

WITNESSES

The Department hereby adopts the statements listing witnesses who presented testimony in the Witnesses section as set forth in the ALJ Decision, as follows:

Petitioners presented testimony from Petitioner [Taxpayer 1].

Respondent presented testimony from Jeffrey C. Davenport.

EXHIBITS

The Department hereby adopts, except as below modified, the statements listing exhibits which were admitted into evidence in the Exhibits section set forth in the ALJ Decision, as follows:

~~Petitioner's~~ **Petitioners'** Exhibits 1 through 5 were admitted into evidence.

Respondent's Exhibits 1 through 10 were admitted into evidence.

STATUTORY BACKGROUND

The Department hereby adopts the Statutory Background set forth in the ALJ Decision, as follows:

A tax credit to directly reduce North Carolina individual income tax liability ("Credit") is available for those taxpayers who invest in the equity securities or subordinated debt of a "qualified business" N.C. Gen. Stat. § 105-163.011(b). To be eligible for the Credit, a taxpayer must timely file an application with the North Carolina Secretary of Revenue (together with Respondent, "Respondent," unless otherwise indicated). *Id.*

Prior to January 1, 2009, N.C. Gen. Stat. § 105-163.011(c) stated that a taxpayer's application for a Credit "should be filed on or before April 15 of the year following the calendar year in which the investment was made" *See* Former N.C. Gen. Stat. § 105-163.011(c). Respondent could grant extensions to this deadline "except that the application may not be filed after September 15 of the year following the calendar year in which the investment was made." *Id.*

Based upon the sworn testimony of the witnesses, exhibits entered into evidence and the other competent evidence admitted at the hearing, the ~~undersigned~~ **finds ALJ found** the following facts:

FINDINGS OF FACT

The Department hereby adopts all Findings of Fact set forth in the ALJ Decision, as follows:

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. In 2005, Petitioners invested in [a limited liability company] “[Company]”. [Company] was a “qualified business” within the meaning of N.C. Gen. Stat. § 105-163.011(b).
3. Respondent provided an application, Form D-499, for individuals to apply for the Credit.
4. In the instructions for all 2006 individual income tax returns, Respondent advised taxpayers who wanted to claim a Credit based on a 2005 investment that they should file a Form D-499 by April 15, 2006 but that the latest they could do so was September 15, 2006.
5. Petitioners did not file an application for a Credit based on their 2005 investment in [Company] by September 15, 2006.
6. Petitioners filed their joint 2006 personal tax return on April 9, 2007. In that return, Petitioners claimed a Credit of \$6,250.00 based on their [Company] investment and reduced their income tax accordingly. Petitioners also requested that any refund they claimed they were entitled to for year 2006 be applied to their estimated income tax liability for year 2007. Respondent, in turn, applied the Petitioners’ requested 2006 refund to their 2007 tax liability.
7. On December 15, 2009, Respondent advised Petitioners that it was reviewing the \$6,250.00 by which they had reduced their 2006 income tax liability. Respondent determined that Petitioners did not file a timely application for Credit based on the [Company] investment and that Petitioners were not entitled to the \$6,250.00 reduction they had claimed. On January 21, 2010, Respondent issued a Notice of Proposed Assessment against Petitioners for an additional \$6,250.00 in income tax for 2006, plus interest. Respondent also sent Petitioners the calculations underlying the Proposed Assessment.
8. On January 23, 2010, Petitioners filed an application for a Credit based on their 2005 [Company] investment.
9. On April 16, 2010, Respondent issued a notice of final determination, upholding its proposed assessment against Petitioners.

CONCLUSIONS OF LAW

The Department hereby adopts, except as below modified, all Conclusions of Law set forth in the ALJ Decision, as follows:

1. The parties properly ~~are~~ **were** before the Office of Administrative Hearings.

2. “A proposed assessment of the Secretary is presumed to be correct.” N.C. Gen. Stat. § 105-241.9. In OAH, Petitioners have the burden of proof to establish by a preponderance of evidence that the assessment substantially prejudiced their rights and that the Department exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. §§ 150B-23, 150B-29(a); *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).
3. Further, because the Credit under N.C. Gen. Stat. § 105-163.011(b) is in the nature of an exemption or deduction from otherwise applicable taxes, Petitioners bear the burden of proof to show they are entitled to claim the Credit. See *Henderson v. Gill*, 229 N.C. 313, 319, 49 S.E.2d 754, 758 (1948); see also *Norfolk Southern Corp. v. Commissioner*, 140 F.3d 240, 244 (4th Cir. 1998).
4. As noted, former N.C. Gen. Stat. § 105-163.011(c) required that a taxpayer claiming a Credit file an application with Respondent “on or before April 15 of the year following the calendar year in which the investment was made.” The statute also stated that the taxpayer’s application for a Credit “may not be filed after September 15 of the year following the calendar year in which the investment was made.” *Id.*
5. Because Petitioners did not file an application for the Credit based on their 2005 [Company] investment by September 15, 2006, as required by the statute, they were not entitled to claim the Credit on their 2006 return.
6. Further, because Petitioners received the benefit of their incorrectly claimed Credit, Respondent correctly assessed Petitioners in its notice of final determination for the amount of the Credit Petitioners had claimed, plus applicable interest.
7. Petitioners advance a series of arguments about whether the tax credit ceiling is good public policy. “When the General Assembly enacts a statute after examining its legal and public policy implications, it is not the province of [a] Court to substitute its judgment for that of our legislature.” *Andrews v. Haygood*, 362 N.C. 599, 605, 669 S.E.2d 310, 314 (2008). Weighing “public policy considerations” such as those Petitioners argue “is the province of our General Assembly, not this Court.” *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008).
8. Petitioners have not established that Respondent’s assessment against them substantially prejudiced their rights or that the Department exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

DECISION

The Department determines that the Findings of Fact and Conclusions of Law of the Administrative Law Judge, as adopted by the Department, support the ALJ’s Decision. Based on the foregoing, the Department hereby decides that Respondent was entitled to judgment after

trial. The Department therefore UPHOLDS and ADOPTS the ALJ's Decision in this matter in its entirety. Accordingly, the Notice of Final Determination issued by the Department to Petitioner on April 16, 2010 is sustained as to the tax and interest shown due on the Notice, plus interest that has accrued since the date of the Notice. The accrued interest has been calculated according to the interest rate set by the Secretary of Revenue under N.C. Gen. Stat. § 105-241.21. That rate is currently 5% per annum which, for Petitioners, results in daily interest of 85 cents. The rate is subject to periodic change by the Secretary. If the Secretary changes the rate, then Petitioners' daily interest will change accordingly.

Tax and interest due by Petitioners to Respondent as of February 8, 2011, plus the daily interest accrual rate, are as follows:

Tax	\$6,250.00
Interest computed through 02/08/2011	+ 1,385.59
Total as of 02/08/2011	\$7,635.59

Daily Interest Accrual Rate as of 02/08/2011: \$0.85

APPEAL

Pursuant to N.C. Gen. Stat. § 150B-45, a party wishing to appeal the final decision of the Department in a contested tax case arising under N.C. Gen. Stat. § 105-241.15 may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f) within 30 days after being served with a written copy of this Final Agency Decision. Before filing a petition for judicial review, a taxpayer must pay the amount of tax, penalties, and interest that this Final Agency Decision states is due. N.C. Gen. Stat. § 105-241.16.

Under N.C. Gen. Stat. § 150B-47, the Department is required to file the official record in the contested case under review, any exceptions, proposed findings of fact, or written arguments submitted to the Department, as well as the Department's Final Agency Decision, with the reviewing court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the petition must be sent to the following address: North Carolina Department of Revenue, ATTN: Janice W. Davidson, 1429 Rock Quarry Road, Suite 105, Raleigh, North Carolina 27610, at the time the appeal is initiated to insure timely filing of the record.

This the 8th day of February, 2011.

NORTH CAROLINA DEPARTMENT OF REVENUE

/s/ Janice W. Davidson

Janice W. Davidson
Agency Legal Specialist, II.
North Carolina Department of Revenue