No. 24-1384

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IN RE JOSE L. GARCIA-MORALES, DEBTOR

ROBERTSON B. COHEN, CHAPTER 7 TRUSTEE, APPELLANT

V.

JOSE L. GARCIA-MORALES, APPELLEE

ON APPEAL FROM:

THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO
CIVIL CASE NO. 23-CV-02178-PAB
(BANKRUPTCY NO. 21-14949-KHT, CHAPTER 7)

APPELLANT ROBERTSON B. COHEN'S CORRECTED OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED
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I. JURISDICTIONAL STATEMENT

This appeal arises from the Bankruptcy Court's denial of the Motion to Compel Turnover ("Turnover Motion") filed by Appellant Robertson B. Cohen, Chapter 7 Trustee (the "Trustee") in accordance with 11 U.S.C. §§ 521, 541, and 542. The parties do not dispute that the Bankruptcy Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (E). The United States District Court for the District of Colorado (the "USDC") had jurisdiction pursuant to 28 U.S.C. § 158(a)(1) and Fed. R. Bankr. P. 8001. Trustee timely perfected the appeal to the USDC pursuant to Fed. R. Bankr. P. 8002(a)(1) by filing his Notice of Appeal and Statement of Election on August 25, 2023. *Appellant App.* at 147.

This appeal is from a final order. On August 14, 2023, a corrected order entered in favor of Jose L. Garcia Morales (the "Debtor") and against the Trustee denying Trustee's Turnover Motion. *Id.* at 111; *see In re Graves*, 396 B.R. 70, 72 (10th Cir. BAP 2008) (order denying motion for turnover is final for appeal purposes). On September 4, 2024, the USDC entered its judgment affirming the Bankruptcy Court's decision. *Appellant App.* at 218. Trustee timely perfected the appeal to the Tenth Circuit Court of Appeals (the "Tenth Circuit") pursuant to Fed. R. App. P. 4 by filing his Notice of Appeal on October 3, 2024. *Id.* at 220.

II. STATEMENT OF ISSUE PRESENTED AND APPLICABLE STANDARD OF APPELLATE REVIEW

There is one issue presented for review:

> Whether the Bankruptcy Court erred when it denied the Turnover Motion and determined that Debtor's $1,455 federal tax refund was solely "attributed to" a $1,800 refundable child tax credit and therefore 100% exempt pursuant to Colo. Rev. Stat. § 13-54-102(1)(o), rather than "attributed to" Debtor's tax withholdings and the child tax credit on a pro-rata basis.

The facts are undisputed. The appeal presents a single legal issue for determination. Legal questions are reviewed *de novo*. *See In re Ruiz*, 455 B.R. 745, 747 (10th Cir. BAP 2011). *De novo* review requires an independent determination of the issues, giving no special weight to the Bankruptcy Court's decision. *Id.*

In addition, while the Tenth Circuit may look to the USDC's intermediate appellate analysis to inform its review, the Tenth Circuit owes no deference to that court's decision. *In re Paige*, 685 F.3d 1160, 1178 (10th Cir. 2012).

III. STATEMENT OF THE CASE

A. Relevant Facts and Procedural History.

The relevant facts are undisputed and set forth in the Bankruptcy Court's Order Denying Motion to Compel Turnover (the "Order"). *Appellant App.* at 137.

The Debtor filed for relief under chapter 7 of the Bankruptcy Code on September 28, 2021 (the "Petition Date"). *Id.* at 1.

In Schedule B to his bankruptcy schedules, the Debtor listed his "2021 Tax refunds payable in in 2022" as an asset. *Id.* at 22. The Debtor valued the refunds at

"$0.00". *Id.* In Schedule C to his bankruptcy schedules, the Debtor asserted "100%" of the refunds were exempt pursuant to C.R.S. § 13-54-102(1)(o). *Id.* at 25.

On January 13, 2022, the Trustee filed a Stipulation to File Income Tax Returns and Turnover Refunds, pursuant to which the Debtor agreed to (a) file tax returns for 2021 and (b) permit the Trustee to receive any refunds. *Id.* at 52. In the Stipulation, the Trustee agreed that "the exempt portion of the refund shall be refunded to the Debtor(s)." *Id.* The Bankruptcy Court entered an order approving the Stipulation. *Id. at* 54.

The Debtor was married in 2021 but the Debtor's spouse did not file a bankruptcy case. The Debtor and the Debtor's spouse filed a joint federal 2021 tax return, which the Debtor provided to the Trustee. The tax return provided that the Debtor was entitled to a $1,455 refund (the "Refund"), which was paid to the Trustee.

On May 12, 2022, the Trustee filed the Turnover Motion in which Trustee noted that the Debtor claimed the entire Refund was exempt and the Trustee disputed that claim. *Id.* at 56. To resolve the dispute, the Trustee and the Debtor agreed to file stipulated facts and legal briefs and requested that the Bankruptcy Court treat the briefing as motions for summary judgment. *Id.* at 78.

On September 12, 2022, the parties filed Stipulated Facts. *Id.* at 79. The parties also filed their respective briefs. *Id.* at 97-137. The parties stipulated that

the Debtor and his non-bankrupt spouse reported and calculated the following in their 2021 federal tax return:

Total Wages:	$99,147
Total Taxable Income:	$74,047
Total Tax Due:	$ 8,485
Total Federal Income Tax Withheld from W-2:	$ 8,140
Refundable Child Tax Credit:	$ 1,800
Total Payments:	$ 9,940
Total Federal Refund:	**$ 1,455**

Id. at 80. The 2021 federal tax return is in the Appellant's Appendix at 85. Because the Debtor's non-bankrupt spouse's rights to any refund are not property of the bankruptcy estate in the Debtor's case, the parties stipulated that 72% of the W-2 withholdings were attributable to the Debtor and the remaining 28% of withholdings were attributable to the non-bankrupt spouse. *Id.* at 80.

B. Ruling Presented for Review.

On August 14, 2023, the Bankruptcy Court entered its corrected Order on the Trustee's Turnover Motion determining that the Refund was 100% exempt but that a state tax refund of $554 was not exempt. *Id.* at 138.

The Bankruptcy Court described the disputed issue as follows: "[T]his case presents an apportionment issue: what part of the tax payments should be apportioned to the payment of tax obligations." *Id.* at 142. The Bankruptcy Court first looked to *In re Roy*, No. 12-11246, 2013 Bankr. LEXIS 5710, at **8-16 (Bankr. D. Kan. Sep. 24, 2013)—a Kansas bankruptcy court case applying a Kansas

exemption statute that did not use the word "attribute" or anything remotely similar—for the conclusion that "[p]roperty subject to an exemption should not be burdened with a tax liability." *Appellant App.* at 142.

The Bankruptcy Court then turned to the dictionary definition of "attribute," determined the word should be "interpreted according to its ordinary meaning," and drew from this a required showing of "but-for causation." *Id.* at 144. The Bankruptcy Court determined that while "often events have multiple but-for causes," the fact that one of the multiple but-for causes of the Refund in this case was the inclusion of an exempt refundable child tax credit was sufficient to find the entire Refund exempt. *Id.*

C. The USDC's Opinion and Judgment

The Trustee appealed the Order to the USDC. *Id.* at 148. On September 3, 2024, the USDC entered its order affirming the Order. *Id.* at 201. The USDC largely followed the Bankruptcy Court's analysis, applying the same but-for causation analysis and concluding that because the "refundable child tax credit is thus a 'but-for' cause of the federal refund" the "refund is therefore exempt." *Id.* at 214.

IV. SUMMARY OF ARGUMENT

At issue in this appeal is the application of the words "attributed to" in the tax refund exemption statute at issue: C.R.S. § 13-54-102(1)(o). Based upon the statute's plain language, application of the Tenth Circuit's decision in *In re*

Borgman, 698 F.3d 1255 (10th Cir. 2012), and the calculations required in the federal tax return to determine refund amounts, the Trustee asserts that the amount of the Refund at issue must be equally "attributed to" all components giving rise to the Refund. The Bankruptcy Court erred by effectively interpreting the words "attributed to" out of the statute, not following *Borgman*, and applying a subjective tort-like standard of but-for causation to what should be a straightforward mathematical analysis based upon objective facts.

If the Bankruptcy Court's Order is reversed, the Trustee seeks entry of judgment in his favor as a matter of law because there are no disputed issues of fact. For the reasons discussed herein, the Refund is property of the chapter 7 bankruptcy estate. 11 U.S.C. § 542(a) requires debtors to turn over and account for property that the Trustee may use, sell or lease, unless the property is of inconsequential value. The Order should be reversed, and the Tenth Circuit should grant the Turnover Motion.

V. ARGUMENT

A. Exemptions Generally.

A chapter 7 bankruptcy estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). An income tax refund is included in this definition of property of the estate. *See Borgman*, 698 F.3d at 1257.

Pursuant to 11 U.S.C. § 522(b)(2), a debtor may exempt property from the bankruptcy estate. Section 522(b) contemplates both federal and state exemptions in property. The specific federal exemptions are set forth in 11 U.S.C. § 522(d). However, states are permitted to opt-out of the federal exemptions and limit a resident's exemptions to those allowed under state law. *See* 11 U.S.C. § 522(b)(2); *Borgman*, 698 F.3d at 1259.

Colorado is an opt-out state. C.R.S. § 13-54-107 provides as follows:

> The exemptions provided in section 522(d) of the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, are denied to residents of this state. Exemptions authorized to be claimed by residents of this state shall be limited to those exemptions expressly provided by the statutes of this state.

With some exceptions not applicable here, the "exemptions expressly provided by the statutes" of the state of Colorado are set forth in Article 54 of Title 13 of the Colorado Revised Statutes.

While exemption statutes are liberally construed, "even a liberal construction must find support in the statutory text." *Gordon v. Wadsworth (In re Gordon)*, 791 F.3d 1182, 1186 (10th Cir. 2015).

B. By Its Plain Terms, C.R.S. § 13-54-102(1)(o) Exempts Only an Interest in Refundable Tax Credits, Not the Credits Themselves.

Some exemption statutes exempt property itself and others exempt only property interests. *See, e.g., Schwab v. Reilly*, 560 U.S. 770, 782 (2010) (describing certain exemption statutes as defining "the 'property' a debtor may 'clai[m] as

exempt' as the debtor's 'interest'—up to a specified dollar amount—in the assets described in the category, *not* as the assets themselves") (emphasis in original).

The exemption statute at issue in this appeal is the 2022 version of C.R.S. § 13-54-102(1)(o), which exempted from property of the estate "the full amount of any federal or state income tax refund attributed to an earned income tax credit or a child tax credit." By its plain terms, C.R.S. § 13-54-102(1)(o) is the type of exemption statute that only exempts an interest, and not the property itself, because of the words "attributed to."

Had the Colorado legislature intended to exempt the credit itself, it could have done so as evidenced by the numerous exemption statutes that provide for the exemption of specific property, not just an interest therein. *See, e.g.* C.R.S. § 13-54-102(1)(d) (exempting "burial sites" with no limitation); C.R.S. § 13-54-102(1)(h.5) (exempting National Guard members' military equipment with no limitation); C.R.S. § 13-54-102(1)(m) (exempting proceeds of fire or casualty insurance with no limitation); and C.R.S. § 13-54-102(1)(n) (exempting proceeds of personal injury claims with no limitation).

When the legislature means to exempt an entire type of property, it knows how to do so. Had the legislature intended to exempt the tax credits themselves, C.R.S. § 13-54-102(1)(o) could have been worded to exempt "the full amount of any earned income tax credit or child tax credit" and stated nothing regarding attribution.

This distinction is important here because the Bankruptcy Court, in concluding that "[p]roperty subject to an exemption should not be burdened with a tax liability," *Appellant App.* at 142, effectively, and erroneously, interpreted the statute as exempting the credit itself and read the legislature's "attributed to" limitation out of the statute.[1] Courts cannot interpret language out of a statute. *See Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, 121 P.3d 190, 195 (Colo. 2005) ("We interpret every word, rendering none superfluous; undefined words and phrases are read in context and construed literally according to common usage"); *McCloy v. USDA*, 351 F.3d 447, 451 (10th Cir. 2003) ("Under a long-standing canon of statutory interpretation, one should avoid construing a statute so as to render statutory language superfluous"); *see also Gordon*, 791 F.3d at 1186 ("even a liberal construction must find support in the statutory text").[2] misapprehension

[1] This is also the primary reason the *Roy* case relied upon by the Bankruptcy Court is inapposite. The Kansas exemption statute analyzed in *Roy* exempted the property itself: "the debtor's right to receive tax credits. . .", Kan. Stat. Ann. § 60-2315, with no limitation, unlike the Colorado statute at issue.

[2] Moreover, the Bankruptcy Court's statement that "[p]roperty subject to an exemption should not be burdened with a tax liability" reflects a misinterpretation

Moreover, the Bankruptcy Court erred in utilizing the phrase "full amount" in the statute to bolster its conclusion. Without citing to any authority or textual analysis, the Bankruptcy Court pronounced that "[g]iving effect to the word 'full' requires a determination a debtor's tax refund is exempt up to the amount of the exempt refundable credit received." *Appellant App.* at 145. As set forth above, giving this effect to the word "full" results in rewriting the statute to (a) omit the words "attributed to" and (b) exempt the tax credit itself, not the amount of the Refund attributed to the credit.

In contrast, there is a way to give effect to the word "full" without rewriting the statute: the legislature's use of the word "full" clarifies that the entire amount of any refund attributed to a tax credit is exempt, not some lesser portion. *See Denver Publ'g Co.*, 121 P.3d at 195 ("We interpret every word, rendering none superfluous"); *McCloy*, 351 F.3d at 451 (courts "should avoid construing a statute so as to render statutory language superfluous").

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of the 2021 tax return and Refund. As evidenced by the 2021 tax return, the Debtor's refundable tax credit was $1,800 and the Refund was only $1,455. Leaving aside the question of allocation, there is no doubt that the IRS applied some of the refundable tax credit to the tax liability of $8,485 and thereby "burdened" the credit with tax liability.

C. Under *Borgman*, Determining the Portion of a Tax Refund Attributable to Exempt Credits is an "Equation" Requiring Equal Consideration of Each Component Part.

The *Borgman* case primarily addressed a different issue (whether a nonrefundable child tax credit is exempt), but in the course of reversing the Bankruptcy Appellate Panel's ruling in *In re Dunckley*, 452 B.R. 241 (B.A.P. 10th Cir. 2011), the Tenth Circuit answered the question raised in this appeal and is worth quoting at length:

> In light of the fact that a refund depends first upon a payment, it cannot be said that the disputed refunds in this case were "attributed to" the nonrefundable portion of the [Child Tax Credit "CTC"]. The Dunckleys' refund was "attributed to" the fact that they had $8,447 in withholding, as against total tax liability of $4,186. Meanwhile, Borgman's refund was "attributed to" the fact that he had $1,328 in withholding, a $400 Making Work Pay credit, a $1,860 earned income tax credit, and a $182 Additional CTC, as against total tax liability of zero.
>
> The BAP reasoned that there need be no direct correlation between the credit and the refund for the "full amount" of the refund to be "attributed to" the credit and thus exempt, so long as the application of the credit "directly affects the refund." *Dunckley,* 452 B.R. at 246. We disagree. It is true that the nonrefundable portion of the CTC is "part of the equation," *id.,* by which a refund, if any, is calculated, but so too are the amount of income earned, the amount of deductions claimed, the amount of credits available, and the amount of taxes already paid in withholding, among other variables. A taxpayer's refund, if any, is no more "attributed to" the nonrefundable portion of the CTC than it is to any of these other elements of the equation. If the nonrefundable portion of the CTC happens to reduce a taxpayer's liability to an amount less than the taxpayer's payments and refundable credits, then the taxpayer will receive a "refund," but that "refund" will be "attributed to" the taxpayer's payments and refundable credits, and not to the reduction in tax liability. Meanwhile, if, even after application of

> the nonrefundable CTC, a taxpayer's tax liability equals or exceeds his payments and refundable credits, the taxpayer will either receive no refund, or will owe taxes. The BAP's analysis, which presupposes the existence of a refund instead of examining the refund's constituent parts, fails in this latter case.

698 F.3d at 1261 (emphasis added).

The Bankruptcy Court stated that "*Borgman* does not compel a different result," *Appellant App.* at 145, but did not address the above-quoted excerpt from the opinion. The USDC distinguished *Borgman* from the instant case on the basis that *Borgman* addressed a nonrefundable child tax credit as opposed to a refundable child tax credit, *Appellant App.* at 215, but the above-quoted language had nothing to do with the type of credit; rather, the Tenth Circuit addressed head-on the inclusion of the words "attribute to" in the statute. *See Borgman*, 693 F.3d at 1261.

The *Borgman* analysis applies with equal measure to this case: the "equation" for determining what a tax refund is "attributed to" requires analysis of each of the components of the federal tax refund.

D. The Standard of But-For Causation Relied Upon by the Bankruptcy Court "Makes Little Sense" Where Multiple Potentially Dispositive Causes Exist.

The Bankruptcy Court's ruling is premised on two determinations. First, the court relied upon the dictionary definition of "attribute" as "to explain as caused or brought about by . . . ." *Appellant App.* at 143. Second, after interpreting this definition of "attribute" as essentially meaning cause, the court relied on *Bostock v.*

Clayton Cnty., Georgia, 590 U.S. 644, 656 (2020) for the proposition that when a statute includes a "but-for" causation element, that "test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Appellant App.* at 144 (quoting *Bostock*, 590 U.S. at 656).

Armed with this language, the Bankruptcy Court "changed one thing at a time" by removing the refundable child tax credit from the refund calculation, determined this one change would have resulted in no refund, and concluded that the Refund was "attributed" to the refundable credit under the "sweeping" but-for causation test in *Bostock*. *Appellant App.* at 144. The USDC employed identical reasoning. *Id.* at 214.

There are three critical flaws in this analysis. First, Justice Gorsuch explicitly limited the Supreme Court's holding in *Bostock* to Title VII cases. After describing the but-for test as a "sweeping standard," and acknowledging that often "events have multiple causes," the Court states "[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." 590 U.S. at 656 (emphasis added). The instant dispute is not one that arises under Title VII.

Second, *Bostock* and the other cases relied upon by the Bankruptcy Court and the USDC for the "sweeping standard" all concern application of statutes that

necessarily involve the application of subjective considerations or elements that are otherwise impossible to precisely quantify. *See, e.g., Bostock*, 590 U.S. 644 (interpreting Title VII anti-discrimination statute); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (relied upon in *Bostock* and also interpreting Title VII); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) relied upon in *Bostock* and interpreting the Age Discrimination in Employment Act of 1967); *Rocky Mtn. Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287 (Colo. 2020) (cited by the USDC and applying tort causation principles to liability under the Colorado Premises Liability Act); and *Dos Almas LLC v. Indus. Claim Appeals Off.*, 434 P.3d 777 (Colo. App. 2018) (cited by the USDC and applying but-for test to analyzing the purchase of "substantially all assets" of a business under the Colorado Employment Security Act).

In contrast, here, as described in more detail below, the amount of a tax refund that may be "attributed to" its component parts is subject to a precise calculation based upon an equation utilizing those objective, component parts (as recognized in *Borgman*). It makes no sense to employ the "sweeping standard" applied in cases where precision is impossible to a case where precision is definitively attainable (and where there are no subjective considerations).

Third, the Bankruptcy Court's application of the "sweeping standard" is premised on an incorrect statement of the law. As set forth above, the cases relied

upon by the Bankruptcy Court and the USDC considered causation in the context of tort or tort-like actions where courts are tasked with identifying harm and allocating responsibility. But even in those cases, courts recognize an exception to the sweeping but-for standard: cases where an injured party can prove the existence of multiple, independently sufficient factual causes. *See Nassar*, 570 U.S. at 347 (citing the Restatement (Third) of Torts § 27); *Burrage v. United States*, 571 U.S. 204, 214-15 (2014) (citing *Nassar* and expanding on the concept).

Burrage (one of the "[Citations omitted]" from the Bankruptcy Court's block quote of *Bostock* excerpted in its opinion), is instructive. After describing "actual causality," Justice Scalia states as follows:

> Thus, "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.
>
> This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the

> lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.

Burrage, 571 U.S. at 211-12 (internal citations omitted, emphasis added).

The Debtor's Refund is like a 5 to 2 baseball score, not a 1 to 0 result. It is true in the instant case that there would have been no Refund in the absence of a refundable child tax credit. But it is equally true that there would have been no Refund in the absence of non-exempt wage withholding. In this case, there are multiple, independent causes of the Refund. Indeed, as set forth in more detail below, because there are six potential component parts to a tax refund, all of which are quantifiable and given equal weight in the refund calculation, the possibility exists for up to six independent causes of a federal tax refund.

Thus, *Burrage* explicitly rejects the Bankruptcy Court's conclusion that the "existence of multiple but-for causes does not prevent the Court from finding the but-for causation requirement satisfied as to the refundable credit." *Appellant App.* at 144-45. To the contrary, "it makes little sense to say that" the Refund "resulted from or was the outcome," *Burrage*, 571 U.S. at 212, of one factor or another when no single factor was dispositive (or when multiple factors were equally dispositive).

Based upon the foregoing, the Bankruptcy Court's conclusion that a single but-for cause of the Refund is sufficient to render the Refund entirely exempt was erroneous.[3]

E. The Appropriate Methodology for Applying C.R.S. § 13-54-102(1)(o) is a Pro-Rata/Percentage Calculation.

The question remains: how is the phrase "attributed to" to be applied? No Colorado cases provide an answer. *Borgman* provides the best authority by

[3] Although not at issue in this appeal, the USDC supported its use of the but-for standard with the contention that "the Colorado legislature could have chosen alternative words to impose a causation standard different from but-for causation," *Appellant App.* at 216, and quoted *Bostock*'s statement that the legislature "could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law." *Id.* quoting *Bostock*, 590 U.S. at 656. This conclusion does not withstand scrutiny. For the reasons already discussed, there are exceptions to the strict but-for test where multiple potentially dispositive causes exist. Thus, the absence of additional language in the statute is not meaningful. Further, the statute already includes limiting language: the phrase "attributed to." If the legislature had intended to exempt the credits themselves, as already discussed, it could have omitted the words "attributed to."

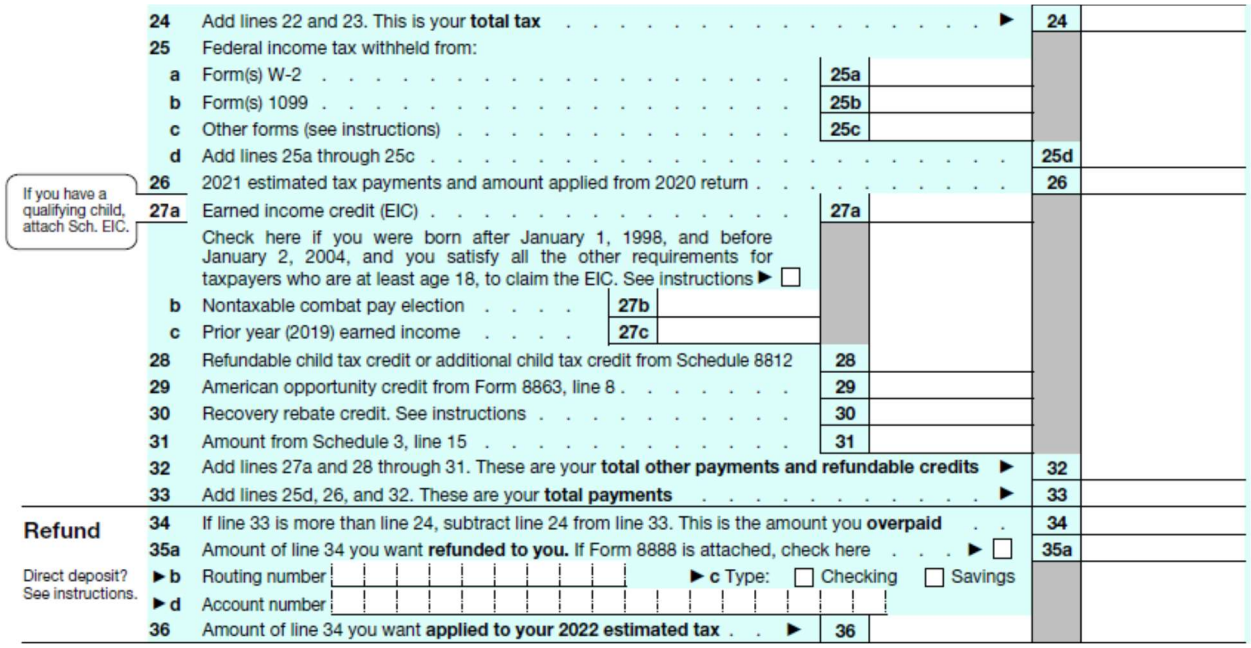
acknowledging the equation implicit in the language of the statute:

> It is true that the nonrefundable portion of the CTC is 'part of the equation,' *id.,* by which a refund, if any, is calculated, but so too are the amount of income earned, the amount of deductions claimed, the amount of credits available, and the amount of taxes already paid in withholding, among other variables. A taxpayer's refund, if any, is no more "attributed to" the nonrefundable portion of the CTC than it is to any of these other elements of the equation.

698 F.3d at 1261. *Borgman* suggests a pro-rata/percentage methodology, which is most appropriate given the equal weight each component of a tax refund is given by the IRS in calculating the refund amount.

Other courts have applied the pro-rata method for allocating the payment of tax debt from exempt and non-exempt sources. *See, e.g., In re Plantz*, No. 09-65036-AER7, 2010 WL 4736234, at *2 (Bankr. D. Or. Nov. 16, 2010); *In re Ross*, No. 12-4937-AJM-7, 2012 WL 3817792, at *3 (Bankr. S.D. Ind. Sep. 4, 2012) ("Rather than using the [lowest intermediate balance], the fairer way to determine the exempt portion of the Disputed Funds is determine the percentage of the EIC Funds to the PNC Account total and to apply that percentage to the Disputed Funds"); *see also In re Tydings*, No. 19-20889-drd-7, 2020 WL 1510025, at *2 (Bankr. W.D. Mo. Mar. 27, 2020) (applying pro rata approach to calculate exempt and non-exempt funds in a bank account).

To illustrate this methodology, it is worth reviewing the applicable lines of the 2021 federal tax return form:



	24	Add lines 22 and 23. This is your **total tax** ▶			24
	25	Federal income tax withheld from:			
	a	Form(s) W-2	25a		
	b	Form(s) 1099	25b		
	c	Other forms (see instructions)	25c		
	d	Add lines 25a through 25c			25d
If you have a qualifying child, attach Sch. EIC.	26	2021 estimated tax payments and amount applied from 2020 return			26
	27a	Earned income credit (EIC)	27a		
		Check here if you were born after January 1, 1998, and before January 2, 2004, and you satisfy all the other requirements for taxpayers who are at least age 18, to claim the EIC. See instructions ▶ ☐			
	b	Nontaxable combat pay election 27b			
	c	Prior year (2019) earned income 27c			
	28	Refundable child tax credit or additional child tax credit from Schedule 8812	28		
	29	American opportunity credit from Form 8863, line 8	29		
	30	Recovery rebate credit. See instructions	30		
	31	Amount from Schedule 3, line 15	31		
	32	Add lines 27a and 28 through 31. These are your **total other payments and refundable credits** ▶			32
	33	Add lines 25d, 26, and 32. These are your **total payments** ▶			33
Refund	34	If line 33 is more than line 24, subtract line 24 from line 33. This is the amount you **overpaid**			34
	35a	Amount of line 34 you want **refunded to you.** If Form 8888 is attached, check here ▶ ☐			35a
Direct deposit? See instructions.	▶b	Routing number ▶c Type: ☐ Checking ☐ Savings			
	▶d	Account number			
	36	Amount of line 34 you want **applied to your 2022 estimated tax** ▶	36		

Line 34 is the refund amount. The refund is calculated by subtracting line 24 (the "total tax") from line 33. Line 33, in turn, is the total of "payments" made by the taxpayer and is calculated by adding the amounts in lines 25 through 30. In other words, a tax refund generated from this 2021 form is "attributed to" any combination of the six separate sources of payments in lines 25 through 30. These lines include wage withholding (line 25), the earned income tax credit (line 27), and the refundable child tax credit (line 28). Each of these line items is given equal weight (in other words, each line item is applied in full for a dollar-for-dollar calculation of "payments" made).

Because each line item is given equal weight, calculating the amount of a refund attributable to any one line item is a matter of a simple equation where "x" is

any of the individual payment lines 25 through 30 and "y" is the percentage of the total refund attributed to the specific payment:

x / Line 34 [the "overpayment"] = y

The equation applied here results in the following calculations[4]:

8,140 [Line 25] / 9,940 = 81.89%

1,800 [Line 28] / 9,940 = 18.11%

The same simple equation can be performed for any 2021 tax return to determine what percentage of a tax refund is attributed to any individual line item. Again, because each individual "payment" line item is given equal weight in calculating the refund, it necessarily follows that the amount of the refund attributed to each line item is the percentage the line item bears to the overall refund. This is the only reasonable means of applying C.R.S. § 13-54-102(1)(o).

VI. CONCLUSION

The Trustee requests that the Tenth Circuit enter an order reversing the Order

[4] To simplify the analysis and because it is not relevant to the issue on appeal, the equation set forth herein does not account for the secondary allocation of the Refund between the Debtor (72%) and his non-bankrupt spouse (28%) based on the total amount of federal income tax withheld from their respective wages for the 2021 tax year.

and grant the Turnover Motion, holding that $634.60 of the Refund is non-exempt property of the bankruptcy estate. This amount is 81.89% of the total Refund, as set forth above, reduced to account for (a) the bankruptcy estate's 72% interest in the Refund and (b) the date on which the bankruptcy case was filed[5]:

Refund	$1,455.00
81.89%	$1,191.50
72%	$857.88
270/365 (date of filing)	$634.60

VII. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34 and 10th Cir. R. 28.2(C)(2), the Trustee requests oral argument. The Trustee believes oral argument will assist the Tenth Circuit in evaluating the arguments raised with respect to the issue on appeal.

VIII. CERTIFICATE OF COMPLIANCE WITH RULE 8015(a)(7)(B)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) because this brief contains 5,278 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has

[5] Pursuant to *In re Barowsky*, 946 F.2d 1516, 1519 (10th Cir. 1991), the estate's share of the Refund only includes amounts "attributable to the pre-petition portion of the taxable year in question." The Petition Date fell on the 270th day of 2021.

been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

IX. CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, ESET Endpoint AntiVirus, and according to the program are free of viruses.

Date: December 20, 2024

/s/ *David V. Wadsworth*
David V. Wadsworth

CERTIFICATE OF SERVICE

I do hereby certify that on the 20th day of December, 2024, the **OPENING BRIEF OF APPELLANT ROBERTSON B. COHEN** was served by CM/ECF on the following:

Stephen H. Swift
stephen.swift@swiftlaw.net

/s/ Dorelia E. Tackett
For Wadsworth Garber Warner Conrardy, P.C.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: JOSE L. GARCIA- MORALES, Debtor.	Case No. 21-14949 KHT Chapter 7

CORRECTED ORDER ON TRUSTEE'S MOTION FOR TURNOVER

THIS MATTER comes before the Court on the *Trustee's Motion to Compel Turnover* (the "Motion," docket #37), filed by Robertson B. Cohen, Chapter 7 Trustee ("Trustee"), the Response thereto (docket #44), filed by Debtor Jose L. Garcia-Morales ("Debtor"), the parties' Stipulated Facts (docket #55), and the briefs filed by Debtor (docket #58) and Trustee (docket #59). The Court heard oral argument on the matter (docket #61), following which the matter was taken under advisement. The Court is now prepared to rule, and hereby finds and concludes as follows:

I. STIPULATED FACTS

Debtor filed his Chapter 7 bankruptcy petition on September 28, 2021. Trustee is the duly appointed Chapter 7 trustee. Debtor and Trustee entered into a Stipulation to File Income Tax Returns and Turnover Refunds (the "Tax Stipulation," docket #18), which provided, in relevant part:

1. The Trustee, Robertson B Cohen and the above-named Debtor(s) agree that the Debtor(s) shall file all income tax returns for the 2021 tax year with the Internal Revenue Service and the State of Colorado by no later than April 15, 2022. Copies of all such income tax returns shall be delivered to the Trustee contemporaneously with the filing of the same with the appropriate taxing authorities.

2. By their signatures on this Stipulation, the Debtor(s) authorize the Internal Revenue Serve and the Colorado Department of Revenue to send the Debtor(s) tax refund checks for the taxable year(s) set forth above directly to the Trustee. In the event the refund checks are sent to the Debtor(s), the Debtor(s) shall, within three (3) days after such refund is received, endorse the refund check as follows: "Pay to the order of Robertson B Cohen, Trustee," and deliver such check to the Trustee.

3. Upon receipt of any refund check(s), the Trustee will deposit the same in an estate bank account. After deducting the exempt portion of any refund, the non-exempt portion of the refund for the applicable

> year will be prorated as follows: The non-exempt amount of the refund will be divided by the number of days in the tax year for which the refund is due. The quotient will then be multiplied by the number of days in that year preceding the date of the filing of the petition to determine the estate's interest in the refund; provided, however, that the Trustee may also apply the non-exempt portion of the refund exceeding the estate's prorated share to satisfy any other non-exempt property. Otherwise, the non-exempt amount of the tax refund which is not retained for the benefit of the creditors of the estate will be returned to the Debtor(s). The exempt portion of the refund shall be refunded to the Debtor(s).

Tax Stipulation at 1. The Court approved the Tax Stipulation (docket #19).

In February 2022, Debtor and his Non-Filing Spouse filed their 2021 Colorado and federal income tax returns, reflecting the following amounts:

Federal Tax Return:

Total Wages	$99,147
Total Taxable Income	$74,047
Total Tax Due	$8,485
Total Federal Income Tax Withheld	$8,140
Refundable Child Tax Credit	$1,800
Total Payments	$9,940
Total Federal Refund	$1,455

Colorado State Tax Return:

Total Federal Taxable Income	$74,047
Total Net Colorado Tax Owed	$3,332
Total Colorado Income Tax Withheld	$3,774
Sales Tax Refund	$112
Total State Refund	$554

Pursuant to the Tax Stipulation, the total federal refund for 2021 of $1,455 was paid directly to Trustee. Trustee holds the $1,455 attributable to the 2021 federal tax refund, pending the outcome of this dispute. The State of Colorado paid the $544 attributable to the 2021 Colorado tax refund to Debtor.

II. APPLICABLE LAW

A tax refund comes from tax "payments," including refundable credits and other payments such as wage withholdings. *See In re Borgman*, 698 F.3d 1255, 1261 (10th Cir. 2012) (discussing "payments" as defined by the IRS). When a debtor's total tax payments are higher than his tax liability, he will receive a refund of the "overpayment."

Id. The refund is property of the estate, to the extent attributable to the pre-petition portion of the taxable year in question. *In re Barowsky*, 946 F.2d 1516, 1519 (10th Cir. 1991), *cited in Borgman*, 698 F.3d at 1262.[1] The refunds at issue here are entirely attributable to pre-petition periods and are therefore property of Debtor's bankruptcy estate.

To the extent an exemption applies, a debtor may remove exempt property from his estate. On Debtor's petition date, Colorado law provided an exemption for "[t]he full amount of any federal or state income tax refund attributed to an earned income tax credit or a child tax credit." Colo. Rev. Stat. § 13-54-102(1)(o) (2021). The refundable credit Debtor received here, the Child Tax Credit, falls within this exemption.

After Debtor's petition date, Colorado added a tracing provision to the exemption statute:

> To the extent that exempt assets are commingled with nonexempt assets, a first-in first-out accounting shall be used to determine the portion of the commingled assets to which the exemption applies. If exempt assets are commingled with nonexempt assets as part of a single transaction, any amounts withdrawn from an account for the purpose of such transaction shall be assessed on a pro rata basis. This subsection (6) applies to all provisions of the Colorado Revised Statutes concerning the exemption of assets from seizure, except for exemptions that require segregation.

Colo. Rev. Stat. § 13-54-102. Colorado did not amend the "attributed to" language of § 13-54-102(1)(o).[2]

III. PARTIES' ARGUMENTS

Trustee argues the Court should treat all tax "payments" (refundable credits and wage withholdings) as commingled property (exempt property[3] mixed with non-exempt property) and apply tracing rules, the most logical of which would be the pro-rata method. In a hypothetical example, if a debtor has a tax liability of $1,000, withholdings of $1,000,

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[1] In contrast, non-refundable credits (which are not considered "payments," *see Borgman*, 698 F.3d at 1261) are not property of a debtor's bankruptcy estate. *In re Landgrebe*, No. 08-26271 EEB, 2009 WL 3253933 (Bankr. D. Colo. Sept. 23, 2009). Exemptions may not be claimed on property that is not property of the bankruptcy estate. *Id.,* (citing *Owen v. Owen*, 500 U.S. 305, 308 (1991) (finding "[n]o property can be exempted (and thereby immunized), however, unless it first falls within the bankruptcy estate."); *Carbaugh v. Carbaugh (In re Carbaugh)*, 278 B.R. 512, 520-21 (10th Cir. BAP 2002) ("Exemptions may only be claimed on property that is property of the bankruptcy estate.")). *See also Borgman*, 698 F.3d at 1262 (non-refundable credits are not eligible for exemption).

[2] Colorado amended the language to exempt "an earned income tax credit or any child tax credit, whether as a refundable tax credit or as a nonrefundable reduction in tax." 2022 Colo. Legis. Serv. Ch. 74 (S.B. 22-086). The amendment, which became effective after this case was filed, is not at issue here.

[3] The Court refers to refundable credits as exempt because the refundable credit at issue here falls within the exemption statute. The Court does not hold all refundable credits are exempt; only refundable credits included in the exemption statute are exempt.

and a refundable tax credit of $1,000, he has total tax payments of $2,000 and overpayments of $1,000, and he would receive a refund of $1,000. Under Trustee's argument, the withholdings and the refundable tax credit each accounted for 50% of the total payments, so only 50% of the hypothetical debtor's refund would be exempt.

Debtor argues the Court should construe the exemption statute liberally in a way that maximizes the exemption available to debtors. In the above hypothetical, under Debtor's argument, if the debtor had a refundable tax credit of $1,000 and a refund of $1,000, the entire refund would be exempt.

IV. DISCUSSION

Trustee argues this case presents a tracing issue. He seeks to apply commingling rules and tracing methods to a debtor's right to receive a refund, before the taxing authority issues the refund. But, before a refund is issued, a debtor has no ownership interest in a taxing authority's funds. In the absence of an ownership interest in funds or an obligation to segregate funds, such as that applicable to funds held in trust, commingling rules or tracing methods are inappropriate:

> When property of the estate is alleged to be held in trust, the burden rests upon the claimant to establish the original trust relationship. The claimant must prove title and identify the trust fund or property and, where the fund or property has been mingled with the general property of the debtor, the claimant must sufficiently trace the property. However, if it cannot first be shown that a trust has been created, there is no necessity for inquiry as to whether the property can be identified or traced. Additionally, where the recipient of the funds can by agreement use them as the recipient's own and commingle them with the recipient's own monies, a debtor-creditor relationship exists, not a trust. 5 *Collier* ¶ 541.11, at 541-59 (footnotes deleted).

In re Bangor & Aroostook R.R. Co., 320 B.R. 226, 231-32 (Bankr. D. Me. 2005*), aff'd*, No. 01-11565, 2007 WL 607867 (D. Me. Feb. 23, 2007).

A taxing authority is under no obligation to segregate funds received from or owed to any particular taxpayer, and funds it receives are commingled with other funds. *See, e.g., United States v. Menotte (In re Custom Contractors, LLC)*, 484 B.R. 835, 845 (S.D. Fla. 2012) (affirming bankruptcy court, which found "the IRS immediately deposits tax payments into the Treasury for general use by the Government" and "the payments are commingled with other funds and are not segregated into separate accounts according to their origin."), *aff'd*, 745 F.3d 1342 (11th Cir. 2014). A taxpayer entitled to a refund has a debtor-creditor relationship with the taxing authority. With a debtor-creditor relationship, pre-payment identification or tracing does not apply.

The Court cannot apply tracing rules to a tax refund until the refund is issued. If a taxpayer receives a refund and deposits it into an account in which other funds are

deposited and funds are withdrawn, he may have commingled the refund with his other funds, but in the absence of that or similar action on the taxpayer's part, the funds are not considered commingled. Here, Debtor did not receive the federal refund, which was paid directly to Trustee. The refund cannot be considered commingled.[4] This case does not present a tracing issue. Instead, this case presents an apportionment issue: what part of the tax payments should be apportioned to the payment of tax obligations?

Trustee argues for application of a pro-rata method, so a debtor's tax obligation is considered paid by all tax payments (wage withholdings, which are not exempt, and refundable credits, which are exempt), based on the proportion each type of payment bears to the payment total. In the above hypothetical, if a debtor has a tax liability of $1,000, withholdings of $1,000, and a refundable tax credit of $1,000, Trustee would apportion $500 of the tax liability to the non-exempt wage withholdings and $500 of the tax liability to the otherwise-exempt refundable credit.

The Court cannot accept Trustee's argument. Property subject to an exemption should not be burdened with a tax liability. As another bankruptcy court within this circuit explained:

> [T]here are no cases that directly address the trustee's argument that when the debtors owe tax to which the EIC [Earned Income Credit, a refundable credit] would be applied, the portion of the debtors' refund that can be attributed to the credit should be reduced to force the pro rata application of a portion of the credit to the tax paid. The trustee's view is that permitting the debtors to retain all of their EIC when, in fact, some portion of the taxes they pay should be attributed to it effectively places the burden of paying the debtors' taxes on the creditors by diminishing the estate.
>
> . . .
>
> But in *In re Westby,* [473 B.R. 392 (Bankr. D. Kan. 2012), *aff'd*, 486 B.R. 509 (10th Cir. BAP 2013),] Judge Karlin refused to permit an allocation of the EIC into pre- and postpetition portions. She correctly held that the *Barowsky* [946 F.2d 1516, 1519 (10th Cir. 1991)] proration [of a tax refund into pre-petition and post-petition periods] did not apply to the EIC because the EIC is exempt, noting that "[Kan. Stat. Ann. § 60-2315] explicitly exempts the 'maximum credit' for 'one tax year.' Therefore, a pro rata division would not be appropriate, because [Kan. Stat. Ann. § 60-2315] exempts the property from the estate entirely." That reasoning disposes of the point here, too. Because the entire EIC is exempt, it should not be burdened with paying the debtor's tax bill. This conclusion is buttressed by

[4] The Court assumes, without deciding, the Colorado state tax refund was commingled with Debtor's other funds. But, there is still no need to applying tracing rules. Any turnover obligation Debtor may have would extend to the property or its value. 11 U.S.C. § 542(a); *In re Ruiz*, 455 B.R. 745, 751 (10th Cir. BAP 2011). To the extent Debtor has a turnover obligation with respect to the state tax refund, he would not need to trace or turn over the specific funds received. Whether Debtor in fact has any turnover obligation is discussed below.

> the long-held Kansas view that exemptions are to be liberally construed in favor of the debtor.
>
> Another facet of Kansas exemption law also undercuts the trustee's argument. The Kansas Supreme Court has historically rejected creditors' efforts to marshal a debtor's assets in a way that would invade their homestead exemption, instead holding that nonexempt assets must first be liquidated to pay lienholders' and general creditors' debts. [citing and discussing *Colby v. Crocker*, 17 Kan. 527 (1877)]. . . .
>
> In *Meyer v. United States*, [375 U.S. 233, 239-240 (1963),] the Supreme Court held that where New York had enacted an exemption for the proceeds of life insurance, and where its courts refused to marshal assets to diminish those rights, requiring the I.R.S. to first enforce its tax lien on the death benefits to the prejudice of the survivor beneficiaries would undermine that benevolent policy of the exemption. The same rule should apply in this case. Forcing the proration the trustee seeks effectively calls upon the [debtors] to apply their exempt asset, the EIC portion of the refund, to the payment of a debt on par with their nonexempt assets. Under the rule in *Meyer*, and, by analogy, the rule in *Colby v. Crocker*, the trustee should not be permitted to marshal the debtor's exempt assets by requiring the EIC portion of the refund to bear some part of their tax obligation.

In re Roy, No. 12-11246, 2013 Bankr. LEXIS 5710, at **8-16 (Bankr. D. Kan. Sep. 24, 2013).

Trustee distinguishes *Roy*, noting Colorado and Kansas exemption statutes have different language. *Compare* Kan. Stat. Ann. § 60-2315 (providing an exemption for "**the debtor's right to receive** [certain refundable] tax credits") *with* Colo. Rev. Stat. § 13-54-102(1)(o) (providing an exemption for "**[t]he full amount of any . . . refund attributed to** [certain refundable credits]" (emphasis added)). To be sure, the Kansas exemption statute does not contain the phrase "attributed to." But, the Court cannot find that phrase compels the result Trustee is seeking.

To "attribute" is "to explain as caused or brought about by[;] [to] regard as occurring in consequence of or on account of." *Webster's Third New International Dictionary* 142 (1976).[5] Causation is a well-established legal concept, recently discussed by the Supreme Court:

> [A]s this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" [Citations omitted.] In the language of law, this means that [the statute's] "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. [Citation omitted.]

[5] *Quoted in In re Dunckley*, 452 B.R. 241, 243-44 (10th Cir. BAP 2011), *rev'd sub nom. In re Borgman*, 698 F.3d 1255 (10th Cir. 2012). Although *Borgman* reversed *Dunckley*, *Borgman* did not reverse *Webster's* or otherwise disagree with the definition of the verb attribute.

> That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. [Citation omitted.] In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.
>
> This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. [Citation omitted.] When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. [Citations omitted.]
>
> No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. *Cf.* 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written "primarily because of " to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. *Cf.* 22 U.S.C. § 2688. But none of this is the law we have. . . .

(Emphasis in the original.) *Bostock v. Clayton Cnty., Georgia*, -- U.S. --, 140 S. Ct. 1731, 1739-40 (2020) (citations omitted).

Turning to the language of the Colorado exemption statute, the phrase "attributed to" should similarly be interpreted according to its ordinary meaning, requiring the "'simple' and 'traditional' standard of but-for causation." If the refundable credit were removed from the tax equation, would the refund amount be different? If so, we have identified a but-for cause. Here, removing the refundable credit would eliminate Debtor's federal refund. The refundable credit is a but-for cause of Debtor's refund, and the causation requirement of the exemption statute is satisfied. The refund is attributed to the refundable credit.

As the Supreme Court noted, often events have multiple but-for causes. A tax refund may be caused or brought about by many factors, including "the amount of income earned, the amount of deductions claimed, the amount of credits available, and the amount of taxes already paid in withholding, among other variables." *Borgman*, 698 F.3d at 1261. To the extent a taxpayer receives a refundable credit and receives a refund, the refundable credit helped cause or bring about the refund. So did the income earned, refundable and nonrefundable credits available, and withholding paid. In *Borgman*, the court held: "A taxpayer's refund, if any, is no more 'attributed to' the nonrefundable portion of the CTC than it is to any of these other elements of the equation." *Id.* The Court would add a taxpayer's refund is also no less attributed to the nonrefundable credit than it is to any of the other elements of the equation. Each element may be a but-for cause of the refund. The existence of multiple but-for causes does not prevent the Court from finding

the but-for causation requirement satisfied as to the refundable credit.

Colorado exempts "[t]he **full amount** of any . . . refund." C.R.S. § 13-54-102(1)(o) (emphasis added.) Trustee's argument reducing the exemption by apportioning a percentage of tax liability ignores the plain meaning of the word "full." Giving effect to the term "full" requires a determination a debtor's tax refund is exempt up to the amount of the exempt refundable credit received. If a debtor has a tax liability of $1,000, withholdings of $1,000, and an exempt refundable tax credit of $1,000, he would receive a refund of $1,000, and the full $1,000 amount of the refund would be exempt.[6]

Ordinarily, when the language of a statute is plain, the Court's inquiry into its meaning ends. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). But, out of an abundance of caution, the Court will address additional case law below.

Colorado courts and federal courts applying Colorado law have long held Colorado exemptions must be liberally construed. *See, e.g., Sandburg v. Borstadt*, 109 P. 419, 421 (Colo. 1910), *cited in In re Hellman*, 474 F.Supp. 348, 350 (D. Colo. 1979). A liberal construction of exemption statutes requires creditors to look to sources other than exempt property to satisfy general creditors' debts. *See Roy*, 2013 Bankr. LEXIS 5710, at **12 (citing *Meyer v. United States*, 375 U.S. 233, 239-240 (1963) (applying NY law); *Colby v. Crocker*, 17 Kan. 527, 532 (1877)); *see also In re Chadwick*, 114 B.R. 663, 664-65 (Bankr. W.D. Mo. 1990); *Gibson v. Farmers & Merchants Bank*, 81 B.R. 84, 87 (N.D. Fla. 1986); *In re Mills*, 40 B.R. 72, 75 (Bankr. E.D.N.C. 1984); *Westinghouse Credit Corp. v. Central Trust Co. (In re Leonardo)*, 11 B.R. 453, 455 (Bankr. W.D.N.Y. 1981); *Bank of Luverne v. Turk*, 133 So. 52, 55 (Ala. 1930); *Sims v. McFadden*, 233 S.W.2d 375, 377 (Ark. 1950). Colorado is no exception. As a bankruptcy court applying Colorado law held:

> It is true that 11 U.S.C. § 541 places all the debtor's property in the estate, but § 522(b) requires the trustee to accede to the debtor's claim of exemption notwithstanding § 541.
>
> . . . .
>
> Under the doctrine of marshaling, [the secured creditor] will be required to satisfy its lien first from the non-exempt items covered by its security interest. Marshaling in this manner will further the "fresh start" policy of the Bankruptcy Code and also the state and federal policies of liberally construing homestead and exemption laws.

Genova v. Chavez (In re Chavez), 26 B.R. 129, 130-31 (Bankr. D. Colo. 1983).

Borgman does not compel a different result. *Borgman* criticized a hypothetical debtor who sought to claim an exemption in a refund caused by excessive withholding,

[6] Of course, the exemption cannot exceed the amount of the exempt refundable credit. If a taxpayer has a tax liability of $1,000, withholdings of $1,500, an exempt refundable credit of $1,000, and a refund of $1,500, only $1,000 of the refund would be exempt.

"'which would have been other assets of the bankruptcy estate if the excessive withholdings had not been made.'" 698 F.3d at 1262 (quoting *Barowsky*, 946 F.2d at 1518). Here, the Court does not permit the exemption of excess withholding; the Court permits the application of appropriate withholding. In this Court's hypothetical example, a debtor who has a tax liability of $1,000 and withholdings of $1,000 has not over-withheld. His tax liability is appropriately satisfied by withholdings from his non-exempt wages. To the extent a debtor over-withholds, the excess withholdings refunded to the debtor are appropriately included in property of the estate. For example, a debtor with a $1,000 tax liability, $1,500 in withholdings, and a $1,000 refundable credit will receive a refund of $1,500, of which $1,000 (the refundable credit) is exempt and $500 (the excess withholding) is non-exempt. A debtor who under-withholds will receive a reduced refund, but that does not provide a justification for further reducing the exempt amount. A debtor with a $1,000 tax liability, $500 in withholdings, and a $1,000 refundable credit will receive a refund of $500, effectively waiving the exemption as to the amount of the credit applied to his tax liability. But, any such "waiver" should not extend further to that debtor's general unsecured creditors.

Finally, as to the argument creditors are harmed if a debtor's tax liability is allocated to his withholdings first, to preserve an exemption in a refundable credit, the Court agrees with *Roy*:

> [T]he trustee argues that it is unfair for the debtors to retain their entire EIC while the unsecured creditors' share has already been diminished by the taxing authority's deducting the tax owed from the refund. This is no more "unfair" than the priority scheme of the Bankruptcy Code is. Income tax claims are typically paid before the claims of unsecured creditors under § 507(a)(8). So even if the debtors somehow managed to file their return but avoid application of their overpayment to their taxes, the taxing authority would have a priority claim that would be paid before any distribution to the unsecured creditors.

2013 Bankr. LEXIS 5710, at **15-16.

V. CONCLUSION

In this case, Debtor's federal tax liability was $8,485, his withholdings were $8,140, and his exempt refundable credit was $1,800. For the reasons discussed above, he is entitled to claim an exemption of the full amount of his $1,455 federal refund. He is not entitled to claim an exemption in the Colorado state refund of $554, which does not appear to be attributed to an earned income tax credit or a child tax credit.

The Court has not decided the issue of whether or how the tax obligations or refunds should be apportioned between Debtor and his non-filing spouse, which issue was not presented to the Court on stipulated facts.

Accordingly,

IT IS HEREBY ORDERED that the Motion is DENIED.

Dated August 14, 2023

BY THE COURT:

Kimberley H. Tyson
United States Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Case No. 23-cv-02178-PAB
(Bankruptcy No. 21-14949-KHT, Chapter 7)

In re:

JOSE L. GARCIA-MORALES,

Debtor.

ROBERTSON B. COHEN, Chapter 7 Trustee,

Appellant,

v.

JOSE L. GARCIA-MORALES,

Appellee.

ORDER

This is an appeal by the chapter 7 trustee Robertson B. Cohen (the "Trustee") from the August 14, 2023 order of the United States Bankruptcy Court for the District of Colorado (the "bankruptcy court") denying Trustee's Motion to Compel Turnover. The Court has jurisdiction pursuant to 28 U.S.C. § 158(a).[1]

The issue on appeal is the meaning of the term "attributed to" in the Colorado tax statute regarding exemptions for the refundable child tax credit. *See* Colo. Rev. Stat. § 13-54-102(1)(o) (2021); *see also* Docket No. 7 at 4-5; Docket No. 8 at 5.

[1] After reviewing the parties' submissions, the Court has determined that oral argument is not necessary to the resolution of this appeal.

I. BACKGROUND

A. Bankruptcy Exemptions

Filing a petition for bankruptcy creates a bankruptcy estate. *In re Borgman*, 698 F.3d 1255, 1257 (10th Cir. 2012) (citing 11 U.S.C. § 541(a)). The bankruptcy estate includes all the "property" of the debtor as of the commencement of the case. 11 U.S.C. § 541(a)(1). An "income tax refund attributable to the pre-petition portion of the taxable year in question constitutes property of the bankruptcy estate." *In re Barowsky*, 946 F.2d 1516, 1519 (10th Cir. 1991); *see also Kokoszka v. Belford*, 417 U.S. 642, 648 (1974). In a chapter 7 bankruptcy, a debtor's property is liquidated and the proceeds are distributed to creditors. *In re Borgman*, 698 F.3d at 1257. However, the debtor may exempt certain property from the estate. *Id*. (citing 11 U.S.C. §§ 522(b)(2), (d)). The Bankruptcy Code provides default rules defining exempt property, yet states may opt out of the default rules and create their own rules. *Id*. (citing 11 U.S.C. § 522(b)(2)).

The State of Colorado has codified its own rules for exempt property. *See* Colo. Rev. Stat. § 13-54-107. As applies to this case, Colorado law provided that the "following property is exempt from levy and sale under writ of attachment or writ of execution: . . . [t]he full amount of any federal or state income tax refund attributed to an earned income tax credit or a child tax credit." Colo. Rev. Stat. § 13-54-102(1)(o) (2021).[2]

[2] After the date of debtor's petition in this case, Colorado amended the exemption statute to exempt "[t]he full amount of any federal or state income tax refund attributed to an earned income tax credit or any child tax credit, *whether as a refundable tax credit or as a nonrefundable reduction in tax*." Colo. Rev. Stat. § 13-54-102(1)(o) (2022) (emphasis added). Colorado also added a tracing provision to the exemption statute:

B. Factual Background and Procedural History[3]

On September 28, 2021, Jose L. Garcia-Morales filed a chapter 7 voluntary petition for bankruptcy. Docket No. 6-1 at 2. Mr. Garcia-Morales' spouse did not file for bankruptcy. *See id*. at 89; *see also* Docket No. 7 at 6; Docket No. 8 at 5. On September 28, 2021, Trustee was appointed as the chapter 7 trustee. Docket No. 6-1 at 89. Mr. Garcia-Morales and the Trustee entered into a stipulation, agreeing that: (i) Mr. Garcia-Morales would file all income tax returns for the 2021 tax year with the Internal Revenue Service ("IRS") and the State of Colorado (the "State") by April 15, 2022; (ii) the IRS and the State would send Mr. Garcia-Morales' tax refunds checks directly to the Trustee; and (iii) the Trustee would refund "the exempt portion of the refund" to Mr. Garcia-Morales. *Id*. at 92-93. On January 13, 2022, the bankruptcy court approved the stipulation. *Id*. at 3.

> To the extent that exempt assets are commingled with nonexempt assets, a first-in first-out accounting shall be used to determine the portion of the commingled assets to which the exemption applies. If exempt assets are commingled with nonexempt assets as part of a single transaction, any amounts withdrawn from an account for the purpose of such transaction shall be assessed on a pro rata basis. This subsection (6) applies to all provisions of the Colorado Revised Statutes concerning the exemption of assets from seizure, except for exemptions that require segregation.

Colo. Rev. Stat. § 13-54-102(6) (2022). Both parties agree, however, that the subsequent amendments do not apply to this case. Docket No. 7 at 10 & n.3, 21; Docket No. 8 at 17. Accordingly, the Court will apply the statute that was in effect at the time of debtor's petition. *See In re Est. of DeWitt*, 54 P.3d 849, 854 (Colo. 2002) ("Absent legislative intent to the contrary, a statute is presumed to operate prospectively, meaning it operates on transactions occurring after its effective date.").

[3] The following facts are taken from the bankruptcy court's record, including the stipulated facts that the parties submitted to the bankruptcy court. *See* Docket No. 6-1 at 89-91.

On February 21, 2022, Mr. Garcia-Morales and his spouse filed their 2021 state and federal income tax returns. *Id*. at 89.[4] They reported the following information in their federal tax return:

Total Wages	$99,147
Total Taxable Income	$74,047
Total Tax Due	$8,485
Total Federal Income Tax Withheld from W-2	$8,140
Refundable Child Tax Credit	$1,800
Total Payments	$9,940
Total Federal Refund	**$1,455**

Id. at 90. In the federal tax return, Mr. Garcia-Morales claimed an exemption for the full amount of his 2021 federal tax refund under Colo. Rev. Stat. § 13-52-102(1)(o). *Id*. at 32. Pursuant to the parties' stipulation, the total federal refund of $1,455 was paid directly to the Trustee. *Id*. at 91. Trustee holds the federal refund pending the outcome of this dispute. *Id*.

On May 12, 2022, the Trustee filed a Motion to Compel Turnover (the "motion") because Mr. Garcia-Morales claimed that the entire amount of the federal refund was exempt under Colo. Rev. Stat. § 13-54-102(1)(o). *Id*. at 62-64. The Trustee asked the bankruptcy court to decide what portion of Mr. Garcia-Morales' refund was "attributed to" the refundable child tax credit and therefore exempt under Colo. Rev. Stat. § 13-54-102(1)(o). *Id*. at 107. The Trustee argued that a tax refund is "attributed to" exempt

[4] The state tax return is not at issue in this appeal. *See* Docket No. 7 at 7 n.1.

payments, such as the refundable child tax credit, as well as non-exempt payments, such as wage withholdings. *Id*. at 112-113, 120. The Trustee asserted that the bankruptcy court should apply a pro-rata tracing method for determining what percentage of the tax refund is attributed to the child tax credit, and that under this method, the estate is permitted to keep $914.40 of the refund. *Id*. at 120. Mr. Garcia-Morales argued that the entire amount of the federal refund was exempt under Colo. Rev. Stat. § 13-54-102(1)(o) because, "[b]ut for" the refundable child tax credit of $1,800, Mr. Garcia-Morales and his spouse would not have received a federal refund and would have owed the IRS $345. *Id*. at 122-23. Mr. Garcia-Morales also maintained that exemption statutes must be "liberally construed" in favor of the debtor. *Id*. at 123. The parties filed stipulated facts in connection with the Trustee's motion. *Id*. at 89-91. On October 24, 2022, the bankruptcy court held a hearing on the motion. *Id*. at 6.

On August 14, 2023, the bankruptcy court issued an order denying Trustee's motion and holding that Mr. Garcia-Morales "is entitled to claim an exemption of the full amount of his $1,455 federal refund." *Id*. at 157-166.[5] The bankruptcy court explained that the dictionary definition of "attribute" is "to explain as caused or brought about by[;] [to] regard as occurring in consequence of or on account of." *Id*. at 162. The bankruptcy court therefore concluded that the phrase "attributed to" in Colorado's exemption statute should "be interpreted according to its ordinary meaning, requiring the simple and traditional standard of but-for causation." *Id*. at 163 (internal quotations omitted). The bankruptcy court found that the refundable child tax credit was a "but-for

[5] The bankruptcy court originally issued the order on August 11, 2023, but entered a corrected order on August 14, 2023. Docket No. 6-1 at 6-7.

cause" of Mr. Garcia-Morales' federal refund because removing the child tax credit of $1,800 would eliminate the federal refund. *Id*. The bankruptcy court recognized that events often have multiple but-for causes and that a tax refund might be caused by many factors, such as the amount of withholdings, income earned, tax credits, or deductions. *Id*. However, the bankruptcy court found that existence of multiple but-for causes "does not prevent the Court from finding the but-for causation requirement satisfied as to the refundable credit." *Id*. at 163-64 (citing *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 656 (2020)). The bankruptcy court rejected the Trustee's argument that the exemption should be apportioned by a percentage of tax liability because that argument ignored the plain meaning of the word "full" in the statute. *Id*. at 164. Although the language of the statute was unambiguous, the bankruptcy court noted that "exemptions must be liberally construed" under Colorado law. *Id*. In support of its position that the pro-rata method would not apply, the bankruptcy court also cited *In re Roy*, 2013 Bankr. LEXIS 5710, *8-16 (Bankr. D. Kan. Sep. 24, 2013), where the court denied the trustee's motion to compel turnover because the debtors' earned income credit was exempt under Kan. Stat. Ann. § 60-2315. Docket No. 6-1 at 161-62.

On August 25, 2023, the Trustee filed a notice of appeal from the bankruptcy court's order. Docket No. 1. The Trustee filed an opening brief on October 25, 2023. Docket No. 7. Mr. Garcia-Morales filed a response brief on November 18, 2023. Docket No. 8. The Trustee filed a reply brief on December 4, 2023. Docket No. 9. The Trustee raises one issue in this appeal:

> [w]hether the bankruptcy court erred when it denied the Trustee's motion to compel turnover of tax refund and determined that the debtor's $1,455 federal tax refund was solely "attributed to" a $1,800 refundable child tax credit and therefore 100% exempt pursuant to Colo. Rev. Stat. § 13-54-102(1)(o), rather

> than "attributed to" debtor's tax withholdings and the child tax credit on a pro-rata basis.

Docket No. 7 at 4-5.

II. STANDARD OF REVIEW

A party may appeal the "final judgments, orders, and decrees" of a bankruptcy court to either the district court or a bankruptcy appellate panel. 28 U.S.C. §§ 158(a)(1), (c)(1). A district court reviews the bankruptcy court's legal conclusions de novo, its factual findings for clear error, and its discretionary decisions for abuse of discretion. *In re Baldwin*, 593 F.3d 1155, 1159 (10th Cir. 2010); *Busch v. Busch* (*In re Busch*), 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003) (lifting of automatic stay); *Brasher v. Turner* (*In re Turner*), 266 B.R. 491, 494 (B.A.P. 10th Cir. 2001) (excluding an exhibit); *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 771 (10th Cir. 1997) (entering default judgment). A court must "reach its own conclusions regarding state law legal issues, without deferring to the bankruptcy court's interpretation of state law." *In re Borgman*, 698 F.3d at 1259 (quoting *In re Wagers*, 514 F.3d 1021, 1024 (10th Cir. 2007)). The Court finds, and both parties agree, that the bankruptcy court's interpretation of Colo. Rev. Stat. § 13-54-102(1)(o) is subject to de novo review because it involves a question of law. *See* Docket No. 7 at 5; Docket No. 8 at 5.

III. ANALYSIS

The Trustee argues that the bankruptcy court erred as a matter of law in determining that the refund was "attributed to" the exempt federal child tax credit. Docket No. 7 at 9. The Trustee acknowledges that the statute does not define the term "attributed to" and the Colorado Supreme Court has not interpreted the phrase. *Id*. at

10. However, the Trustee argues that the refund is "attributed to" the "exempt amount and non-exempt amount on a pro-rata basis." *Id*. at 8.

The Trustee contends that, in *In re Borgman*, the Tenth Circuit interpreted the phrase "attributed to" in Colorado's exemption statute and determined that a tax refund is "attributed to" all payments that generate the refund, including wage withholdings, earned income tax credits, and refundable child tax credits. *Id*. at 8-9, 11-12. The Trustee argues that the bankruptcy court's interpretation of the phrase "attributed to," relying "primarily on a dictionary definition," is not consistent with *In re Borgman* or the plain language of the statute. *Id*. at 19. The Trustee asserts that the plain language of the statute requires a quantitative calculation because the phrase "attributed to" modifies the phrase "full amount," suggesting that the Court must determine the "portion of a refund" attributed to the child tax credit. *Id*. at 20. Furthermore, the Trustee contends that a "liberal construction" of the exemption statute cannot re-write the statute. *Id*. at 16, 18.[6]

The Trustee argues that, in circumstances where it is impossible to differentiate the source of funds due to comingling, courts should apply equitable tracing principles. *Id*. at 13. The Trustee asserts that the Court should apply the pro-rata approach, which "requires the determination of the exempt funds to the account total when the deposit is made" and applies that percentage "to the disputed funds." *Id*. at 14 (citation omitted). The Trustee contends that several other bankruptcy courts outside this District have applied a pro-rata method for allocating the payment of tax debt from exempt and

[6] Moreover, the Trustee argues that the bankruptcy court erred in comparing this case to *In re Roy* because Kansas' exemption statute does not contain the "attributed to" limitation. Docket No. 7 at 17.

nonexempt sources. *Id*. at 16 (citing *In re Plantz*, 2010 WL 4736234, at *2 (Bankr. D. Or. Nov. 16, 2010); *In re Ross*, 2012 WL 3817792, at *3 (Bankr. S.D. Ind. Sept. 4, 2012)). Applying the pro-rata method, the Trustee argues that the estate is entitled to $914.40. *Id*. at 23.

Finally, the Trustee argues that the Colorado General Assembly amended Colo. Rev. Stat. § 13-54-102 twice since *In re Borgman*, which inferentially supports Trustee's argument. *Id*. at 21. The Trustee contends that the General Assembly amended the exemption statute in 2015, but did not alter the tax refund exemption. *Id*. Trustee argues that, "[w]hen a statute is amended, judicial construction previously placed upon [the] statute is deemed approved by the General Assembly to the extent that the provision remains unchanged." *Id*. (quoting *City of Lamar v. Koehn*, 968 P.2d 164, 167 (Colo. App. 1998)). Additionally, the Trustee contends that the General Assembly amended the statute in 2022 to provide that, for cases filed after April 7, 2022, a "pro-rata" method applies "[i]f exempt assets are commingled with nonexempt assets as part of a single transaction." *Id*. (quoting Colo. Rev. Stat. § 13-54-102(6)). Moreover, the Trustee argues that the 2022 amendments related to section 13-54-102(1)(o) retain the same language of "attributed to" as the mechanism for connecting the child tax credit to the amount of the refund. *Id*. at 22.

Mr. Garcia-Morales responds that the Court should affirm the bankruptcy court's order because Colorado's exemption statute provides clear guidance for determining how much of an income tax refund is attributed to a child tax credit. Docket No. 8 at 11. The statute provides that the "full amount" of a refund "attributed to" the tax credit is exempt. *Id*. Mr. Garcia-Morales contends that the bankruptcy court correctly

determined that a but-for causation test applies because the ordinary meaning of the phrase "attributed to" means "caused by." *Id*. at 8. He argues that the but-for causation test "requires a calculation of the amount of the refund with the credit and without the credit. The difference is the exempt amount." *Id*. at 6. Mr. Garcia-Morales asserts that he is entitled to the full amount of the refund because, but for his $1,800 child tax credit, "there would be no refund." *Id*. at 8. In response to the Trustee's argument that the bankruptcy court re-wrote the statute, Mr. Garcia-Morales argues that the court implemented the plain meaning of the statute, supported by a dictionary definition. *Id*. at 16. Mr. Garcia-Morales contends that the bankruptcy court merely cited the "liberal construction" principle as an additional policy consideration supporting the statutory interpretation. *Id*. at 17.

Furthermore, Mr. Garcia-Morales argues that *In re Borgman* does not mandate use of the pro-rata tracing method for determining how much of an income tax refund is exempt. *Id*. at 6, 12. Mr. Garcia-Morales asserts that, in that decision, the Tenth Circuit held that the non-refundable portion of a child tax credit, the Subpart A credit, is not a "refund." *Id*. at 12. Mr. Garcia-Morales recognizes that the Tenth Circuit briefly discussed the statutory phrase "attributed to," but argues that discussion was irrelevant to the holding of the case. *Id*. at 12, 14. Moreover, Mr. Garcia-Morales asserts that the Tenth Circuit did not calculate percentages or adopt the pro-rata method, but rather seems to have utilized a "hybrid" but-for causation test. *Id*. at 14-15.

"When the federal courts are called upon to interpret state law, the federal court must look to the rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule." *Johnson v. Riddle*, 305 F.3d 1107,

1118 (10th Cir. 2002); *see also Belcher v. Turner*, 579 F.2d 73, 74 (10th Cir. 1978) ("The scope and application of [state bankruptcy] exemptions are defined by the state courts and we are bound by their interpretations"). The Colorado Supreme Court has not interpreted the meaning of the phrase "attributed to" in Colo. Rev. Stat. § 13-54-102(1)(o). The statute does not define the term "attributed to." Accordingly, the Court must construe the meaning of the term "attributed to" in section 13-54-102(1)(o) to predict how the Colorado Supreme Court would rule on that issue.

When construing a statute under Colorado law, "courts ascertain and give effect to the intent of the Colorado General Assembly and refrain from rendering judgments inconsistent with that intent." *Kouzmanoff v. Unum Life Ins. Co. of Am.*, 374 F. Supp. 3d 1076, 1087 (D. Colo. 2019) (citing *Walker v. People*, 932 P.2d 303, 309 (Colo. 1997); *Farmers Ins. Exch. v. Bill Boom, Inc.*, 961 P.2d 465, 469 (Colo. 1998)). "To determine legislative intent, courts look first to the statute's plain language." *Id*. (citing *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997); *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 590 (Colo. 1997)). "If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what said." *Id*. (citing *Askew v. Indus. Claim Appeals Off.*, 927 P.2d 1333, 1337 (Colo. 1996); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 545 (Colo. 1995); Colo. Rev. Stat. § 2-4-101); *see also Cowen v. People*, 431 P.3d 215, 218 (Colo. 2018) ("In the absence of a definition, we construe a statutory term in accordance with its ordinary or natural meaning." (citation and internal alterations omitted)). "If the statutory language is clear and unambiguous, courts need not look further." *Kouzmanoff*, 374 F. Supp. 3d at 1087

(citing *Town of Superior v. Midcities Co.*, 933 P.2d 596, 600 (Colo. 1997); *Boulder Cnty. Bd. of Equalization v. M.D.C. Constr. Co.*, 830 P.2d 975, 980 (Colo. 1992)). When determining the plain and ordinary meaning of words, a court may "consider a definition in a recognized dictionary." *Cowen*, 431 P.3d at 218. In applying the plain meaning of statutory language, a court must "give consistent effect to all parts of the statute, and construe each provision in harmony with the overall statutory design." *Id.* (citation and internal alterations omitted).

"However, where the words chosen by the legislature are unclear in their common understanding, or capable of two or more constructions leading to different results, the statute is ambiguous." *Kouzmanoff*, 374 F. Supp. 3d at 1087 (citing *Colby v. Progressive Cas. Ins. Co.*, 928 P.2d 1298, 1302 (Colo. 1996)); *see also Abercrombie v. Aetna Health, Inc.*, 176 F. Supp. 3d 1202, 1207 (D. Colo. 2016), *aff'd*, 704 F. App'x 728 (10th Cir. 2017) (unpublished). If a statute is "ambiguous," courts may consider, among other matters, "(a) the object sought to be attained; (b) the circumstances under which the statute was enacted; (c) the legislative history, if any; (d) the common law or former statutory provisions, including laws upon the same or similar subjects; (e) the consequences of a particular construction; (f) the administrative construction of the statute; and (g) the legislative declaration or purpose." *Kouzmanoff*, 374 F. Supp. 3d at 1087 (citing Colo. Rev. Stat. § 2-4-203); *see also Abercrombie*, 176 F. Supp. 3d at 1207. Nevertheless, a court may only "resort to extrinsic aids of construction" if "the statutory language is susceptible to more than one reasonable interpretation and is therefore ambiguous." *Cowen*, 431 P.3d at 218.

On the date of Mr. Garcia-Morales' bankruptcy petition, Colorado law provided that "[t]he full amount of any federal or state income tax refund attributed to . . . a child tax credit" is exempt. Colo. Rev. Stat. § 13-54-102(1)(o) (2021). Dictionaries define the verb "attribute" as "to say that (something) is because of (someone or something)," *Attribute To, Britannica*, https://www.britannica.com/dictionary/attribute (last visited Sept. 3, 2024); "to explain (something) by indicating a cause," *Attribute*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/attribute (last visited Sept. 3, 2024); to "consider as caused by something indicated," *Attribute, Dictionary.com*, https://www.dictionary.com/browse/attribute (last visited Sept. 3, 2024); or "[t]o ascribe, impute, or refer, as an effect to the cause; to reckon as a consequence of." *Attribute, Oxford English Dictionary,* https://www.oed.com/dictionary/attribute_v (last visited Sept. 3, 2024). The Court therefore finds that the plain meaning of the statute exempts the full amount of any federal tax refund *caused by* the child tax credit.

Under Colorado law, the "test for causation" is typically the but-for test. *See Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287, 292 (Colo. 2020) (quoting *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996)) (applying but-for causation test to negligence claims); *see also Dos Almas LLC v. Indus. Claim Appeals Off.*, 434 P.3d 777, 781 (Colo. App. 2018) (noting that the "statutory phrase 'because of' required only a showing of 'but for' causation"). The United States Supreme Court has also found that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,' [which] incorporates the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U.S. at 656 (citations omitted); *see also Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 332

(2020) ("This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action."). But-for causation "is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 590 U.S. at 656; *see also Wagner*, 467 P.3d at 292 (noting that but-for causation is satisfied if the action "produce[s] the result complained of, and without which the result would not have occurred"). "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 590 U.S. at 656.

Here, Mr. Garcia-Morales' total federal refund was $1,455. Docket No. 6-1 at 90. Mr. Garcia-Morales claimed a refundable child tax credit of $1,800. *Id*. Removing the refundable child tax credit would eliminate Mr. Garcia-Morales' federal refund. *See id*. The refundable child tax credit is thus a "but-for" cause of the federal refund. *See Bostock*, 590 U.S. at 656. Because the full amount of Mr. Garcia-Morales' federal refund is "attributed to" the "child tax credit," his refund is therefore exempt under section 13-54-102(1)(o). Accordingly, the Court finds that the bankruptcy court correctly determined that Mr. Garcia-Morales is entitled to claim an exemption of the full amount of his $1,455 federal refund. *See* Docket No. 6-1 at 165.

The Court rejects the Trustee's argument that the plain language of the statute requires a quantitative calculation determining what percentage or "portion of a refund" is attributed specifically to the child tax credit. *See* Docket No. 7 at 20. The statute does not say that Colorado law exempts the "portion of" or "percentage of" a federal tax refund attributed to a child tax credit. Rather, the statute provides that "[t]he *full amount*

of any federal or state income tax refund attributed to . . . a child tax credit" is exempt. Colo. Rev. Stat. § 13-54-102(1)(o) (2021) (emphasis added). "Where the legislature could have chosen to restrict the application of a statute, but chose not to, we do not read additional restrictions into the statute." *McDonnell v. The Colo. Real Est. Comm'n*, 361 P.3d 1138, 1146 (Colo. App. 2015) (quoting *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 804 (Colo. 2000)).

Moreover, the Court finds that *In re Borgman* does not alter the statutory interpretation analysis. In that case, the Tenth Circuit addressed whether a "nonrefundable" child tax credit was exempt from a debtor's estate under Colo. Rev. Stat. § 13-54-102(1)(o). *In re Borgman*, 698 F.3d at 1257. The Tenth Circuit explained that "a prerequisite for a refund is a *payment* of some form in the first instance." *Id*. at 1260. The Tenth Circuit noted that "payments" include federal withholding from wages, the earned income tax credit, and the refundable child tax credit. *Id*. at 1261. However, the Tenth Circuit found that the nonrefundable child tax credit is not treated as a "payment" under the Internal Revenue Code because it is a "reduction in tax liability," and therefore, the nonrefundable child tax credit "is outside the scope of § 13-54-102(1)(o), which exempts only 'refunds.'" *Id*. In other words, because the nonrefundable child tax credit could never give rise to a "refund," the Tenth Circuit found that the nonrefundable child tax credit is not included in the "full amount of [a] federal . . . income tax refund attributed to . . . a child tax credit." *Id*. at 1262. This appeal is distinguishable from *In re Borgman* because Mr. Garcia-Morales claimed the refundable child tax credit, not the nonrefundable child tax credit. *See* Docket No. 6-1 at 90. The parties in *In re Borgman* did not dispute that the refundable child tax credit "creates a

refund that is exempt from the bankruptcy estate under § 13-54-102(1)(o)." *In re Borgman*, 698 F.3d at 1259 n.4.

The Trustee is correct that the Tenth Circuit briefly discussed how a taxpayer's refund is "attributed to" many variables, including the "amount of income earned, the amount of deductions claimed, the amount of credits available, and the amount of taxes already paid in withholding." *Id*. at 1261. Nevertheless, the existence of multiple factors contributing to an income tax refund does not alter the Court's but-for causation analysis. "Often, events have multiple but-for causes." *Bostock*, 590 U.S. at 656. As long as the factor was "one but-for cause of" the event, "that is enough to trigger the law." *Id*. The statute provides that the "full amount" of a federal income tax refund "attributed to" a child tax credit is exempt. Colo. Rev. Stat. § 13-54-102(1)(o) (2021). The Colorado legislature could have chosen alternative words to impose a causation standard different from but-for causation. *See Bostock*, 590 U.S. at 656 (noting that Congress "could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law" or "could have written 'primarily because of' to indicate that the prohibited factor had to be the main cause"); *Dos Almas LLC*, 434 P.3d at 780 (recognizing that "the statutory phrase 'because of' required only a showing of 'but for' causation, without any requirement to show a 'sole' cause"). The Court will not "read a limitation into the provisions" of section 13-54-102(1)(o) that "is not supported by the statutory language used." *See Dos Almas LLC*, 434 P.3d at 780-81.

Accordingly, the Court finds that the Tenth Circuit's decision in *In re Borgman* does not compel a different result in this case.[7]

Because the Court has interpreted the plain meaning of Colorado's statutory language, the Court does "not invoke the aid of other interpretative rules." *See Cowen*, 431 P.3d at 219. The Court therefore declines to address the Trustee's arguments related to extrinsic aids of construction, such as the legislative history of Colo. Rev. Stat. § 13-54-102(1)(o) or other bankruptcy court opinions applying the pro-rata method under other states' exemption statutes. *See* Docket No. 7 at 16, 21-22. The Court affirms the bankruptcy court's ruling that Mr. Garcia-Morales is entitled to claim an exemption of the full amount of his $1,455 federal refund. *See* Docket No. 6-1 at 165.

IV. CONCLUSION

It is therefore

ORDERED that the Order Denying Trustee's Motion to Compel Turnover is **AFFIRMED**. It is further

[7] Moreover, the Court notes that the Colorado General Assembly has seemingly expressed disagreement with *In re Borgman*. "When a statute is amended, the judicial construction previously placed upon the statute is deemed approved by the General Assembly *to the extent that provision remains unchanged*." *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 403 (Colo. 2010) (emphasis added). In 2022, the Colorado General Assembly amended the exemption statute to exempt "[t]he full amount of any federal or state income tax refund attributed to an earned income tax credit or any child tax credit, *whether as a refundable tax credit or as a nonrefundable reduction in tax*." Colo. Rev. Stat. § 13-54-102(1)(o) (2022) (emphasis added). This amendment contradicts the Tenth Circuit's holding in *In re Borgman* that a nonrefundable tax credit is not exempt from a debtor's estate under section 13-54-102(1)(o). *See In re Borgman*, 698 F.3d at 1262.

ORDERED that this case is closed.

DATED September 3, 2024.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 23-cv-02178-PAB
(Bankruptcy No. 21-14949-KHT, Chapter 7)

In re:

JOSE L. GARCIA-MORALES,

Debtor.

ROBERTSON B. COHEN, Chapter 7 Trustee,

Appellant,

v.

JOSE L. GARCIA-MORALES,

Appellee.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order [Docket No. 11] of Chief United States District Judge Philip A. Brimmer entered on September 3, 2024, it is

ORDERED that the Order Denying Trustee's Motion to Compel Turnover is AFFIRMED. It is further

ORDERED that judgment is entered in favor of appellee Jose L. Garcia-Morales and against appellant Robertson B. Cohen. It is further

ORDERED that appellee is awarded his costs, to be taxed by the Clerk of the Court, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is further ORDERED that this case is closed.

Dated: September 4, 2023.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By s/ S. Grimm
Deputy Clerk