

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

DAVID and VICKI HAIDLE,)	
)	DOCKET NO. IT-2011-8
Appellants,)	
)	
-vs-)	
)	FACTUAL BACKGROUND,
)	CONCLUSIONS OF LAW,
)	ORDER and OPPORTUNITY
THE DEPARTMENT OF REVENUE)	<u>FOR JUDICIAL REVIEW</u>
OF THE STATE OF MONTANA,)	
)	
Respondent.)	

This case comes to us through a direct appeal by Taxpayers David and Vicki Haidle from an adverse decision of the Office of Dispute Resolution (ODR) of the Department of Revenue (DOR). A telephonic hearing was held on September 28, 2012. David Haidle represented Taxpayers, and testified on his own behalf. The Department of Revenue (DOR) was represented by Tax Counsel Amanda Myers, and DOR Auditor Cheryl Yauger. Paul Driscoll of the Department of Environmental Quality presented testimony on behalf of the DOR. By agreement of the parties, the ODR decision and transcript were considered by this Board.

Issue

The issue presented is whether or not the Haidles can claim a \$1,000 energy conservation installation credit on their 2009 Montana Individual Income Tax return for expenses which included the cost of the roofing and siding their home.

Facts Presented

1. Taxpayers David and Vickie Haidle replaced the roof and siding on their home at 215 6th Avenue East in Eureka in 2009 in order to add insulation to their residence. Haidle Letter of Nov. 11, 2011.
2. Taxpayers filed a Form ENRG-C claiming an income tax credit for 2009 of \$1,000. Exh. 2. Taxpayers showed a total conservation investment of \$7,386, claiming a credit equal to the lesser of 25% of the amount expended or \$1,000. Section 15-32-109, MCA.
3. The Taxpayer testified that he included the cost of insulation, roofing and siding in his credit calculations. The Instructions allow for investments in “insulation of floors, walls, ceilings and roofs in existing buildings” to qualify. Exh. 2.
4. The General Instructions do not allow for a credit for “reshingling or repairing a roof” or “siding with little or no insulation.” Exh 2.
5. The DOR conducted an audit of the Taxpayers’ 2009 tax return and disallowed the expenditures claimed for replacing the roof and the siding but allowed the expenses for the insulation installed beneath them. DOR Letter to the Haidles, Nov. 4, 2011.
6. During the audit, DOR employee Tina Standish referred the question of the deductibility of siding to the Department of Environmental Quality. She recited that the Taxpayers installed insulated vinyl siding with an R value between 2.8 and 3.5 which they argue is not excluded by the “siding with little or no insulation” language in the General Instructions. Standish Email memo of Aug 1, 2011 to Paul Tschida.
7. Standish received a response from DEQ employee Paul Driscoll which stated that the federal tax credits exclude all-in-one siding and the state of

- Montana generally follows the federal government lead, so the expense should be ineligible. Driscoll Email memo of Aug. 1, 2011 to Tina Standish.
8. In addition, Paul Tschida of the DEQ responded to Ms. Standish, agreeing that siding does not qualify because it generally does not reduce the energy use in the building. He suggested the DOR remove the phrase “siding with little or no insulation” from the instructions accompanying the tax form because “Taxpayers may incorrectly interpret that the total cost of siding with an insulation value is eligible.” Tschida Email memo of Aug. 1, 2011 to Tina Standish.
 9. The memo does not explain what would be incorrect about such an interpretation. Tschida Email memo of Aug. 1, 2011 to Tina Standish.
 10. Taxpayers installed a metal, Energy Star roof which they claim has insulative value. Haidle Letter of Nov. 11, 2011.
 11. The DOR also relied on the DEQ for advice on the roof and submitted into evidence a memo from Georgia Bresdal, at DEQ, stating that roof replacement does not meet the intent of the incentive because the improvement must add significant insulative value to the home. “Merely replacing a roof that has exceeded its life expectancy does not achieve this.” Memo to Jeanne Lear, DOR, from Georgia Bresdal. May 2, 2006.
 12. The DOR letter denying part of the credit cited the tax instructions that specifically disallow the expenses of “siding with little or no insulation” and “reshingling or repairing a roof.” Peterson Letter of Nov. 23, 2011; ARM 42.4.208(3)(b) (iii), (iv).
 13. Taxpayers requested an informal appeal, stating that the roof was still in good working order when they replaced it. The house, built in the early 1900’s, had no roof insulation and was very cold and drafty. In order to add insulation, Taxpayers were required to remove the existing roof, add roof

rafters to accommodate the thickness of the insulation, and then install a new roof over the new insulation. They chose to install an Energy Star roofing material. Similarly, they had to remove and replace the wood siding, still usable, in order to insulate under it. The Taxpayer replaced the wood siding with a siding with insulative value. Taxpayers argued, therefore, that the new roof and siding were part of the insulation installation. Haidle Letter of Nov. 11, 2011.

14. After informal review, the DOR did not change its assessment notice. Peterson Letter of Nov. 23, 2011.
15. Taxpayers requested a hearing before the DOR's Office of Dispute Resolution (ODR) which was held February 24, 2012. The ODR upheld the DOR's decision. ODR Decision of June 4, 2012.
16. Taxpayers timely appealed the ODR decision to this Board, Haidle Letter to STAB, July 2, 2012, and a telephonic hearing was held.
17. The Taxpayers restated their argument that the roof and siding were a necessary part of the insulation installation. Mr. Haidle stated that it was his understanding that sometimes roofs were approved for the credit.
(Testimony David Haidle)
18. The DOR argued that the roof was not allowed by the regulations, but the DEQ's Mr. Driscoll testified that sometimes roofs do qualify for the credit, citing flat roofs as an example of situations in which the roofing was allowed as part of the insulation expense. His explanation for the exception is that the roofs were not visible and therefore the roofing was not cosmetic. (Testimony Driscoll.)

Applicable Statutes

1. Montana statutes allow Taxpayers to take an income tax credit for the lesser of: 25% of qualifying energy conservation capital improvements to their home, or \$1,000, for a married couple filing jointly, so long as the investment is “for an energy conservation purpose.” Section 15-32-109, MCA.
2. The law defines “energy conservation purpose” to mean the result of the investment is “reducing the waste or dissipation of energy.” Section 15-32-102(4)(a), MCA. No further detail is found in statute.
3. The DOR implementing regulations state: “(1) the following capital investments are those that exclusively qualify for the conservation of energy credit: (a) insulation in existing buildings of floors, walls, ceilings, and roofs; (d) windows that result in reduction of energy consumption; (e) storm doors; (f) insulated exterior doors; (g) caulking and weather stripping except when it is a standard component in the construction or maintenance of the structure such as the chinking and caulking in a log home; . . .” ARM 42.4.204.
4. The Regulations also provide for an annual update of capital investments which qualify for the credit: “(1) Each September, the department will review ARM 42.4.204 to consider other capital investments that qualify for the energy conservation credit for the following tax year. (2) The department will consider any information received that may indicate that capital investments should be added or deleted from the capital investments in ARM 42.4.204. The department will consult with the Department of Environmental Quality to determine whether capital investments should be added or deleted.” ARM 42.4.208.

5. The same Regulation also describes the type of investments that do *not* qualify: “(a) Components of conventional buildings will typically not qualify for the energy conservation credit. Examples of such components. . . include: (a)(i) carpeting; (ii) paint; (vi) any item with an R-value of less than 1;(b)(iii) replacing siding; (iv) replacing or reshingling a roof. . .” ARM 42.4.208(3)(a).
6. The General Instructions distributed to taxpayers by the DOR with the energy credit tax form describe what qualifies for the credit with a list that starts with “Insulation of floors, walls, ceilings and roofs in existing buildings” and lists other items not relevant to this case. Exh. 2.
7. The Instructions also list investments that will *not* qualify including “reshingling or repairing a roof, . . . siding with little or no insulation.” 2009 Energy Conservation Installation Credit form, DOR Exh. 17.

Findings of Fact, Conclusions of Law and Discussion

The Montana Legislature implemented the Montana energy conservation tax credit to encourage Montana homeowners to conserve energy by adding insulation and capital investments that reduce the waste or dissipation of energy. Section 15-32-101, MCA. Taxpayers argue that the necessity of removing their old roofing and siding in order to add structural components that would accommodate the new insulation makes the new roof and siding part of the insulation installation. The Taxpayers also note that the new roof and siding have significantly higher insulative value than the prior roof and siding, and thus qualify, in their entirety, for the energy credit. The DOR disagrees with both contentions.

Energy Tax Credit Instructions

The basic problem in this case is that the language in the DOR's instructions to Taxpayers does not match the language of DOR's regulations, and the Taxpayers' contested expenses fall squarely into the gap.

Inconsistencies in Instructions

Faced with inconsistent language in the regulations and Instructions, this Board finds the Instructions controlling as those are directly provided to Taxpayers with the tax form. The Montana Supreme Court has declared that confusion in tax statutes is to be strictly construed against the taxing authority and in favor of the taxpayer.

Western Energy, 297 Mont. 55, 10, 990 P.2d 767, p.10 (1999), *Omimex Can., Ltd. v. State*, 2008 MT 403, 201 P.3d 3.

We note that the Regulations appear to dictate a different outcome because they specifically disallow "replacing siding" and "replacing" a roof, but the DOR has chosen to publish less restrictive standards in the Instructions. Neither of the contested expenditures is excluded by the Instructions and we find the DOR reasoning for disallowing them unpersuasive. We now look to the specific claims at issue.

A. The Roof

The administrative rule list prohibits taking a credit for "replacing or reshingling a roof" whereas the General Instructions prohibit the costs of "reshingling or repairing a roof." The DOR points to this and claims that the roof replacement costs are non-qualifying. The Taxpayers, however, point out that they replaced, rather than repaired or resingled their roof and so are not excluded by that language in the General Instructions. The DOR offered no explanation for the difference between the regulations and the Instructions.

The DOR offers an email opinion from the DEQ stating that roofs do not qualify because they do not have "significant insulative value," although that criteria is neither

defined nor described in either regulation or Instructions for Taxpayers to understand. Further, the DEQ's Mr. Driscoll stated that roofs are sometimes allowed when installed on a flat-roofed building where they are not visible and have no cosmetic value, although Mr. Driscoll could not say why visibility or cosmetic value should be considered in rating insulation value. The written DEQ opinion states "Merely replacing a roof that has exceeded its life expectancy does not achieve [insulation objectives]." In this case, there is uncontroverted evidence from the Taxpayers that the roof was still in fair shape and had not exceeded its life expectancy. We note that, although it is referenced that Taxpayers installed an Energy Star roof, there is nothing in the record indicating the DOR even considered its possible insulative value. It was denied based on the opinion of the DEQ that roofs don't qualify because they are presumed to have no insulation value, unless it is a flat roof.

The standards being applied are, therefore, less than clear, but this case can be decided without resolving insulation standards. The General Instructions only exclude repairing or reshingling, so the issue is whether Taxpayers expenses fall within that exclusion, or whether they replaced the roof and fall outside the exclusion. The evidence shows that Taxpayers tore off the old shingle roof and decking and rebuilt the underlying roof substructure before adding insulation and an entirely new Energy Star metal roof. This is not a repair or merely reshingling. It is replacing the entire roof with a considerably more insulative one.

We find that the new roof is not excluded by the specific language of the Instructions.

B. The Siding

A similar problem arises with the siding that Taxpayers installed, which did have an insulative value. The Regulations say "replacing siding" does not qualify but the General Instructions say "siding with little or no insulation" is excluded. Again, the Taxpayers claim that they fall outside the exclusion in the General Instructions and,

therefore, qualify. And again, the DOR has no explanation for the difference in language between regulations and Instructions but simply relies on DEQ's statement that siding doesn't qualify. The reasoning given by the DEQ is that the federal tax credit rejects the all-in-one siding-insulation products and Montana follows the federal rules. We again note that such a standard is not published in the Regulations or the Instructions and directly contradicts the General Instructions. That DEQ memo also advises the DOR to remove that language with which the DEQ disagrees as it might create the "mistaken" impression that insulative siding qualifies. Indeed, it does.

We find that the new siding is not excluded by the language of the Instructions.

**Department of Revenue Consultation
with Department of Environmental Quality**

The Department of Revenue regulations require an annual review in September of the list of qualifying items and instruct the DOR to consult with the DEQ on inclusions or exclusions from that list. It would appear, however, that the DOR has gone beyond that annual consultative process and ceded day-to-day decisional authority on individual cases to the DEQ. We can find no authorization by statute, regulation or instruction for such action.

If the DOR determines in its September consultative review that certain products, such as the roofing and siding in this case, should not qualify for the tax credit, appropriate changes to the language of the General Instructions (or administrative rule) could easily be made. Taxpayers might then more clearly understand the rules and avoid buying a non-qualifying product which can result not only in losing the benefit of the tax credit but can also trigger penalty and interest if the credit is denied, so taxpayers can actually lose money for trying to comply with this incentive program.

It is not appropriate to develop unpublished standards and criteria on an internal, ad hoc basis, during an audit process, especially when those ad hoc decisions

contradict the Instructions, and involve unexpected criteria like the visibility of the roof. We have held in prior cases, in which lack of notice by the DOR makes it difficult or impossible for the Taxpayer to comply, that the imposition of penalties and interest for failing to meet unpublished standards is particularly inappropriate. *Shultz v. Montana Dept. of Rev.*, (2007) MT-2006-13, *MCR, LLC. v. Montana Dept. of Rev.*, (2012), MT-2011-1, *Hope Lutheran Church v. Mont. Dept. of Rev.*, (2009) SPT-2009-4.

Insulation Project Not Determinative

This Board does not agree with the Taxpayers that the roof and siding qualify simply because they were part of the insulation project. The goal of the credit is to encourage taxpayers to add insulation above and beyond the routine components of a home. The DOR testified that it is assumed that every home in Montana will have a roof and homeowners do not need tax incentives to decide to install a roof. Such an argument is in line with the statutory language. The Instructions could easily distinguish the expenses of one from the other in order to focus the credit only on insulation.

The Board concludes that the denial of the credit is reversed.

Order

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the Taxpayers' appeal and complaint be granted and the ENRG tax credit applied for by the Haidles include the expenses of the roof and siding.

DATED this 14th day of November, 2012.

BY ORDER OF THE
STATE TAX APPEAL BOARD


KAREN E. POWELL, Chairwoman

(S E A L)


SAMANTHA SANCHEZ, Member


KELLY FLAHERTY-SETTLE, Member

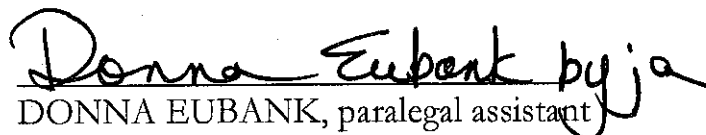
NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

I certify that on this 14th day of November, 2012, a true and correct copy of the foregoing Order was served by placing same in the United States Mail, postage prepaid, and addressed as follows:

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