12-58
TAX TYPE: CORPORATE FRANCHISE TAX
TAX YEARS: 2006, 2007 AND 2009
DATE SIGNED: 4-11-2014
COMMISSIONERS: M. CRAGUN, R. PERO
COMMISSIONER D. DIXON CONCURS IN PART AND DISSENTS IN PART
COMMISSIONER B. JOHNSON DISSENTS
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 12-58 Account No. ##### Tax Type: Corporate Franchise Tax Tax Years: 2006, 2007 and 2009 Judge: Phan

Presiding:
D'Arcy Dixon, Commissioner
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYER-1, Attorney at Law
REPRESENTATIVE FOR TAXPAYER-2, Attorney at Law
REPRESENTATIVE FOR TAXPAYER-3, Attorney at Law
REPRESENTATIVE FOR TAXPAYER-4, Director of Tax
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Manager, Corporate Franchise Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 26, 2013, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Respondent ("Division") issued a corporate franchise tax audit against Petitioner ("Taxpayer") for the period from January 1, 2006 through December 31, 2009. The Statutory Notice was issued on August 18, 2011. The amount of additional of deficiency from the audit

was $$$$$ in tax and $$$$$ in interest. Taxpayer appealed the audit deficiency and the matter proceeded to a Formal Hearing before the Utah State Tax Commission.

2. At issue at the Formal Hearing was the Division's disallowance of the enterprise zone tax credits claimed in each of the audit years. Originally when the Taxpayer appealed the audit there had been two issues, the disallowance of the enterprise zone credits and an issue with the tax credit for research activities. However, prior to this hearing the parties had reached an agreement regarding the tax credit for research activities.

3. The Taxpayer has facilities and operations in Utah. These include an administrative building and a (X) mine and manufacturing plant in CITY, Utah. The mine is located about six miles from the manufacturing plant. The Taxpayer mines (X), ships it to its plant and manufactures it into (X-1) by a process of crushing, screening and heating. The (X-1) is the product that is sold to the customers from this operation. The (X-1) is shipped out by railway or truck. It is sold typically to large manufacturers. For example it is sold to a power plant which uses the (X-1) in their emissions scrubbing system.

4. During the years at issue in the audit, the Taxpayer employed at the plant or at the mine a combined 54 to 71 individuals. Most were employed in either the mining or manufacturing operations. A few employees were involved in the sales of the product produced.

5. The mine and plant in CITY, Utah, is the largest operation that the Taxpayer has in the United States.

6. Taxpayer acquired the CITY, Utah operation in YEAR and it had two kilns at that time. The kilns are important pieces of equipment in the manufacture of (X-1). Taxpayer built two additional kilns in the 1990's and then another kiln in 2011. So at this time it has five kilns. The cost to build the kiln in 2011 had been approximately $$$$$.

7. There was no dispute that the Taxpayer had facilities located within a qualified enterprise zone for purposes of the enterprise zone credit provisions and had made investments that would otherwise qualify. There was no dispute that the Taxpayer met the requirements of employing individuals who reside in the County in which the enterprise zone is located. The matter in dispute was limited to whether the Taxpayer did not qualify for the credit under Utah Code Sec. 63-38f-413(5)(2006) (63-1-413)(5)(2009)) as a business entity engaged in retail sales.

8. The Taxpayer's total taxable sales in 2006 for its entire business operations were $$$$$ and its total sales for its entire business operation as reported on its income tax return was $$$$$.[1] This indicates the taxable sales were 27.59% of the total sales. The total sales per income

[1] Petitioner's Exhibit 2.

tax returns were for the entire business, which included sales in numerous states as well as outside the United States. This could be compared to the taxable sales based on the Taxpayer's ERP System.[2] The other years were similar to 2006. The total sales for the entire business operation in 2007 was $$$$$ and the total taxable sales of the business $$$$$. For 2008 the total sales of the business per the income tax return had been $$$$$, while the taxable sales for the business had been $$$$$. For 2009 total sales had been $$$$$ and taxable sales of $$$$$. Based on these numbers the total taxable sales of the business had been from 24-28% of the business' total sales for each audit year.

9. The Taxpayer argues the Division should look instead at the Utah taxable sales, which were $$$$$ for tax year 2006, and divide that by the total sales revenue from the entire business group including the sales in numerous other states and countries. The Taxpayer's calculation for 2006 was to divide the $$$$$ total business sales by the $$$$$ Utah taxable sales, which results in 3.26%[3]. The Taxpayer calculated this percentage for each year based on the Utah taxable sales compared to the total business sales, which was from 1.81% to 3.26% for each year of the audit period from 2006 to 2009.[4]

10. For the 2006 tax year the Taxpayer's Utah taxable sales as reported on its Utah sales tax returns had been $$$$$. It was the Division's conclusion that the Utah total sales were $$$$$ and the Division calculated out that the Utah taxable sales were 89% of the Utah total sales.[5] Based on this method of calculation, the percentage did change during the audit years. While the percentage of the total Utah sales that were taxable was 89% for 2006, the percentage decreased to 79% for 2007, 45% for 2008 and 47% for 2009.[6] In this calculation reflected in Petitioner's Exhibit 3, the Division's numbers regarding the total Utah sales were different from the total Utah sales reported to Utah on the Taxpayer's income tax return which included sales shipped to Utah purchasers from outside Utah and rent and royalty receipts.[7] Regardless, if the numbers as reported on Petitioner's income tax return were used it would still result in a significantly high percentage of the total Utah sales that were taxable.

11. The Taxpayer did provide legislative testimony which it argues shows that changing the language from not allowing the tax credit to businesses "engaged in retail trade" to not allowing the credit to business "primarily" engaged in retail trade was merely a clarification.

[2] Petitioner's Exhibit 2, pages 2-5
[3] See Petitioner's Exhibit 2.
[4] *Id.*
[5] See Petitioner's Exhibit 3.
[6] *Id.*
[7] See Petitioner's Exhibit 1, 2006 Return Schedule J.

Portions of the legislative discussion at the time the Utah Legislature adopted H.B. 17 are as follows:

> From the 2011 General Legislative Session-State of Utah House Floor Debate-February 10, 2011 H.B. 17
>
> Representative Powel: Over the past few years there have been a high percentage of audits by the State Tax Commission from taxpayers-on taxpayers who claim Enterprise Zone Credits. The purpose of this bill is to clarify several of those provisions that have been the subject of audits, hearings and litigation. . . This bill will clarify that by stating that a business is disallowed only if it is primarily engaged in retail trade, which once again I believe is the original intent of the bill
>
> . . .
>
> Question: Representative, did I see in here that one of the things this bill does is excludes, if someone is more of the retail business, excludes them from receiving this tax credit?
>
> Answer from Representative Powell:
> Originally, under the legislation, actually as it has already always existed, businesses that are engaged in retail trade have not been allowed to claim the credit. I understand the purpose for that was to attract a certain type of business and industry and not to other types of business and industry. So yes, the answer is yes, the bill has always done that and under this –the statute has always done that and under this bill will have a slight clarification which will expand the availability of the credit slightly so that you will only be disallowed from taking the credit if your business is primarily engaged in retail trade.

APPLICABLE LAW

Enterprise Zone Credits are provided at Utah Code §63-38f-413(1) (2006)[8] as follows:

> Subject to the limitations of Subsections (2) through (4), the following nonrefundable tax credits against a tax under Title 59, Chapter 7, Corporate Franchise and Income Taxes, or Title 59, Chapter 10 Individual Income Tax Act, are applicable in an enterprise zone: . . . (g) an annual investment tax credit of 10% of the first $250,000 in investment, and 5% of the next $1,000,000 qualifying investment in plant, equipment, or other depreciable property.

That section also provides that businesses engaged in retail trade and public utilities may not claim the credit. Utah Code §63-38f-413(5)[9] provides:

[8] Revisions to the law and rule and renumbering of provisions occurred by the 2009 tax year. However, the parties did not argue any substantive changes to the matters at issue during years 2006 to 2009. This decision will refer to the 2006 citations. The 2006 version of Utah Code 63-38f-413(1) was renumbered for 2009 at 63M-1-413(1). Revisions were again made in 2011 to provisions that are relevant in this case.

> The tax credits under Subsections (1)(a) through (g) may not be claimed by a business entity engaged in retail trade or by a public utilities business.

A further qualification for the credit is located at Utah Code §63-38f-412 (2006)[10] which provides that to qualify for an enterprise zone credit, a business must meet residency requirements as follows:

> The tax incentives described in this part are available only to a business entity for which at least 51% of the employees employed at facilities of the business entity located in the enterprise zone are individuals who, at the time of employment, reside in the county in which the enterprise zone is located.

Utah Code §59-12-102(76) defines what constitutes a retail sale as follows:

> "Retail sale" or "sale at retail" means a sale, lease, or rental for a purpose other than: (a) resale; (b) sublease; or (c) subrent.

Utah Admin. Rule R865-6F-28(6) (2006-2009) clarifies the retail sales criteria would not eliminate qualification for the credit if the retail sales were de minims as follows:

> A business firm that conducts non-retail operations and is engaged in retail trade qualifies for the credits under Section 63-38f-413 if the retail trade operations constitute a de minimis portion of the business firm's total operations.

Utah Admin. Rule R865-6F-28(A)(1) (2006-2009) defines a business engaged in retail trade as follows:

> "Business engaged in retail trade" means a business that makes a retail sale as defined in Section 59-12-102.

The burden of proof and how the Commission is to construe exemptions and in this proceeding is set out pursuant to Utah Code §59-1-1417(2012) which provides:

> (1) In a proceeding before the commission, the burden of proof is on the petitioner . . .
> (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
> (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
> (b) construe a statute providing an exemption from or credit against the tax, fee or charge strictly against the taxpayer.

[9] For 2009 this section was identical to the 2006 version except that it was renumbered to 63M-1-413(5).
[10] For 2009 this was renumbered to Utah Code 63M-1-412.

DISCUSSION

At the hearing in this matter the Taxpayer's representatives argued the Taxpayer was entitled to the enterprise zone credits it had claimed on its returns under Utah Code §63-38f-413(5). One of the issues addressed by the parties at the hearing and then in the post-hearing briefing was the Taxpayer's position that revisions made by the 2011 Utah Legislature should be treated as a clarification to the code and applied to the audit years. During the audit period Utah Code §63-38f-413(5)(2006) stated that, "The tax credits under Subsections (1)(a) through (g) may not be claimed by a business entity engaged in retail trade . . . " This provision remained the same throughout the audit period and for fifteen years prior to the 2011 revisions. The Tax Commission adopted a rule in 2001 to further clarify this provision, which was also in effect up through the audit period, but was amended after the 2011 legislation. Utah Admin. Rule R865-6F-28(6)(2006) provided, "A business firm that conducts non-retail operations and is engaged in retail trade qualifies for the credits under Section 63-38f-413 if the retail trade operations constitute a de minimis portion of the business firm's total operations."

Utah Code §63-38f-413(5) was revised by the Utah Legislature in the 2011 session with H.B. 17. H.B. 17, which is now Utah Code Sec. 63M-1-413((4), states, "Tax credits under Subsections (1)(a) through (g) may not be claimed by a business entity **primarily** engaged in retail trade . . . (Emphasis Added.)" It was the Taxpayer's argument that adding "primarily" to that section was a clarification to what had originally been meant by the Utah Legislature and not an amendment to the statute. As such, it was the Taxpayer's contention that for the audit years, the Commission should conclude that although there was some retail trade, the Taxpayer was not "primarily" engaged in retail trade, and, therefore, could qualify for the credit.

Upon review of the evidence and argument in this matter, the Commission concludes that the proper statutory provisions to apply are the 2006 through 2009 provisions of the Utah Code, which stated at Sec. 63-38f-413(5), "The tax credits under Subsections (1)(a) through (g) may not be claimed by a business entity engaged in retail trade . . ." Even if the Commission were to consider the legislative history regarding the 2011 amendment, it is clear that it was an amendment to the statute that was made in 2011 and not a clarification. As part of the legislative debate on H.B. 17, there was discussion about pending audits and hearings by the Tax Commission on taxpayers who had claimed the credit and that the Tax Commission had denied the credit for businesses engaged in retail trade. The Utah Legislature was aware that this was an issue before the Tax Commission, but specifically set the effective date forward one year, rather than make it retroactive to January 1, 2011, the year of the session. If they had intended this to be

a clarification to apply to those audits that were pending, they could have done so by making the statute retroactive. Further, although one legislator does continually refer to this bill as a clarification, he also acknowledges that the change "will expand the availability of the credit slightly so that you will only be disallowed from taking the credit if your business is primarily engaged in retail trade."

However, applying the version of Utah Code §63-38f-413(5) in effect in 2006 through 2009, it is this Commission's conclusion that the Taxpayer qualifies for the credit. The Taxpayer was clearly involved in substantial mining and manufacturing activities in an enterprise zone. The Taxpayer had made substantial investment in equipment to expand its manufacturing operations in the enterprise zone, approximately $$$$$ on a new kiln in 2011 for example. As noted in detail by our colleague in the partial concurrence it appears that the original intent of the Utah Legislature in establishing the Enterprise Zone credit was to encourage development or expansion of exactly the type of business as is conducted by the Taxpayer. Denying the credit because the Taxpayer sold some of the product it manufactured at retail rather than wholesale appears to defeat the purpose of the original intent.

Although as noted now in statute[11] and as had been noted by the court previously, tax credit statutes, like tax exemptions, "are to be strictly construed against the taxpayer." See *MacFarlane v. State Tax Comm'n*, 2006 UT 25, ¶11. However, the court in MacFarlane went on to state, "While we recognize the general rule that statutes granting credits must be strictly construed against the taxpayer, the construction must not defeat the purposes of the statute. The best evidence of that intent is the plain language of the statute." (Citations omitted.) *See id. at* ¶19. It is this Commission's conclusion that the purpose of the statute would be defeated with an interpretation of "engaged in retail trade" that would prohibit a mining and manufacturing operation, which had invested in an enterprise zone from receiving the credit simply because some of its product was sold at retail.

The Commission had defined by Administrative Rule in effect during the audit period a definition of "engaged in retail trade." Utah Admin. Rule R865-6F-28(A)(1) (2006-2009) provides that a "business engaged in retail trade" means a business that makes a retail sale as defined in Section 59-12-102. "Retail sale" is defined at Utah Code §59-12-102(92)(2009) and has not changed during the audit years. Retail sale is a sale, lease or rental for a purpose other than resale, sublease or subrent. The Commission had concluded that there may be instances were a business which was engaged in some retail sales would still qualify for the credit and had

[11] Utah Code §59-1-1417(2012).

adopted Utah Admin. Rule R865-6F-28(6)(2006) which provided, "A business firm that conducts non-retail operations and is engaged in retail trade qualifies for the credits under Section 63-38f-413 if the retail trade operations constitute a de minimis portion of the business firm's total operations."

This Commission concludes that the de minimis rule is one valid test for determining whether a business is not "engaged in retail trade." The Commission also concedes that under the de minis rule, the Taxpayer does not qualify for the exemption.[12] However, denying the exemption in this case defeats the purpose of the statute reflected in the statute's plain language. As the Utah Supreme Court has noted, "It is a long-standing principle of administrative law that an agency's rules must be consistent with its governing statutes." *Sanders Brine Shrimp v Auditing Division of the State Tax Comm'n,* 846 P.2d 1304 (Utah 1993) citing *Merrill Bean Chevrolet, Inc. v State Tax Comm'n,* 549 P.2d 443, 445 (Utah 1976); *Robert H. Hinckley, Inc. v. State Tax Comm'n*, 404 P.2d 662, 668 (1965). See also *Airport Hilton Ventures, Ltd. V. State Tax Comm'n,* 1999 UT 26, ¶6 (1999) in which the Court noted, "Any regulations promulgated by the Commission . . . . must be in harmony with the language of these statutes." It is our conclusion that limiting the determination of whether a business is engaged in retail trade to the de minimis test improperly restricts the underlying statutory provisions. There are other factors that may be considered to determine if a business is "engaged in retail trade." Despite making retail sales directly to consumers of its products, the evidence does not show that Taxpayer has any stand-alone retail operations. Therefore, it is our conclusion that the Taxpayer is "engaged" in mining and manufacturing operations, not retail trade. The Taxpayer is entitled to the credit.

CONCLUSIONS OF LAW

1. During the audit period Utah Code §63-38f-413(5)(2006) provided that the tax credit may not be claimed by "a business entity engaged in retail trade . . ." Tax credit statutes, like tax exemptions, "are to be strictly construed against the taxpayer." *MacFarlane v. State Tax Comm'n*, 2006 UT 25, ¶11. However, that court went on to note, "While we recognize the

[12] The Commission has previously issued rulings on what level of retail trade would constitute de minimis. In *Utah State Tax Commission, Initial Hearing Order, Appeal No. 09-3565*, the Commission indicated that it would consider both the proportion of the sales and the nature of the sales to determine whether the taxpayer's retail activity was de minimis. The Commission did allow the credits in that appeal. In that appeal the retail sales were less than 5% of the Taxpayer's total operations, although the Commission did note that the dollar amount of the sales was large and considered other factors including that the business was not a stand-alone retail operation. In the Order in *Appeal No. 09-3565*, pg 5, the Commission did note, "Retail sales comprising less than 5% of a business' total operations, is generally a strong indication that the business in not engaged in retail trade for purposes of Utah Code Sec. 63-38f-413(5)."

general rule that statutes granting credits must be strictly construed against the taxpayer, the construction must not defeat the purposes of the statute. The best evidence of that intent is the plain language of the statute." (Citations omitted.) *See id. at* ¶19. It is our conclusion that the Utah Legislature intended the credit to apply to the type of mining and manufacturing business as the Taxpayer is operating in the enterprise zone.

2. Utah Admin. Rule R865-6F-28(A)(1) (2006-2009) provides that a "business engaged in retail trade" means a business that makes a retail sale as defined in Section 59-12-102. "Retail sale" is defined at Utah Code §59-12-102(92)(2009) and has not changed during the audit years. Retail sale is a sale, lease or rental for a purpose other than resale, sublease or subrent. Although, the Commission has set out in rule the position that a business engaged in some retail sales would still qualify for the credit if the retail trade operations constitute a de minimis portion of the business firm's total operations at Utah Admin. Rule R865-6F-28(6)(2006), the Commission also concludes that it may consider other factors, as the rule must be consistent with the governing statutes. See *Sanders Brine Shrimp v Auditing Division of the State Tax Comm'n*, 846 P.2d 1304 (Utah 1993) and *Airport Hilton Ventures, Ltd. V. State Tax Comm'n*, 1999 UT 26, ¶6 (1999).

3. The evidence presented at this hearing is that the Taxpayer is a mining and manufacturing operation. Although some of its product is sold at retail, it does not have any stand alone retail operations. It is the Commission's conclusion that the Taxpayer is not engaged in retail trade and is qualified for the credit.

DECISION AND ORDER

Based on the foregoing, the Commission grants the Taxpayer's request regarding the enterprise zone credit for each of the audit years 2006 through 2009. It is so ordered. Under Utah Code Sec. 59-1-205(1)(c), in the event of a tie vote by the Commissioners, the position of the taxpayer is considered to have prevailed. Two Commissioners sign this as the majority opinion. Although, one Commissioner is concurring in part and dissenting in part to this order and another is dissenting, based on operation of Sec. 59-1-205(1)(c) the Taxpayer is to be allowed the credit.

DATED this _____day of _____, 2014.

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

COMMISSIONER DIXON CONCURS IN PART AND DISSENTS IN PART

PRELIMINARY MATTERS

My position was originally written to be a lone dissent; however, when two of my fellow commissioners reached the same conclusion for different reasons, it became a partial concurrence, partial dissent. I concur that the Taxpayer qualifies for the enterprise zone credit; however, I dissent as to the reasons why. The basis of my opinion is a comprehensive review of the legislative proceedings when the applicable laws were enactment, and further, an in depth review of documents that were part of the law making and rule making process, all of which made clear to me that it would be incorrect to deny the enterprise zone income tax credits to the Taxpayer.

The applicable statutes were enacted with **Senate Bill ("SB") 239 (1996) Tax Credits for Rural Economic Resettlement Zones by Sen. Leonard Blackham, which was amending the Enterprise Zone Act**. I take administrative notice of documents on the State of Utah Legislative Website ("website") which is a public website, as well as the statements made by Sen. Blackham, the bill sponsor, during the presentation and debate of the bill on the Senate floor in 1996[13].

FINDINGS

There are three specific items that lead me to conclude the Taxpayer is entitled to the enterprise zone income tax credits. These are (1) legislative intent, (2) the origin of the phrase "engaged in retail trade", and (3) the lack of definition of retail trade in statute.

Item One: Legislative Intent

During the Utah State Senate floor debate before final passage of SB239, Senator Blackham, the senate sponsor of SB 239, was asked by a fellow senator why construction companies were not eligible to claim the enterprise zone tax credits. **Senator Blackham's**

[13] While documents can be found on the Utah State Legislative website, http://image.le.utah.gov/imaging/bill.asp SB239 (1996) Sen. Blackham (sponsor), the audio files for the Senate debates are available for listening at the Utah State Senate offices, which is where I went to listen to the tapes of the Senate debates for SB239 (1996).

answers, as paraphrased below, placed the legislative intent for SB 239 directly into the Senate oral record.[14]

> "This bill is geared to manufacturers, production, and that kind of firm; those that will build permanent factories and facilities. If they make a commitment they should be there 20, 30, 40 years. That is who we are gearing towards."
> . . . .
>
> "Construction companies are pretty easy to leave. Some come for three or four years and move on. Trucking is pretty easy to leave as well."
> . . . .
>
> "It is an investment tax credit. We want them to invest in a building, equipment and labor. We want them to build permanent factories and bring in machinery. We want them investing in infrastructure so it is not as easy to abandon."

Item Two: Origin of the phrase "Engaged in Retail Trade"

The phrase "engaged in retail trade" was proposed by the Division of Business and Economic Development ("DBED") in the then Department of Community and Economic Development. In the legislative record for SB 239 is a memo dated February 16, 1996 from the DBED to the legislative drafting attorney. The memo reads:

> "The changes are highlighted in bold large type. We are also concerned that the language in the bill also clearly states the Department's authority to determine the designation of zones. Currently there is language which seems to say we have this authority, but we would like to ensure it. Thanks"

Accompanying the memo is a draft of SB239 date 02-09-96 9:50 AM. As indicted in the memo, on several pages of the draft bill are additions or changes in bolded, all capital letters. One of these changes is on page six, line 28 of the draft bill, and is shown as follows:

> 28 9-2-413 (Repealed 01/01/89)[15]. State tax credits
> 29 (1) [the] Subject to the limitations of Subsections (2), (3), and (4) the following state tax credits against income tax or corporate franchise tax are applicable in an enterprise zone **FOR ALL BUSINESSES EXCEPT THOSE ENGAGED IN RETAIL TRADE OR PUBLIC UTILITIES.**

[14] Audio tape of Utah State Senate floor debate, February 23, 1996, SB 239, beginning on the audio tape at approximately 2620, and Sen. Blackham's comments at approximately 2660.

[15] The statutory location changed frequently (9-2-413 in 1996; 59-19-413 in 1987; 59-20-413 in 1988; 9-2-413 in 1992; 9-2-413 in 1996; 63-38f-413 in 2005; 63M-1-413 in 2008). All citations to the Utah Code in this opinion are to the 1996 version of the code and the 1996 proposed legislative language or the 2011proposed legislative language.

Item Three: There is no definition of "Retail Trade" in statute

"Retail Trade" is not a defined term in the Utah Code; however, retail trade is a recognized and defined term in the 1987 Standard Industrial Classification (SIC) Manual.[16] I take administrative notice of the NACIS Association ("Association") website, which states:

> The Standard Industrial Classification was originally developed in the 1930's **to classify establishments by the type of activity in which they are primarily engaged"**,… and cover "the entire field of economic activities by defining industries in accordance with the composition and structure of the economy.

Retail Trade is Division G of the SIC codes**.** The United States Department of Labor,[17] citing the Standard Industry Classification Manual gives the following definition of retail trade on its website **(bolded emphasis added)**:

> **Description— Retail Trade** [18]
> **This division includes establishments engaged in selling merchandise for personal or household consumption** and rendering services incidental to the sale of the goods. In general, retail establishments are classified by kind of business according to the principal lines of commodities sold (groceries, hardware, etc.), or the usual trade designation (drug store, cigar store, etc.). **Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy**; **the establishment buys or receives merchandise as well as sells; the establishment may process its products, but such processing is incidental or subordinate to selling**; **the establishment is considered as retail in the trade**; and the establishment sells to customers for personal or household use. Not all of these characteristics need be present and some are modified by trade practice.
> **For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption**. Exceptions to this general rule are lumber yards; paint, glass, and wallpaper stores; typewriter stores; stationery stores; and gasoline service stations which sell to both the general public for personal or household consumption and to businesses. These types of stores are classified in Retail Trade even if a higher proportion of their sales is made to other than individuals for personal or household consumption.

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[16] 1987 Standard Industrial Classification (SIC) Manual of the Federal Executive Office of the President (of the United States), Office of Management and Budget. "SICs were replaced by the *North American Industry Classification System* (NAICS) for most, but not all purposes, when the NAICS Codes were published in 1997" per the NACIS Association website at http://www.naics.com/info.htm.
[17] https://www.osha.gov/pls/imis/sic_manual.html
[18] https://www.osha.gov/pls/imis/sic_manual.display?id=7&tab=division
See also the Bureau of Labor Statistics website http://www.bls.gov/iag/tgs/iag44-45.htm and the U.S. Census website http://www.census.gov/econ/census02/naics/sector44/44-45.htm

> **However, establishments that sell these products only to institutional or industrial users and to other wholesalers and establishments that sell similar merchandise for use exclusively by business establishments are classified in Wholesale Trade.**
> ….
> **Buying of goods for resale to the consumer is a characteristic of retail trade establishments that particularly distinguishes them from the agricultural and extractive industries.** For example, farmers who sell only their own produce at or from the point of production are not classified as retailers.

Further, the sectors of retail trade under the SIC codes are given as follows:[19]

> Division G: Retail Trade
> Major Group 52: Building Materials, Hardware, Garden Supply, and Mobile Home Dealers
> Major Group 53: General Merchandise Stores
> Major Group 54: Food Stores
> Major Group 55: Automotive Dealers and Gasoline Service Stations
> Major Group 56: Apparel and Accessory Stores
> Major Group 57: Home Furniture, Furnishings, and Equipment Stores
> Major Group 58: Eating and Drinking Places
> Major Group 59: Miscellaneous Retail

ANALYSIS

The DBED viewed the term retail trade as synonymous with the term retail business.

The documents for SB 239 (1996) on the State of Utah Legislative Website ("website") prove the DBED was consulted and involved in reviewing the wording of the draft legislation, thus the DBED would have known directly from Sen. Blackham the intent of the legislation. The legislation gave the DBED a role in talking to businesses and assisting any qualified business. As such the DBED would have to discern what entities would be a qualifying business that would meet the objectives and intent of the legislation. **This intent, as stated by the Sen. Blackham, was to attract manufacturing and production firms that will build permanent factories and facilities and bring in machinery; firms that will make a 20, 30 or 40 year commitment by investing in equipment, labor, and infrastructure.**

While entities whose primary activity is as a retail business are very important to communities and provide a valuable service and role, they would not, by their very nature, fulfill the legislative intent of SB 239. One would expect the DBED as the entity in state government

[19] *See* https://www.osha.gov/pls/imis/sic_manual.html.

responsible for business and economic development to recognize this and know what industries it needed to attract to fulfill the intent and objectives of the legislation. It then follows the DBED would seek a phrase that would assist it in narrowing their work to those businesses that would meet the objectives of the Legislation.

The phrase engaged in retail trade was a phrase selected and requested by the DBED to assist it in implementing, administrating and overseeing the legislative objectives[20]. While the term retail trade is not a defined term in state statute, retail trade is a well known and recognized term in the SIC codes. In the SIC codes, retail trade is the category for businesses whose primary activity is as a "retail business". **The term retail business is synonymous with the term retail trade.** The DBED due to its work with businesses, and other economic development initiatives that use SIC codes would have intimately understood this.

I take administrative notice that in January 1997 an article about the Enterprise Zone Tax Credits was in the Deseret News. The article quotes a member of the DBED, using the term "retail business" when discussing the enterprise zone credits.

> TAX CREDITS AIM TO BRING FIRMS TO RURAL UTAH[21]
> By Roger Pusey, Staff Writer, Deseret News
> Published: Thursday, January 30 1997 12:00 a.m. MST
>
> Recent amendments to the Utah enterprise zone legislation have increased the number of tax credits available to businesses and expanded the areas in rural Utah eligible for designation. The changes were passed by the Legislature in 1996.
> ….
>
> ``Utah businesses looking to expand or relocate their operations can take advantage of state tax credits by relocating to rural Utah," **said Sharon Young, director of business development in the Utah Division of Business and Economic Development.**
>
> **Young said** tax credits must be claimed within three years. Businesses closing operations in one rural area and relocating to another may not claim tax credits under the program, and construction jobs, **retail businesses** (emphasis and underline added) and public utilities **are not eligible to claim tax credits**.

[20] It is a recognized practice for government agencies that will have responsibility for implementing and administering legislation to requests words or phrases in the legislation that will assist them in administering the legislation. The Memo from DBED with requested language, and the legislative documents showing the inclusion of the requested language, is a perfect example of that practice.
[21] http://www.deseretnews.com/article/540444/TAX-CREDITS-AIM-TO-BRING-FIRMS-TO-RURAL-UTAH.html?pg=all

This news story, crediting a DBED representative with saying "retail businesses…are not eligible to claim the credits" documents that the DBED considered a business engaged in retail trade to be a retail business.

The phrase "retail businesses…are not eligible to claim the credits" is a clear and concise statement. In stating "retail businesses are not eligible to claim the credits" the DBED focuses the conversation, the objectives, and the scope of work for recruiting and expanding businesses in enterprise zones.[22] This was particularly important as the DBED also had the responsibility for reporting to the Legislature on the success of the program.

The Tax Commission incorrectly narrowed the legislative intent through rulemaking

I take administrative notice that on February 18, 1999, the Office of the Utah State Tax Commission received a letter ("1999 letter") from a CPA requesting clarification on items involving use of enterprise zone credits. The Office of the Commission replied on October 17, 2000 by issuing Advisory Opinion ("Opinion") 99-021.[23] Among other items, the Opinion speaks specifically to retail trade, and states the following:

> **Retail Trade Operations**. As previously discussed, subsection 9-2-413(5) specifies that a business engaged in retail trade does not qualify for any of the enterprise zone tax credits. When a business firm conducts both retail trade operations and non-retail operations, the business firm may still be eligible for the tax credits, but only if the retail trade operations are a **de minimis** (bold

[22] In 1996, the Utah Enterprise Zone Act, section 9-2-412 *Business qualifying for tax incentives*, had two sections: (1) a requirement that at least 51% of the employees employed at the facilities of the firm located in the enterprise zone are individuals who, at the time of employment, reside in the enterprise zone; **and (2) that the firm operates within the enterprise zone a business whose primary activity lies within a specifically noted standard industrial code.** None of the **SIC codes in Division G Retail Trade were listed as qualifying SIC codes** i.e. those businesses whose primary activity was retail trade were not eligible to claim enterprise zone credits. In July 1992, the federal Office of Management and Budget (OMB) which oversaw the Standard Industrial Classification (SIC) Manual, established the Economic Classification Policy Committee (ECPC) and charged it with "conducting a fresh slate examination of economic classifications." In 1997, except for a few applications, the OMB ceased use of SIC codes. In 1998, the Utah Legislature passed HB 256 (1998) which removed the list of qualifying SIC codes in 9-2-412(2) from the Enterprise Zone Act effective Jan. 1, 1998. **Though not dispositive, I offer this as further support that the Division anticipated the SIC Codes would be phased out, and the Division would not have the specific SIC codes in legislation to point to for eligibility to qualify for the enterprise zone tax credits. (**This change in legislation was also noted in Utah State Tax Commission Private Letter Ruling (PLR) 99-021. http://tax.utah.gov/commission/ruling/99-021.htm)

[23] I requested from State Archives the file for Advisory Opinion 99-921. Archives responded they had no files or records from 1999. On May 14, 2002, the commission approved a rule amendment to Rule R861-1A-34 changing Advisory Opinions to Private Letter Rulings (PLRs). As such Advisory Opinion 99-021 was subsequently changed to PLR 99-021. I further inquired of Archives if there were any PLR boxes that might contain a working file for 99-921. Archives did not find a file. Redacted PLRs can be found at http://www.tax.utah.gov/commission-office/rulings

> added) portion of the business firm's total operations. Also, if a retail trade business firm does not qualify for the enterprise zone tax credits, its administration activities may not separately qualify. Administration activities qualify for the tax credits only if they are related to a business firm that qualifies for the tax credits.

Based on my research, this appears to be the first time the Tax Commission uses the term "de minimis" in relation to, in connection with or in reference to the enterprise zone credits. The Opinion also states the following:

> In addition to these statutory limitations, Utah Admin. Rules R865-6F-28 ("ARule 28") and R865-9I-37 ("ARule 37") imply that only manufacturing operations can qualify as business firms receiving the tax credits. However, neither of these rules has been amended since 1993. Because the 1998 statutory amendment deleted the SIC code references, the rules now too narrowly define the business firms that qualify for the tax credit. Accordingly, the Commission will commence a procedure to amend the rules to provide a more comprehensive definition of qualifying business firms.

The Tax Commission commenced rulemaking sometime in 2001 and the Office of the Commission created administrative rule files ("rule file") for rules R865-6F-28 and R865-9I-37.[24] In looking through the rule file for R865-9I-37 there is a copy of another letter dated October 22, 2001 ("2001 Letter") from the same CPA who wrote the 1999 Letter that prompted the Opinion. In the margins of the 2001 Letter are hand written notes ("notes"). On page two of the 2001 Letter is a paragraph titled "**RETAIL BUSINESS"**. In this paragraph and for most of the page, the CPA outlines various scenarios and asks several questions regarding how retail trade is to be interpreted and applied. In the right hand margin is a large hand drawn brace "}" encompassing the entire list of scenarios and questions given by the CPA. To the right of the brace, is the following hand-written note:

> **"2 options that will handle all of these issues: (1) define retail trade based on SIC or NAICS (2) define retail trade based on retail sales as defined in 59-12-102"**

Because the rule file is an administrative rule file of the Tax Commission it is reasonable to conclude it was a Tax Commissioner or Tax Commission employee that wrote these hand

[24] These rule files, and other rule files, are permanently archived at State Archives.

written notes in the margins of the copy of the letter. [25] These notes then show that the Commission recognized it could use SIC or NAICS codes in the applicable rule. Use of the SIC or NAICS codes would have looked to the primary activity in which the business is engaged. Instead the Commission chose to define retail trade based on retail sales as defined in 59-12-102. There is nothing in the rule file that shows why the SIC or NAICS codes were not used. In addition, the written minutes[26] for the Tax Commission rule meeting of February 22, 2002, where the rules were adopted, give no indication as to why the SICs and NAICS codes were not used. Also in the rule file is a copy of Opinion 99-021. On page six at the bottom is the paragraph titled "**Retail Trade Operations**" (previously referenced). Handwritten on the right hand margin is a large greater than symbol " >" with the wide end bracketing a sentence in the paragraph, a check mark and the hand written words ***"put in rule".***[27] The wording noted to be put in rule reads:

> "When a business firm conducts both retail trade operations and non-retail operations, the business firm may still be eligible for the tax credits, but only if the retail trade operations are a de minimis portion of the business firm's total operations."

On February 25, 2002 the Tax Commission made effective Administrative Rule R865-9I-37E inserting the language "if the retail trade operations constitute a de minimus portion of the business firm's total operations" and administrative rule R865-9I-37A(1) stating a "Business engaged in retail trade means a business that makes a retail sale."[28] The Tax Commission's

[25] I reference these handwritten notes (and others) in the margins of the CPA letter because a copy of the CPA letter with the handwritten notes is in both the administrative rule file and administrative rule meeting file. It is important to note that there is nothing about either of the letters in the files that would indicate it was the original CPA letter or the original hand written notes. By all accounts these are copies of the CPA letter with the handwritten notes, which would seem to indicate that there was an intent to include a copy of the CPA letter with the handwritten notes in both the administrative rule file and administrative rule meeting file as a record of the rule making process and rule meeting process. On the website for Utah State Division of Archives it shows the following as it relates to the following records. Utah State Tax Commission, , series 11672, Commission files, primary designation, public; and Utah State Tax Commission Administration Division, series 16557, administrative rule making files, primary designation, public. http://archives.utah.gov/recordsmanagement/rclist-t.html#u. When the administrative rule file and administrative rule meeting file were brought from Archives there was nothing in the files noting that these handwritten notes were not intended to be public. Again, these copies of the CPA letter with the handwritten notes appear to be part of the record of the rule making process.

[26] The minutes for the February 22, 2002 Tax Commission Rule Meeting are permanently archived at State Archives, as are other rule meeting minutes and audio cassette tape recordings of the rule meetings. Although there should be an audio tape of the February 22, 2002 Rule Meeting there was not one in the rule file retrieved from State Archives. I note that in the February 22, 2002 administrative rule meeting file is a copy of the 2001 Letter from the CPA with the handwritten notes in the margins.

[27] The 1999 Letter from the CPA as well as a copy of Advisory Opinion 99-021 with the handwritten notes in the margins is in the February 22, 2002 rule meeting file.

[28] The Commission also made the language effective in Utah Administrative Rule R865-6F-28(6) and R865-6F-28(A)(1) effective February 25, 2002.

action put in place language that precluded qualifying entities -- that may have met the legislative intent -- from claiming the enterprise zone tax credits. This exclusion was further exacerbated when the commission issued Tax Commission Order 09-3565 (for tax years 2005, 2006, 2008) on October 14, 2010 ruling that 5% of total sales would be a de minimus amount.[29]

The majority opinion determined that the 5% diminimus rule is one valid test for determining whether a business is not engaged in retail trade; I respectfully dissent from this reasoning. After researching the legislative intent of SB 239 and determining the origin of the phrase engaged in retail trade, I now hold the Commission has incorrectly interpreted and applied the phrase engaged in retail trade over the years. While I understand the Commission was seeking to clarify through rule how the enterprise zone credits would be applied, the Commission erred when it put the language a "business engaged in retail trade means a business that makes a retail sale" and "if the retail trade operations constitute a de minimis portion of the business firm's total operations" into administrative rule. **We should not have required our taxpayers and divisions to go through these gyrations.**

The focus of our analysis in this appeal should be whether the overall intent of the Legislature is satisfied. The question that should be asked is whether the Taxpayer is a manufacturing or production firm, building permanent facilities and bringing in machinery, and investing in infrastructure, equipment and labor. **Instead the Tax Commission's administrative rule has diverted attention from the Legislative Intent to the minutia of whether a business has exceeded 5% of retail sales and whether it is a diminimus portion of the firm's total operations.** As a commission we erred. Therefore, every discussion to these items is moot[30].

It is clear, based on Senator Blackham's statements of legislative intent that the Taxpayer is exactly the type of business SB 239 was written to attract to and incentivize to stay, invest and grow in Utah's rural communities[31] through the use of enterprise zones credits that would then revitalize cities and counties through job creation.[32] The Taxpayer meets the criteria set forth by Sen. Blackham:

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[29] Redacted commission orders can be found at http://www.tax.utah.gov/commission-office/decisions

[30] Tax Commission Administrative Rules R865-6F-28(6) (2006-2009) and R865-6F-28(A)(1) (2006-2009) for the years at issue unduly restrict the statute. **My position is consistent with my partial concurrence and partial dissent in 07-1239 (though less fleshed out than this concurrence) when I wrote that Utah Administrative Rule R865-6F-28 should be revised to define "retail trade" consistent with the NAICS codes.** Redacted Commission orders can be founded at http://www.tax.utah.gov/commission-office/decisions

[31] Counties with a population of 30,000 or less, and cities with a population of 10,000 or less.

[32] To claim tax credits the taxpayer had to meet objectives in the Enterprise Zone Act UCA 63M-1-413:
(a) $750 may be claimed by a business entity for each **new full-time employee position** created within the enterprise zone;

1. "Manufacturing and production firm" -- The Taxpayer has a manufacturing plant in CITY, Utah where it processes (X-1) into a product that can be used by power plants and other consumers.

2. "Building permanent factories and facilities and bringing in machinery" -- In 1989 when the taxpayer purchased the CITY, Utah plant it had two kilns. Over a ten year period the taxpayer added three more kilns.

3. "Investing in infrastructure that is not easy to abandon" -- The last kiln the taxpayer built was in 2011 at a cost of $$$$$. With the two kilns the Taxpayer built in the 1990s, the Taxpayer has made a major investment into the plant in CITY, Utah.

4. "Making a 20, 30 or 40 year commitment" -- As of the tax years at issue, the taxpayer had been in the community for 20 years. After 20 years, it made a further commitment to the community by building a $$$$$ kiln.

5. "Investing in a building, equipment and labor" -- In addition to building the kilns and bringing in any equipment necessary to run the kilns and plant, and transport the (X-1) to the plant, the taxpayer employed 71 individuals during the years in question (2006-2009) at the (X-1) mine and (X-1) plant.

The Taxpayer is not a retail business. The primary activity in which the Taxpayer is engaged is manufacturing and mining. The Taxpayer mines (X-1) and manufactures the (X-1) into (X-1) products. The Taxpayer's primary activity complies with the legislative intent of the Enterprise Zone Act and meets all the criteria of an entity the Legislature was seeking to entice to revitalize and create jobs in rural Utah through the Enterprise Zone Act legislation. The Taxpayer is:

1. A manufacturer, production firm.
2. Building permanent factories and facilities and bringing in machinery.

(b) an additional $500 tax credit may be claimed if the **new full-time employee position created within the enterprise zone pays at least 125% of:**
(i) **the county average monthly nonagricultural payroll wage** for the respective industry as determined by the Department of Workforce Services; or …
(c) an additional tax credit of $750 may be claimed **if the new full-time employee position created within the enterprise zone is in a business entity that adds value to agricultural commodities through manufacturing or processing;**
(d) an additional tax credit of $200 may be claimed for two consecutive years for each new full-time employee position created within the enterprise zone that is filled by **an employee who is insured under an employer-sponsored health insurance program if the employer pays at least 50% of the premium cost for the year for which the credit is claimed;**
(e) a tax credit of 50% of the value of a cash contribution to a private nonprofit corporation, …. [and]
(g) an annual investment tax credit of 10% of the first $250,000 in investment, and 5% of the next $1,000,000 qualifying investment in plant, equipment, or other depreciable property.

3. Investing in infrastructure that is not as easy to abandon.
4. Making a commitment they should be there 20, 30, 40 years.
5. Investing in building, equipment and labor.

LEGAL ARGUMENTS AND CONCLUSIONS

The Utah Supreme Court in MacFarlane v. the Utah State Tax Commission 2006 UT 25, ¶19 wrote:

> "While we agree that the rule of strict construction applies to tax exemptions, this rule is only a secondary consideration that does not always come into play. "[T]he rule of strict construction should not be utilized to defeat the intent of the legislative body." *State Dep't of Assessments and Taxation v. Belcher, 553 A. 2d 691, 695* (Md. 1989). See also Tarrant v. Dep't of Taxes, 733 A. 2d 733, 739 ("While we recognize the general rule that statues granting credits must be strictly construed against the taxpayer, the construction must not defeat the purposes of the statute.")….. If the intent of the legislature is manifestly different from the effect that a strict construction of the statute would produce, the manifest intent trumps.

The Utah Supreme Court expounded further in *MacFarlane*, page nine, footnote 10 as follows:

> Presumably, the reason for the rule of strict statutory construction is because it serves as a guide in determining legislative intent. Because tax credits and exemption are "matters of legislative grace," *Team Specialty Prods., Inc*., 2005-NMCA-020, paragraph 9, 107 P.3d 4 (internal quotation marks omitted), courts may rightly infer that the Legislature would not want to extend that grace too far, but rather would seek to limit its application to a select group for a specific reason. **However, as the Vermont Supreme Court stated, "[w]hile we recognize the general rule that statutes granting credits must be strictly construed against the taxpayer, the construction must not defeat the purposes of the statute." *Tarrant,* 733 A.2d at 739. See also *Belcher,* 553 A. 2d at 695 (Md. 1989) ("[T]he rule of strict construction should not be utilized to defeat the intent of the legislative body."). (Emphasis added)**

I hold any other conclusion, but to grant the credit to the Taxpayer would defeat the purpose of the statute and the intent of the legislative body.

In State v. Sullivan, 95 Fla. 191, 116 So. 255, 261 (1928), the Florida Supreme Court Wrote:

> ". . . In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction.

> The primary purpose designated should determine the force and effect of the words used in the act, **and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or a purpose not designed by the lawmakers**.

The Supreme Court of Florida also stated in Johnson v. State, Fla. 91 So.2d 185, 191 (Fla.1956):

> " . . This construction is squarely in line with the universal rule that statutes must be so construed as to avoid absurd results. . . ."

I hold any other conclusion, but to grant the credit to the Taxpayer would lead to an unreasonable purpose not designed by Utah lawmakers.

Members of the Utah Supreme Court have given guidance on these issues.[33] In *Ivory Homes, Ltd. v Utah State Tax Comm'n*, 2011 UT 54, paragraph 51 n. 18, Justice Durrant dissented disagreeing with the majority's attempt to sustain its "view on the basis of a canon of statutory interpretation that requires strict construction of tax credits statues."[34] In *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶37-41 Justice Lee, dissented, arguing against the uses of a "canon of narrow construction" writing that "When courts resort too hastily to substantive canons, they run the risk of substituting their own policy views for the balance struck by the legislature." Justice Lee defines a canon in saying, "By "canon," we usually have reference to the kinds of "tools that guide our construction of statutes in accordance with common, ordinary usage and understanding of language." *Citing Olsen v. Eagle Mountain City*, 2011 UT 10. Justice Lee concludes in *Marion* that application of such substantive cannons can **"impinge on the policymaking domain of the legislature (Emphasis Added)."**

I hold any other statutory interpretation and use of strict construction impinges on the policy making domain of the Legislature.

CONCLUSION

The Taxpayer is not a retail business. The primary activity in which the Taxpayer is engaged is manufacturing and mining. The Taxpayer's primary activity and actions during the

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[33] While I give the cites for the specific court rulings, I rely in part on an analysis on Utah Appellate decisions by Clemens A. Landau at http://www.utahappellateblog.com/2012/12/12/spudding-vs-starting-summit-operating-llc-v-utah-state-tax-comm-2012-ut-83/

[34] The Utah State Legislature addressed **Ivory** in SB27 (2012) http://le.utah.gov/~2012/bills/sbillenr/SB0027.pdf .

years at issue comply with the legislative intent to create jobs in enterprise zones through the Enterprise Zone Act. I would grant the Taxpayer the enterprise zone tax credits.

THE TAXPAYER'S ARGUMENT

In addition, I agree with the Petitioner's position that the purpose of the HB 17 1st Substitute (2011) was to clarify how the phrase "engaged in retail trade" was always intended to be applied. The introductory section of HB 17 1st Substitute (2011) uses the term "provides" not "modifies" when referencing the section with the phrase engage in retail trade, and the Legislation adds only one word -- "primarily" – to the applicable statute, not a whole new section. This is shown below:

Legislative introduction:

> 27 **provides** that a business entity may not claim a tax credit under the Enterprise Zone
> 28 Act if it is primarily engaged in a retail trade;

Statutory amendments:

> 269 [~~(5) The tax~~] *(4) Tax* credits under Subsections (1)(a) through (g) may not be claimed
> 270 by a business entity *primarily* engaged in retail trade or by a public utilities business.

As the Courts have written, "An Amendment serves as a clarification when it corrects a discrepancy or merely "amplif[ies] . . . how the law should have been understood prior to [the amendment]." Richards Irr. Co. v. Karren, 880 P.2d 6, 8 (Utah Ct. App. 1994) (internal quotation marks omitted) as quoted in Salt Lake County v. Holliday Water Company 2010 UT 45.

At the Formal Hearing, Taxpayer went through the entire legislative history as it relates to the enterprise zone act "…beginning with minutes from legislative committee meetings in 1987 indicating the original intent of the Enterprise Zone Act was to attract businesses to create a stable job market in rural Utah …." (from the Taxpayer's post hearing brief). Included in the Taxpayer's research were:

- the wording in the original enterprise zone legislation from 1987 -- the 11-06-87 9:38 AM DRAFT stating "the firm begins to operate a primarily nonretail business within the enterprise zone",

- the handout provided at the November 18, 1987 Business, Labor and Economic Development Interim Committee meeting titled ***The History of Economic Development in Rural Utah*** which reads:

  > "Today, much of rural Utah faces near depression-level economic conditions. This is largely due to the continuing decline of the agricultural and mining industries—long the mainstay of our rural economy. Significantly, mining and

agriculture have tumbled from 28 percent of Utah's earnings income in 1929 to 3.3 percent today"
Included were two pie charts that illustrated the change in percentages

- the 12-17-87 1:53 PM DRAFT with insertion of SIC codes in the DRAFT 1987 legislation that apply to manufacturing entities,

- the 12-17-87 fiscal analysis of HB 51, that is subsequently titled **Establishment of Enterprise Zones** stating "This bill grants tax credit relief to new manufacturing businesses locating in economically depressed areas as designated by the Department of Community and Economic Development (DCED)"

- The minutes of the 12-17-87 Business, Labor and Economic Development Interim Committee meeting with the sponsor of the Enterprise Zone Legislation, Rep. Ray Neilsen stating "the major emphasis of the bill is to attract industry to rural areas in Utah. Sanpete County has 21 percent unemployment after the turkey factory closes…."

The Taxpayer provided a complete chronological analysis of the history of the Enterprise Zone Legislation showing that the true intent of the legislation from the original drafts of 1987 has never changed. It was always to attract certain business through incentives to rural Utah. Retail businesses were never the target of the Enterprise Zone Act.

In addition, the Taxpayer provided legal analysis and argument. The Taxpayer wrote in its Post-Hearing Brief, page six:

> It is well settled under Utah law that, "when statutory language is ambiguous—in that its terms remain susceptible to two or more reasonable interpretations after we have conducted a plain language analysis – we generally resort to other modes of statutory construction and 'seek guidance from legislative history and other accepted sources." *Marion*, 267 P.3d at 866-67; see also *Regal Ins. Co. v. Vott*, 31 P.3d 5234, 526 (2001). ("This court's primary responsibility in construing legislative enactments is to give effect to the legislature's underlying intent according to the statute's plain language….In order to ascertain 'the meaning of statutory language, we look to the background and general purpose of the statute.'") (internal citations omitted).

Further, in footnote three on page eight, of the same Brief, the Taxpayer wrote:

> The Auditing Division argues that the Enterprise Zone Act should be strictly construed against TAXPAYER because it grants a tax credit, but ignores the well settled rule that strict construction cannot defeat clear legislative intent. The very cases cited by the Auditing Division for this proposition, however, make it very clear that "[t]he rule of strict construction should not be utilized to defeat the intent of the legislative body." *MacFarlane v. Utah State Tax Comm'n*, 2006 UT 25, 19, 134 P.3d1116 (internal citations omitted); see also *Parson Asphalt Products, Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980) ("Statutes which provide for exemptions should be strictly construed …. Notwithstanding the forgoing, there is also to be considered the over-arching

> principle, applicable to all statutes, that they should be construed and applied in accordance with the intent of the Legislature and the purpose sought to be accomplished."); Utah State Tax Commission, Appeal No. 09-3565[35] at 3 ("While we recognize the general rule that statutes granting credits must be strictly construed against the taxpayer, the construction must not defeat the purposes of the statute."). **Thus, where there is such clear evidence of legislative intent as there is here, strict construction cannot change what was intended.**

The legislative history and legal argument provided by the Taxpayer support and bolster my position to grant the enterprise zone credit.

Finally, my three colleagues in both the majority and dissenting opinion assert that had the Legislature intended the 2011 legislation on enterprise zone credits to be a clarification, not an expansion, it could have made it retroactive. It is my experience that legislation is rarely retroactive more than one year, and certainly not several years.

D'Arcy Dixon Pignanelli
Commissioner

COMMISSIONER JOHNSON'S DISSENT

I respectfully dissent from the decision of my colleagues. I agree with much of their analysis. I agree that if one had asked any number of legislators about this facility in 1996, they probably would have wanted it to qualify for the credit. Indeed, under the original language of the statute as passed in 1996, this facility would have qualified. Under the version of Section 9-2-412 originally enacted, a facility would qualify if it (1) met the employment test and (2) operated a business "whose primary activity lies within standard industrial codes 2011 through 3999, [and various other specified codes]. " It appears that the Taxpayer's facility would fall under SIC Code 3274—Manufacturing, (X-1). See OMB, Standard Industrial Classification Manual, 1987, p. 169.[36] Moreover, Tax Commission Rule R865-6F-28.(B)(4)(b) provided that "a qualifying investment may include . . . [t]he investment in the retail portion of a primarily manufacturing business if the retail portion is located within the same enterprise zone as the manufacturing

[35] Redacted commission orders can be founded at http://www.tax.utah.gov/commission-office/decisions

[36] See also SIC Manual 1422—Mining and Quarrying of Nonmetallic Minerals, Except Fuels, Crushed and Broken (X), which provides that "establishments primarily engaged in producing (X-1) are classified in Manufacturing, Industry 3274." Manual p. 49.

portion for which the qualifying investment is being made." Thus, both the statute itself, the SIC Manual that was incorporated by reference in the statute, and the Rule promulgated under the statute all contained or explicitly recognized the "primary" qualifier.

Unfortunately, the "primary" qualifier was dropped from the statute in 1998. See H.B. 256 (1998). The new statutory language, which denied the credit to any business "engaged in retail trade," was interpreted by the Tax Commission in amendments to Rule R865-6F-28(B)(4)(b) which, as noted by the concurrence, implemented the *de minimis* test. This amendment, though not formally adopted until 2001, is a reasonable and roughly contemporaneous interpretation of the statutory change by the agency responsible for implementing the change. It stood unchallenged by the legislature for over a decade. And when it was legislatively modified by H.B. 17 (2011), Representative Kraig Powell, the chief sponsor of the bill acknowledged that the change "will expand the availability of the credit slightly."

We are not tasked with determining who we think should qualify for the credit, or who the legislature would have wanted to get the credit, if the question had been put to them squarely. We are only tasked with the determination of who should get the credit applying the language actually used by the Legislature. We must interpret the statute as written.[37] The Taxpayer is engaged in retail trade. It sells its products directly to the ultimate consumers of those products. Hence, it does not qualify for the credit.

The Taxpayer is also engaged in mining. It is also engaged in manufacturing. In HB 256 (1998), the Legislature clearly chose to abandon SIC Codes as the deciding factor. It is not for the Tax Commission to resurrect them through statutory interpretation. At the same time, the Legislature dropped the "primary" qualifier. The Tax Commission recognized that change in its 2001 amendment to the rule. Whether the Legislature should have dropped the qualifier—or meant to do so—is not for us to decide. It did drop the qualifier and, if error it was, it was for the Legislature, not the Tax Commission to correct. In fact, that "error" has been corrected by the Legislature. And the Legislature made that change prospectively.

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[37] To interpret a statute, this Court looks first to the statute's plain language. MacFarlane, 2006 UT 25, ¶ 12, 134 P.3d 1116, 1118-19; *ExxonMobil Corp. v. Utah State Tax Comm 'n*, 2003 UT 53, ¶ 14, 86 P.3d 706, 710. When a statute is unambiguous, this Court need not look further than the statute's plain language. *MacFarlane*, 2006 UT 25, ¶ 12. If there is ambiguity in the language, then the Court looks to legislative intent and policy considerations for guidance. *ExxonMobil*, 2003 UT 53, ¶ 14. See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-453, 107 S. Ct. 12207, 1224, 94 L. Ed. 2d 434 (1987), Scalia, J., concurring: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."

I close with a quote sometimes referred to by Justice Antonin Scalia, an admitted skeptic where legislative intent is concerned: "Whatever Congress may have meant by Sec. 11503(b)(4) [4-R Act], we must first focus on what it said. Judicial faithfulness to legislative will consists not in crude groupings into the consistently dark closets of legislative history but in a fine faithfulness to the mediating power of the legislative word. Our legislators are servants of the public, and when they speak in statutory language – that most public form of discourse – their motives and desires are submerged into a public product intelligible in a public context. If we do not take a legislative body at its word, we run the risk of substituting our own normative (and inherently nondemocratic) views, of disrupting the strange political trade-offs that make democracy possible, of – worst of all – polluting a public language of relatively fixed meaning and reference, a language necessary for the public discourse we call self-government. We will run these risks when the statutory language leads to absurdities, . . . but not when the language of the statute merely makes Congress look foolish." *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987). See generally, A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), Secs. 58, 60, 66 and 67.

R. Bruce Johnson
Commission Chair

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.