BEFORE THE STATE TAX APPEAL BOARD

OF THE STATE OF MONTANA

PHILIP CAMPBELL/JUDY FAY, Appellant, -vs- DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	)	DOCKET NO.: IT-2011-3 ORDER and OPPORTUNITY FOR JUDICIAL REVIEW

Taxpayers Philip Campbell and Judy Fay of Helena bring this appeal from a denial by the Department of Revenue (DOR) of an income tax credit for the installation of alternative energy generating equipment. Taxpayers appealed the DOR initial ruling, and the Department of Revenue's Office of Dispute Resolution held a hearing on March 14, 2011. The hearing examiner upheld the denial of the credit. (DOR Exh. A, Findings of Fact, Conclusions of Law, and Order of Hearing Examiner H. Heffelfinger.) The Taxpayers appealed to this Board.

The DOR has moved to dismiss the appeal, claiming the statutory language is clear, unambiguous and dispositive and that the Taxpayers do not qualify for the credit. (Montana Department of Revenue's Response to Philip Campbell and Judy Fay's Appeal, October 17, 2011.)

Pursuant to Rule 12(b)(6), M.R. Civ.P., this Board may dismiss an appeal if the moving party can prove no set of facts in support of their claim that would entitle them to relief. The facts of the case are not in dispute but the parties

disagree on the meaning of the statute defining the credit. Thus, this is an instance in which the case may be resolved on the Department's motion.

Alternative Energy Production and Conservation Credits

Montana statutes seek to encourage investments in energy conservation and alternative energy production (§ 15-32-101, MCA) by providing two tax credits. The first, under § 15-32-109, MCA, focuses on home improvements. It is a "credit for energy-conserving expenditures" under which "a resident individual taxpayer may take a credit against the taxpayer's tax liability under chapter 30 for 25% of the taxpayer's expenditure for a capital investment . . . for an energy conservation purpose, in an amount not to exceed $500."

The second credit focuses on commercial expansion, as it is intended "to encourage the development of the alternative energy industry in Montana without adversely affecting tax revenue received from existing economic activity in the state." (§15-32-401, MCA.) Section 15-32-402, MCA, states:

> **Commercial or net metering system investment credit – alternative energy systems.** (1) An individual, corporation, partnership, or small business corporation as defined in 15-30-3301 that makes an investment of $5,000 or more in property that is depreciable under the Internal Revenue Code for a commercial system or a net metering system as defined in 69-8-103, that is located in Montana and that generates energy by means of an alternative renewable energy source, as defined in 15-6-225, is entitled to a tax credit against taxes imposed by 15-30-2103 or 15-31-121 in an amount equal to 35% of the eligible costs, to be taken as a credit only against taxes due as a consequence of taxable or net income produced by one of the following:
>
> (a) manufacturing plants located in Montana that produce alternative energy generating equipment;
>
> (b) a new business facility or the expanded portion of an existing business facility for which the alternative energy generating equipment supplies, on a direct contract sales basis, the basic energy needed; or
>
> (c) the alternative energy generating equipment in which the investment for which a credit is being claimed was made.

The law also states, in §15-32-405, MCA, that the commercial credit provided in §15-32-402, MCA, is mutually exclusive with "other state energy or investment tax credits" which would include the Energy Conservation Installment Credit, under §15-32-109, MCA.

To implement the second credit, §15-32-407, MCA, authorizes the DOR to adopt rules to insure "the claiming of the credit only against taxes due as a consequence of income produced by new economic activity in the state as described in 15-32-402." The Taxpayers dispute the regulations promulgated pursuant to this section because the DOR interprets the §15-32-402 credit as available only for commercial activities.

Taxpayers installed solar panels in their home for a hot water heating system, including a net metering device. They claimed the Energy Conservation Installment Credit under §15-32-109, MCA, on their income tax as well as the Alternative Energy Production Credit (AEPC) under §15-32-402, MCA. The energy conservation credit was allowed by the DOR, but the alternative energy production credit was disallowed because the Taxpayer's installation was not commercial and produced no taxable income against which the credit could be applied. (Appeal of Philip Campbell and Judy Fay, September 13, 2011.)

The Taxpayers claim that the DOR regulations in A.R.M. 42.4.4107, stating "Property placed in service for personal use does not qualify for this credit" is not consistent with the statute, citing §15-32-402, MCA. Specifically, Taxpayers state that a 2001 legislative amendment added net metering systems to the section and a 2003 legislative amendment to that section removed the requirement that property qualify for the business tax credit under §38 of the Internal Revenue Code. (Appeal of Philip Campbell and Judy Fay, Sept. 13, 2011.) Net metering systems, according to Taxpayers, by definition do not produce income. They argue,

therefore, that by adding net metering to the section the Legislature intended the credit to be available for non-commercial use as well as commercial and the regulations requiring commercial applications are inconsistent with the statute, as amended in §15-32-402, MCA.

The DOR points out that the Legislature did not remove other references requiring a commercial installation to qualify for the credit and that the language limiting the credit to commercial expansion is clear.

Net metering systems are defined in §69-8-103, MCA;

> (18) "Net metering" means measuring the difference between the electricity distributed to and the electricity generated by a customer-generator that is fed back into the distribution system during the applicable billing period.
>
> (19) "Net metering system" means a facility for the production of electrical energy that:
>
> (a) uses as its fuel solar, wind, or hydropower;
>
> (b) has a generating capacity of not more than 50 kilowatts;
>
> (c) is located on the customer-generator's premises;
>
> (d) operates in parallel with the utility's distribution facilities; and
>
> (e) is intended primarily to offset part or all of the customer-generator's requirements for electricity.

"By definition," the Taxpayers state in their appeal, "there is no income produced with a net metering system."

Analysis of Statutes

After careful review of the statutes, we conclude that the Taxpayers can show no instance in which they can claim the requested credit. The statutory language in § 15-32-402, MCA, limits the credit so that it can only offset taxes due on the income produced by (a)manufacturing alternative energy generating equipment, or (b) by a new or expanded business facility using alternative energy,

or (c) income produced by the alternative energy equipment for which the credit is sought. All three of those options assume a commercial, income-producing venture. This is emphasized by the requirement that the equipment installed be depreciable, as only income-producing equipment is depreciable. (26 U.S.C. 167(a).)

It is undisputed the Taxpayers in this case realized no taxable income from the alternative energy equipment they installed and, therefore, the DOR correctly denied them the tax credit. Taxpayers argue, however, that the DOR's requirement of taxable income renders the legislative amendments adding net metering systems to the §15-32-402, MCA, credit meaningless as a net metering system does not produce income. Taxpayers cite no legislative history indicating a legislative intent to change the income-producing requirement of the statute and the examination of legislative history by Hearing Examiner Heffelfinger found no such discussion. (Findings of Fact, Conclusions of Law, and Order, H. Heffelfinger, August 15, 2011, pp. 25 – 27.)

We disagree with Taxpayers' contention that the DOR's interpretation renders the legislative amendment meaningless. We note the disputed code section does provide for three alternative situations in which the expenses could qualify for a credit, and Taxpayers focus only on the third. Under the second option an alternative energy/net metering system could be used in a new or expanded business facility, as described in §15-32-402(1)(b), MCA, to supply alternative energy to the facility. In that case, the credit could then offset taxes due on the income from the business facility, and the addition of the net metering language would not be meaningless.

The Taxpayers also point to §15-32-406, MCA, which states: "**Separation of credit portion.** In the case of a business, a portion of which qualifies for the

credit pursuant to 15-32-402 and a portion of which does not qualify for the credit, taxes due from each portion must be separated by using the three-factor formula provided in 15-31-305." From this language they argue the legislature anticipated both commercial and non-commercial applications of alternative energy equipment and that the net metering system should therefore qualify. The intent of that code section, however, is to assure the credit is only used against taxes from qualifying new business activities. (*See* §15-32-407(3), MCA.) It does not expand the taxes against which the credit can be taken, as the Taxpayers suggest, to include personal income taxes.

Whether the 2001 amendment adding net metering systems is meaningful or not, the language limiting the alternative energy credit to the taxes due on the income produced is direct and unambiguous. There is no conflicting or unclear language requiring application of the rules of statutory interpretation. The clause limiting the credit to taxes resulting from alternative energy investments clearly applies to the net metering system as it is all in one continuous sentence in the statute and does not state any exceptions. Simply because a net metering system can be used in a non-commercial application does not mean the statute is unclear.

The Taxpayers suggest we should interpret that sentence to mean "business would apply credit for income earned from investments; net metering systems credit would apply to a taxpayer's income." (Taxpayer's Response to Request for Dismissal, Nov. 18, 2011.) That would require us to directly contravene the language of §15-32-402, MCA, as well as the code section limiting taxpayers to one credit for alternative energy but not both. (§15-32-405, MCA.)

The statutory language is clear, and prevents the Taxpayers from using the credit in this instance. The Department's motion to dismiss is hereby granted as

the moving party can prove no set of facts in support of their claim that would entitle them to relief. (Rule 12(b)(6), M.R. Civ.P.)

ORDER

IT IS HEREBY ORDERED that the Department of Revenue's Motion to Dismiss is granted. This appeal is therefore dismissed.

Dated this 29th day of November, 2011.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/s/_____
KAREN E. POWELL, Chairwoman

(S E A L)

/s/_____
DOUGLAS A. KAERCHER, Member

/s/_____
SAMANTHA SANCHEZ, Member

Notice: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of November, 2011, a copy of the foregoing order was served on the parties hereto by placing a copy in the U.S. Mail and addressed as follows:

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/s/_____
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