statute is the primary indicator of legislative intent.”
20 *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126

1 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted). The statute
2 or statutes whose construction is in question are to “be read in connection with other
3 statutes concerning the same subject matter.” *Quantum Corp. v. N.M. Tax’n &*
4 *Revenue Dep’t*, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848. “[W]e will not
5 read into a statute language which is not there.” *Am. Fed’n of State, Cnty. & Mun.*
6 *Emps. v. City of Albuquerque*, 2013-NMCA-063, ¶ 5, 304 P.3d 443 (omission,
7 internal quotation marks, and citation omitted).

8 {8} Under NMSA 1978, Section 7-1-23 (2019), titled, “Disputing liabilities;
9 election of remedies:”

10 A taxpayer may dispute the taxpayer’s liability for taxes only by
11 [(1)] protesting the assessment of taxes as provided in Section 7-1-24
12 . . . without making payment or [(2)] by claiming a refund as provided
13 in Section 7-1-26 . . . after making payment of the taxes the department
14 asserts are owed. The pursuit of one of the two remedies constitutes an
15 unconditional waiver of the right to pursue the other.

16 Section 7-1-24, titled, “Disputing liabilities; administrative protest,” provides that a
17 taxpayer may file a written protest to dispute:

- 18 (1) the assessment to the taxpayer of any amount of tax;
- 19 (2) the application to the taxpayer of any provision of the Tax
20 Administration Act except the issuance of a subpoena or summons; or
- 21 (3) the denial of or failure either to allow or to deny a:
 - 22 (a) credit or rebate; or
 - 23 (b) claim for refund made in accordance with Section
24 7-1-26.

1 Section 7-1-24(F) states:

2 If a taxpayer fails to timely protest an assessment of tax, penalty or
3 interest: (1) the undisputed amount of tax assessed and not protested
4 becomes final; and (2) the taxpayer is deemed to have waived the right
5 to protest the assessment, unless the taxpayer pays the tax and claims a
6 refund of the tax pursuant to Section 7-1-26.

7 {9} Section 7-1-26(A), titled, “Disputing liabilities; claim for credit, rebate or
8 refund,” provides:

9 A person who believes that an amount of tax has been paid by or
10 withheld from that person in excess of that for which the person was
11 liable, *who has been denied a credit* or rebate claimed . . . may claim a
12 refund by directing to the secretary, within the [applicable] time
13 limitations . . . , a written claim for refund.

14 (Emphasis added.) Under Sections 7-1-26(D), (E)(1), if the claim for refund is
15 denied, “the person shall not refile the denied claim, but the person, within ninety
16 days after either the mailing or delivery of the denial of all or any part of the claim,
17 may elect to pursue” one of three remedies, including filing a written protest
18 “pursuant to the provisions of Section 7-1-24.” Such a written protest must set forth,
19 in pertinent part, “the circumstances of . . . a denied credit.” Section 7-1-26(E)(1)(a).

20 {10} Under Section 7-9G-1, titled, “High-wage jobs tax credit; qualifying high-
21 wage jobs,” “[a] taxpayer that is an eligible employer may apply for, and the
22 department may allow, a tax credit for each new high-wage job.” Section 7-9G-1(A).
23 “The Legislature enacted Section 7-9G-1 to provide an incentive for urban and rural
24 businesses to create and fill new high-wage jobs in New Mexico.” *Weatherford*

1 *Artificial Lift Sys., LLC v. Clarke*, 2021-NMCA-065, ¶ 4, 499 P.3d 679 (internal
2 quotation marks and citation omitted). Section 7-9G-1(C) provides that “[t]he high-
3 wage jobs tax credit may be claimed by an eligible employer for each new high-
4 wage job performed for the year in which the new high-wage job is created and for
5 consecutive qualifying periods.” Under Section 7-9G-1(D), “[t]o receive a high-
6 wage jobs tax credit, a taxpayer shall file an application for approval of the credit
7 with the department once per calendar year on forms and in the manner prescribed
8 by the department.” Section 7-9G-1(M) provides that “an approved high-wage jobs
9 tax credit shall be claimed against the taxpayer’s modified combined tax liability
10 and shall be filed with the return due immediately following the date of the credit
11 approval.”

12 {11} As referenced above, the AHO found that under Section 7-9G-1, a
13 “[t]axpayer’s right to claim [a high-wage jobs tax credit] is not contemporaneous to
14 and synonymous with the right to claim the refund,” and that “[t]he right to claim
15 the high-wage jobs tax credit is afforded by statute, and the credit may only be
16 claimed once the application for credit is approved by the Department.” The AHO
17 further found that “[t]he high-wage jobs tax credit statute requires that the tax credit
18 be approved prior to being claimed.”

19 {12} We disagree with these findings by the AHO inasmuch as Section 7-9G-1 is
20 wholly silent regarding the applicability of Section 7-1-24, Section 7-1-26, or any

1 other specific progression or procedure a taxpayer must follow when disputing the
2 Department's denial of a high-wage jobs tax credit. Moreover, while Section 7-9G-
3 1(M) specifically refers to "an approved high-wage jobs tax credit" and "credit
4 approval," it does not provide that a taxpayer is precluded from seeking any
5 particular remedy to dispute a denial of such credit. We further disagree with the
6 AHO's interpretation of Sections 7-1-24 and 7-1-26, based on the plain language of
7 each, and explain as follows.

8 {13} Here, the Department asserts that Sections 7-9G-1, 7-1-24, and 7-1-26 set
9 forth a clear and structured procedure that a taxpayer must follow to dispute the
10 Department's actions. The Department contends that Section 7-1-26 provides the
11 process by which a taxpayer may pursue the Department's asserted two-step process,
12 wherein a taxpayer must first apply for the high-wage jobs tax credit and may only
13 "claim" the credit following the Department's approval of the credit application. The
14 Department specifies—without citation to authority—"that the fact a credit has been
15 approved by the Department does not necessarily mean that a taxpayer will be
16 successful in claiming the approved credit," asserting such as proof that the
17 Legislature did not intend Section 7-1-26 to function as a method to dispute the
18 denial of a tax credit application. "It is not our practice to rely on assertions of
19 counsel unaccompanied by support in the record. The mere assertions and arguments
20 of counsel are not evidence." *Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M.

1 44, 256 P.3d 987 (internal quotation marks and citation omitted). Further, the
2 Department argues that “[b]y its plain meaning, Section 7-1-26 prescribes the
3 remedy to those taxpayers who were denied a credit they were *claiming*. It offers no
4 remedy to taxpayers whose credit *application* was denied.” The Department
5 contends, as the AHO found, that Section 7-1-24 is the sole remedy available for
6 taxpayers to dispute the denial of an application for a tax credit, and that Section 7-
7 1-26 is the remedy available for taxpayers to claim an already approved tax credit.
8 Under the Department’s interpretation of the relevant statutes, because Taxpayer
9 failed to file an administrative protest under Section 7-1-24 within ninety days of the
10 Department’s denial of the credit application, Taxpayer is without recourse to
11 challenge the Department’s adverse decisions.

12 {14} While certainly what the Department advances, and the AHO found, is one
13 approach in construing the relevant statutes, under the tenets of statutory
14 construction we conclude that the statutes do not reflect in their plain language the
15 Department’s approach. Rather, as stated above, Section 7-9G-1 is silent regarding
16 the methods by which a taxpayer should dispute a denial of their application for a
17 high-wage jobs tax credit. Further, the plain language of both Sections 7-1-24 and
18 7-1-26 indicate that the two statutes exist as alternatives and a taxpayer may dispute
19 a denial of a tax credit under either statute. *See* § 7-1-24(A)(3)(a) (“A taxpayer may
20 dispute . . . the denial of . . . a credit *or* rebate.” (emphasis added)); § 7-1-26(A) (“A

1 person . . . who has been denied a credit . . . may claim a refund.”); *see also High*
2 *Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5 (“[P]lain language of a statute is
3 the primary indicator of legislative intent.”). “As a rule of construction, the word
4 ‘or’ should be given its normal disjunctive meaning unless the context of a statute
5 demands otherwise.” *Bounds v. Hamlett*, 2011-NMCA-078, ¶ 15, 150 N.M. 389, 258
6 P.3d 1181 (internal quotation marks and citation omitted).

7 {15} While New Mexico appellate courts have not previously addressed the
8 specific issues raised in this appeal, we have addressed the function of both Sections
9 7-1-24 and 7-1-26 and our reading thereof has likewise confirmed that relief may be
10 sought through either statute. In *Weatherford*, this Court addressed “the exhaustion
11 requirements for a taxpayer who [sought] to challenge the [d]epartment’s denial of
12 successive applications for [high-wage jobs] tax credits.” 2021-NMCA-065, ¶ 2.
13 There, we stated that “[g]enerally speaking, a taxpayer who is dissatisfied with the
14 [d]epartment’s denial of a tax credit may pursue one of two remedies under the Tax
15 Administration Act—an administrative protest [under Section 7-1-24] or a claim for
16 refund [under Section 7-1-26]—and must exhaust the chosen remedy.” *Id.* The
17 AHO’s decision and order in the instant case loosely reflects this principle—despite
18 ultimately finding to the contrary—stating that “[a] taxpayer generally has two
19 available administrative remedies, to file a protest or to file a claim for refund.”

1 {16} New Mexico appellate courts typically give “persuasive weight to long-
2 standing administrative constructions of statutes by the agency charged with
3 administering them.” *High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5
4 (internal quotation marks and citation omitted). “Agency regulations that interpret
5 statutes and are promulgated under statutory authority are presumed proper, and, of
6 course, it is hornbook law that an interpretation of a statute by the agency charged
7 with its administration is to be given substantial weight.” *Chevron U.S.A., Inc. v.*
8 *N.M. Tax’n & Rev. Dep’t*, 2006-NMCA-050, ¶ 16, 139 N.M. 498, 134 P.3d 785
9 (alteration, internal quotation marks, and citation omitted). Here, though, we cannot
10 disregard the Department’s own guidance found in FYI-402, which is submitted by
11 the Department to taxpayers upon denial of an application for tax credit. The stated
12 purpose of FYI-402 is to explain to a taxpayer “how to dispute a tax liability or other
13 administrative action” by the Department.

14 {17} While FYI-402 does not explicitly refer to either Section 7-1-24 or Section 7-
15 1-26, the language in the form mirrors those statutes. FYI-402 provides that a
16 taxpayer “may dispute a tax liability or certain actions the [D]epartment might take
17 against [a taxpayer] . . . in one of two ways: [(1)] file a written protest . . . without
18 making payment of the protested amount, or [(2)] pay the tax liability and then file
19 a refund claim.” Regarding the first option of filing a protest, FYI-402 states that
20 “[i]f [a taxpayer] choose[s] to protest, [the taxpayer] must do so in writing within

1 [ninety] days of the date of the event you are protesting,” and explains the process
2 by which the Department will review such filed protest, as well as the rights to appeal
3 to this Court. As to the second option of claiming a refund, FYI-402 provides that
4 “[i]f [a taxpayer] believes any tax [the taxpayer has] paid or had withheld” is more
5 than is actually owed, that taxpayer “may file a refund claim” with the Department,
6 and “[t]he Department treats a protest of a denial or departmental action on a
7 complete claim for refund in the same way as a protest of an assessment.” FYI-402
8 further explains that a taxpayer “may file a protest with the Department or file a
9 lawsuit” in district court if a claim for refund is denied. The Department’s letter
10 denying Taxpayer’s credit application directs Taxpayer to refer to FYI-402 for
11 details regarding “procedures to protest the denial of the credit,” and FYI-402 draws
12 no distinction between available dispute methods. Indeed, FYI-402 does not state,
13 or even imply, that a taxpayer may only dispute an application for credit by filing a
14 protest. Rather, the form unequivocally presents the options of “protest” and “refund
15 claim” as equally available to taxpayers, bounded only by applicable time
16 limitations, whether the taxpayer has already paid or is willing to pay the amount in
17 question, and the requirement that “choosing one remedy is an automatic waiver of
18 the right to pursue the other.” Put more simply, FYI-402’s guidance to Taxpayer in
19 this instance would be misleading if one of the options presented to challenge the
20 denial of its credit application is in fact not an option.

1 {18} To summarize, neither the applicable statutes nor the Department’s own
2 guidance suggest that a taxpayer’s sole remedy to dispute the denial of a high-wage
3 jobs tax credit is through the protest procedure provided in Section 7-1-24. “The
4 Legislature knows how to include language in a statute if it so desires.” *Cordova v.*
5 *Cline*, 2021-NMCA-022, ¶ 9, 489 P.3d 957 (alteration, internal quotation marks, and
6 citation omitted). Had the Legislature intended for taxpayers to dispute a denial of a
7 high-wage jobs tax credit *only* through Section 7-1-24, the Legislature would have
8 made as much clear in its writing and subsequent amendments of Sections 7-9G-1,
9 7-1-23, 7-1-24, or 7-1-26. As written, however, the Legislature has not included any
10 language in the relevant statutes that could indicate an intended limitation as to how
11 a taxpayer may dispute the denial of a high-wage jobs tax credit. The plain language
12 of the statutes, as well as the record before us, is devoid of any indication to that
13 effect. *See Britton v. Off. of the Att’y Gen.*, 2019-NMCA-002, ¶ 28, 433 P.3d 320
14 (“[A]ppellate courts will not read into a statute language which is not there.”
15 (alteration, internal quotation marks, and citation omitted)).

16 {19} To the extent that the Department contends that Taxpayer’s interpretation of
17 the relevant statutes would result in impermissible ambiguities and surplusage, we
18 do not agree. We will not interpret a statute to create an exception not reflected in
19 the plain language. *See id.*; *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009,
20 ¶ 31, 147 N.M. 583, 227 P.3d 73. It is only where “the literal meaning of a statute

1 | would be absurd, unreasonable, or otherwise inappropriate in application” that “we
2 | go beyond the mere text of the statute.” *Bishop v. Evangelical Good Samaritan*
3 | *Soc’y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361. We do not consider it
4 | to be absurd, unreasonable, or otherwise inappropriate that a taxpayer may seek one
5 | of two alternative remedies to dispute a denied credit application.


6 | {20} We conclude that the AHO’s interpretation of the relevant statutes does not
7 | comport with our principles of statutory construction. Therefore, we hold that the
8 | AHO’s decision and order is not in accordance with the law and thus requires
9 | reversal under Section 7-1-25(C). Our holding in this regard is wholly unrelated to
10 | the substantive determinations made by the Department in denying Taxpayer’s claim
11 | and shall not be construed as an indication that Taxpayer should or should not be
12 | approved for the high-wage jobs tax credit for which it originally applied. Further,
13 | our holding shall not be read as casting any judgment on the hypothetical practicality
14 | of the Department’s interpretation of the relevant statutes, should the Legislature
15 | choose to amend the statutes accordingly. Until such legislative action occurs,
16 | however, we are beholden to interpret the plain language of the statutes as written.

17 | **CONCLUSION**

18 | {21} For the foregoing reasons, we reverse the AHO’s grant of the Department’s
19 | motion for summary judgment and denial of Taxpayer’s protest, and remand for
20 | proceedings consistent with this opinion.


1 {22} IT IS SO ORDERED.

2
3



J. MILES HANISEE, Judge

4 WE CONCUR:

5 
6 JACQUELINE R. MEDINA, Judge

7 
8 JANE B. YCHALEM, Judge