STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CAPITAL FINANCIAL CORP.	:	DECISION DTA No. 811309
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1988.	:	

Petitioner Capital Financial Corp., c/o Ready Capital, P.O. Box 1547, Westerly, Rhode Island 02891, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on August 20, 1993. Petitioner appeared by Robert J. DeLasho, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner and the Division of Taxation each filed a brief in support of its exception, in opposition to the other party's exception and a reply brief. Oral argument was heard on July 21, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claim for refund of unused special additional mortgage recording tax credit filed with petitioner's 1988 tax return.

II. Whether the Division of Taxation filed a timely exception to the Administrative Law Judge's determination in this matter.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

Petitioner, Capital Financial Corp. ("Capital"), is incorporated in the State of New York and has been engaged in the mortgage business since July 1, 1954. Capital was in the business of obtaining mortgages and would subsequently sell them to Capital Resources who would service the mortgages for their duration. Capital was obligated under Article 11, section 253.1, of the Tax Law to pay a special additional mortgage recording tax calculatedat a statutory rate. Corporations such as petitioner are allowed a special additional mortgage recording tax credit ("the credit") to offset their corporation franchise tax liability. The credit could not reduce the franchise tax below a certain floor; however, the Tax Law provided that any balance could be carried over to future taxable years. The dispute herein arises over petitioner's claim for refund of the credit in a window of four years where the law provided that the credit could be refunded in lieu of carryover.

In 1985, petitioner filed Form CT-3, Corporation Franchise Tax Report, with a computed tax liability of $22,502.00 and attached to which was Form CT-43, Claim for Additional Mortgage Recording Tax Credit. The form indicated that an additional mortgage recording tax had been paid by the lender (petitioner) in the amount of $142,158.00. Applying the maximum amount allowed by law against the 1985 franchise tax liability ($22,252.00), the unused additional mortgage recording tax credit available to be carried forward as indicated on Form CT-43 was in the amount of $119,906.00.

On March 6, 1987, petitioner filed Form CT-3, Corporation Franchise Tax Report, for calendar year 1986, attached to which was Form CT-43, Claim for Additional Mortgage Recording Tax Credit. The form indicated that the additional mortgage recording tax paid by petitioner in 1986 was $140,853.00 to which it added the unused credit from the preceding year

of $119,906.00, resulting in a total available tax credit of $260,759.00. Applying the maximum allowed by law against the franchise tax liability for 1986 in the amount of $21,484.00, the unused additional mortgage recording tax credit available to be carried forward ($119,906.00 from 1985 and $119,369.00[1] from 1986) was $239,275.00.

Petitioner submitted Form CT-3, Corporation Franchise Tax Report, for 1987[2] and also included Form CT-43, Claim for Special Additional Mortgage Recording Tax Credit. The form indicated that the special additional mortgage recording tax paid by petitioner during 1987 was $69,443.00. This amount added to the carryover from preceding years in the amount of $239,275.00 resulted in a total available tax credit of $308,718.00. Since the corporation paid only the minimum franchise tax of $250.00 for that tax year, there was no application of any of the unused portion of the credit. Thus, the amount to be carried forward to 1988 was $308,718.00.

On or about September 15, 1989, petitioner filed its Form CT-3 for 1988 accompanied by Form CT-43.1, Claim for Refund of Unused Special Additional Mortgage Recording Tax Credit. The form indicated that petitioner was claiming a credit for special additional mortgage recording tax it paid as lender in the amount of $308,718.00. The line designated "Refundable Portion of the Special Additional Mortgage Recording Tax Credit" also listed the amount of $308,718.00. (Emphasis supplied.) The instructions on the Form CT-43.1 filed, provide in pertinent part, the following general information:

> "Residential mortgage lenders taxable under Article 9-A may request a refund of the special additional mortgage recording tax on form CT-43.1 instead of carrying it over to the following taxable year. For taxable periods beginning on or after January 1, 1986 through periods beginning before January 1, 1990, taxpayers claiming a credit for special additional mortgage recording tax paid pursuant to section 253.1-a on mortgages of real property that have been or will be principally improved by one or more structures . . . may elect to treat any unused portion of the tax credit as an overpayment of tax to be refunded."

---

[1]The 1986 unused tax credit results from the amount paid during 1986 in the amount of $140,853.00 less the tax credit used to offset the franchise tax liability of $21,484.00.

[2]The date of filing is not established; however, the timeliness of such filing is not in issue.

On September 7, 1990, the Division of Taxation ("Division") denied the claim for refund of the unused special additional mortgage recording tax credit for 1988 in the amount of $308,718.00. The following explanation was provided:

> "For the period ending December 31, 1985, the 199,906.00 [sic] carryforward is disallowed. Enclosed please find TSB-M-86(9)C which states 'if any special additional mortgage recording tax on a Residential Mortgage which was due and paid in a taxable year beginning before January 1, 1986 (including any carryover of such credit from prior years) is not entirely credited against a taxpayer's tax liability on a franchise tax return for a period beginning before January 1, 1986, any tax benefit from the unused portion will be lost.'
>
> "The $119,369.00 carryforward for period ending December 31, 1986 is disallowed. This amount was requested to be treated as a carryforward and not as a refund. (This is also explained in TSB-M-86(9)C. As the Statute for this year has expired, an amended return cannot be filed and the credit is lost.
>
> "In order to receive a refund for the $69,443.00 credit for period ending December 31, 1987, an amended return will have to be filed and a CT-43.1 must be included. Enclosed please find TSB-M-87(7)C. This memo is specific in which areas the credit is allowed. When filing the amended return, be sure to exclude any mortgages that do not qualify for credit.
>
> "As explained above, the $308,718.00 claim for refund based on unused Special Additional Mortgage Recording Tax Credit for the period ending December 31, 1988 is disallowed.
>
> "Under Section 1089(c) of Article 27 of the Tax Law, petition for the recovery of the tax, penalty or other sum which is part of the claim for which this notice of disallowance is issued, may not be filed more than two years after the date this letter was mailed."

After petitioner was informed of the necessity to do so, it filed an amended Form CT-3, Corporation Franchise Tax Report, for 1986 on or about June 19, 1991 accompanied by Form CT-43.1, Claim for Refund for Unused Special Additional Mortgage Recording Tax Credit, indicating petitioner was seeking the refundable portion of the credit in the amount of $119,369.00.

A request for a conciliation conference was made on June 19, 1991 on behalf of petitioner by its representative, Donald Faber, a New Jersey certified public accountant who also provided testimony in this matter. A conference was conducted on January 21, 1992 and resulted in a Conciliation Order dated July 31, 1992 by which the conferee upheld the denial of petitioner's refund claim. Petitioner thereafter filed its petition with the Division of Tax Appeals on

October 26, 1992 seeking review of this matter. Petitioner eventually filed an amended return for 1987 and received an appropriate refund. Thus, the credit to the extent of $69,443.00 for 1987 is no longer in issue.

In addition to the facts found by the Administrative Law Judge, we find the following.

> The Administrative Law Judge's determination was issued on August 20, 1993. On September 20, 1993, the due date for an exception, the Division requested an extension of time to file an exception. By letter dated September 28, 1993, the Tribunal granted the Division an extension of time to October 20, 1993 for the filing of an exception. The Tribunal received a mailed copy of the Division's exception on October 22, 1993. The envelope in which the exception was mailed had a United States Postal Service postmark on it. All portions of the stamped postmark were faint except for the date, i.e., "OCT 20 '93," which was noticeably clearer and which appeared to have been written in red ink. In addition to the mailed exception, on the morning of October 21, 1993, a member of the Division of Tax Appeals' secretarial staff found a yellow envelope on the lobby floor of the office building in which the Tribunal has its offices. The envelope was hand addressed to the Secretary of the Tribunal and had on it a handwritten notation: "Hand delivered on 10/20/93 by R. Jarvis." The envelope contained a copy of the Division's exception.
>
> By letter dated November 9, 1993, petitioner raised as an issue the untimely filing and service of the Notice of Exception by the Division. Petitioner asserted that he was not served with a copy of the Division's exception as required by the rules and regulations of the Tribunal and that he only received a copy when he requested it from the Tribunal. He pointed out that the copy exhibits a stamp of having been received on October 21, 1993. Petitioner requested a copy of the envelope in which the exception was mailed to the Tribunal. The Tribunal made the entire file of the case available to petitioner who inspected the file on January 31, 1994 in the Division's White Plains office. The Tribunal also instructed the parties that the issue of timeliness would be dealt with by the Tribunal in its decision on the merits and that each should address the issue of timeliness in their respective briefs to the Tribunal accompanying their respective exceptions.

OPINION

For the years at issue, Tax Law § 253(1-a) required petitioner to pay a special additional mortgage recording tax. Tax Law § 210(17)(a) provided petitioner with a "special additional mortgage recording tax credit" against petitioner's franchise tax liability. Tax Law § 210(17)(b) provided that the credit could not reduce the franchise tax liability below a certain amount and that the balance of any credit not used to offset tax liability could be carried over into the next taxable year.

In 1986 (L 1986, ch 638), section 210(17)(b) was amended to preclude the carryover of any unused credit for taxable years beginning before January 1, 1986. For taxable years beginning on or after January 1, 1986, the unused portion of credits could be carried over or a taxpayer could elect to treat such unused portion as an overpayment of tax to be credited or refunded in accordance with the provisions of Tax Law § 1086.

Tax Law § 1087(a) provides, generally, that:

> "[c]laim for credit or refund of an overpayment of tax under article nine, nine-a, nine-b or nine-c shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later . . ."

As relevant here, Tax Law § 1087(e) provides that:

> "[n]o credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation . . . unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous."

The Administrative Law Judge determined that, under the 1986 amendment to section 210(17)(b), the unused 1985 credit could not be carried over into 1986 or any following years nor could it be refunded to petitioner, i.e., it was lost. The Administrative Law Judge rejected petitioner's assertion that the 1986 amendment was unconstitutional on its face citing Matter of Brussel (Tax Appeals Tribunal, June 25, 1992) and Matter of Wizard Corp. (Tax Appeals Tribunal, January 12, 1989) for the proposition that the jurisdiction of the Division of Tax Appeals and the Tax Appeals Tribunal "does not encompass challenges to the constitutionality of a statute on its face" (Determination, conclusion of law "F").

The Administrative Law Judge also rejected petitioner's assertion, in effect, that the statute was being unconstitutionally applied by the Division. The Administrative Law Judge determined that the "right" under prior law to carry over the unused credit to subsequent years was not "generated by nor indicative of an overpayment of taxes by petitioner in which petitioner had a vested entitlement" (Determination, conclusion of law "D"). The Administrative Law Judge also rejected petitioner's claim that the 1991 amendment to section

1086(a) of the Tax Law, relating to overpayment of taxes, was not applicable since the 1985 credit was not an overpayment of taxes.

With regard to the unused 1986 credit of $119,906.00, the Administrative Law Judge, based on a review of United States v. Kales (314 US 186), American Radiator & Std. Sanitary Corp. v. United States (318 F2d 915, 63-2 USTC ¶ 9525), Wall Indus. v. United States (10 Cl. Ct. 82, 86-1 USTC ¶ 9438) and Furst v. United States (678 F2d 147, 82-1 USTC ¶ 9333), determined that:

> "it is clear that the Claim for Refund of Unused Special Additional Mortgage Recording Tax Credit filed with petitioner's 1988 Form CT-3 constituted a valid claim for refund. The form itself is one which clearly indicates that a refund is being sought and its heading leaves nothing to the imagination. Although the claim did not contain specific calculations of what comprised the credit sought as a refund, petitioner's records (specifically the 1987 Form CT-3 and attachments) on file with the Division certainly indicated the source of such claimed amounts. In addition, since the 1988 filing took place on September 15, 1989, the Division was placed on notice within the statutory time frame for filing a claim for refund for 1986. Although the Division questions whether a previous election to carry forward the credit can be revoked, the Division cites no authority for its position and I find no basis for holding that petitioner cannot now claim a refund. The Division will not be allowed to withhold its denial of petitioner's refund claim until the statute expires, suggest that it needed another form (an amended return) to perfect its right and then deny the same as untimely. Any other result would certainly be a grave injustice and violate petitioner's due process rights" (Determination, conclusion of law "H").

Petitioner excepted to that portion of the Administrative Law Judge's determination concerning the unused 1985 credit. The Division filed an exception to that portion of the Administrative Law Judge's determination concerning the unused 1986 credit.

Initially, we deal with petitioner's assertion that the Division's exception was not timely filed with the Tax Appeals Tribunal (hereinafter the "Tribunal").

Tax Law § 2006(7) provides, in part, that the Tribunal shall:

> "provide for a review of the determination of an administrative law judge if any party to a proceeding conducted before such administrative law judge, within thirty days after the giving of notice of such determination, takes exception to the determination."

The Tribunal's regulations provide, in pertinent part, that:

> "[w]ithin 30 days after the giving of notice of the determination of an administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal by filing an exception with the secretary.
>
> * * *
>
> "A copy of the exception shall be served at the same time on the other party" (20 NYCRR 3000.11[a][1]).

The Tribunal may grant an extension of time to file an exception, if the request is made within the 30-day period (Tax Law § 2006[7]; 20 NYCRR 3000.11[a][2]). An exception received by the Tribunal after the date it was due is deemed to be filed on the date of the United States postmark stamped on the envelope (20 NYCRR 3000.16).

In its brief on exception, petitioner asserts that filing of the exception was not accomplished in accordance with the Tribunal's regulations, 20 NYCRR 3000.17(e), since delivery of the exception was not made "during business hours (of the Tribunal) to its Troy offices." Petitioner also asserts that the mailed exception was untimely because the postmark on the envelope is illegible.

With reference to the mailed exception, the Division asserts that the envelope was postmarked by the United States Postal Service. Specifically, that on October 20, 1993, the Division's representative:

> "hand carried the subject Notice of Exception to the United States Postal Service facility located at the Albany County Airport. There, a postal service employee weighed the envelope containing the Notice, and determined that the postage amount required for first class mailing of the document was 52 cents. The same employee then affixed this amount of postage to the envelope, by means of the postage machine that is used by the Airport Postal Service facility for such purpose. Because the ink imprint on this postage label was very faint, the postmark date of 'OCT 20 93' was traced over by hand in order to make it easily readable. The postmarked envelope was left with the postal service employee for delivery through the mail to the Division of Tax Appeals.
>
> "It can thus be seen that the postmark on the Division's Notice of Exception was <u>not</u> placed there by the Law Bureau.[3] Rather, it was affixed

---

[3] Indeed, the Law Bureau does not have a postage meter of its own. Mail sent from the Law Bureau is ordinarily processed through the main mailroom for the Tax Department. Such mail is frequently postmarked one or more days after it leaves the Law Bureau, and is imprinted with the type of postage mark shown on Exhibits C, D, and G

> by the employee of the U.S. Postal Service into whose care the document was delivered. As such, this postmark constitutes a 'date stamped by the United States Postal Service' in the manner specified by Section 3000.16(a)(2)(iii) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR §3000.16(a)(2)(iii)).[4]
>
> "Since the document bearing this date stamp was addressed in accordance with the provisions of 20 NYCRR §3000.16(a)(2)(i), and was also deposited in the mail of the United States in compliance with the provisions of 20 NYCRR §3000.16(a)(2)(ii), it is entitled to the filing date granted by 20 NYCRR §3000.16(a)(1)" (Division's brief, pp. 25-27).

In the alternative, again with reference to the mailed exception, the Division asserts that even if the postmark was not made by the Postal Service, it was still received within the time allowed under the Tribunal's regulations.

The Division's brief is supported by an affidavit from the Division's representative which states, in relevant part, as follows:

> "8. On October 20, 1993, I hand carried the envelope containing the Division's Notice of Exception to the United States Postal Service facility located at the Albany County Airport.
>
> "9. While I was at that facility, a postal service employee weighed the envelope containing the Notice, and determined that the postage amount required for first class mailing of the enclosed document was 52 cents. The same
>
> employee then affixed this amount of postage to the envelope, by using a postage machine that is employed by the Airport Postal Service facility for such purpose. Because the ink imprint on this postage label was very faint, the postmark date of 'OCT 20 93' was traced over by hand in order to make it easily readable.
>
> "10. I left the postmarked envelope containing the Division's Notice of Exception with the postal service employee, for delivery through the mail to the Division of Tax Appeals.
>
> "11. In the above manner, the Division's Notice of Exception was delivered to the U.S. Postal Service and marked with a U.S. postmark on

---

attached to petitioner's brief. Because of this possible delay created by the Department's mailroom, the Notice of Exception herein was brought directly to the Post Office for mailing.

[4] It should also be noted that the Department's postage machine imprint (shown in Exhibits C, D, and G attached to petitioner's brief) does not contain the letters "US" and "PS" on the left and right side of the date, respectively, as is the case for the imprints made by the machine used by the Airport postal facility (which imprint is shown on Exhibits A, E, and F.)

> October 20, 1993. In accordance with the provisions of 20 NYCRR §3000.16(a)(1), the document was therefore filed on the date it was due.
>
> "12. Because of the fact that the postmark for this mailing was not entirely legible, the Division's Notice of Exception was also hand delivered on October 20, 1993 to the Riverfront Professional Tower, located at 500 Federal Street in Troy, New York, which building houses the offices of the Division of Tax Appeals. 20 NYCRR §3000.16(e)(1) allows for filing of Notices of Exception by delivering them during business hours to the Troy offices of the Division of Tax Appeals" (Division's Affidavit, ¶¶ 8-12).

We dismiss the Division's exception as untimely.

The Tribunal's mailing regulations, as relevant here, provide that the date of the United States postmark stamped on the envelope in which the Division's exception was contained will be deemed to be the date of filing and that if the postmark is not legible, the Division is required to prove when the postmark was made (20 NYCRR 3000.16[a][1]; 20 NYCRR 3000.16[a][2][iii]).

The mailed exception was in an envelope which the Division, in its brief and affidavit, states was "traced over by hand in order to make it easily readable." At oral argument before this Tribunal, the Division's representative stated that the tracing was done by the Division's representative.[5]

---

[5]The following colloquy took place at oral argument:

> "COMMISSIONER DUGAN: What's the reference in your brief about the tracing on Page 26? It's [sic] says, Part 3, which begins on 25 of the brief in response on the timeliness issue, get to Page 26, and, 'Because the ink imprint on his postage label was very faint the postmarked date of October 20, '93 was traced over by hand in order to make it easily readable.' The implication of that sentence, if you relate it to the prior two sentences, is that that was done by a postal service employee?
>
> "MR. DELLA PORTA: No, that implication would be wrong.
>
> "COMMISSIONER DUGAN: That would be wrong?
>
> "MR. DELLA PORTA: Yes.
>
> "COMMISSIONER DUGAN: Who did it?
>
> "MR. DELLA PORTA: Mr. Jarvis. I'm advised he did it at the post office after it was postmarked. I'm not sure that it matters whether it was the postal employee that would have corrected it or Mr. Jarvis, but the point is before then it did have the postmark of the 20th on it and that they were only trying to highlight that fact and, again, if you believe that somehow its been altered, you'd have to assume that Mr. Jarvis knew that he was going to get a faded postmark when he went to the post office, so it could be altered, which, I submit, is just implausible.

The issue is whether this "traced postmark" serves to indicate the time of mailing as contemplated by the Tribunal in its regulations. We conclude that the tracing makes the postmark illegible such that it does not serve the purpose of our regulations (see, Menard, Inc. v. Commissioner, T.C. Memo 1981-182, 41 TCM 1279). Any other conclusion on our part would be the result of mere conjecture, an exercise we deem wholly inappropriate here (see, August v. Commissioner, 54 T.C. 1535). Since the postmark is not evidence of the date of mailing, we look, therefore, to the other evidence offered by the Division to prove when the postmark was made (20 NYCRR 3000.16[a][2][iii]).

When addressing a proof of mailing issue, the party, here the Division, may prove the fact and date of mailing by establishing the use of a standard mailing procedure for the document, by a person with knowledge of such procedure, and by introducing the evidence that this procedure was used in connection with the mailing of the document (see, Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 USTC ¶ 9533).

The only evidence submitted by the Division is the affidavit which supports the brief, both of which merely assert that it was mailed timely. This proof is wholly insufficient. The Division's alternative argument, i.e., that even if the postmark was made by the Division, the exception is timely because it was received within the ordinary mailing time (citing 20 NYCRR 3000.16[b][i][ii]) is without merit because we do not have a legible postmark date within the prescribed period for the filing of the exception.

"I'd like to get to the merits of the Division's --

"COMMISSIONER DUGAN: You wouldn't know if it was faded unless you could look beyond the ink, let's let it go at that" (Oral Argument Tr., pp. 5-6).

With regard to the exception, which the Division asserts was hand delivered, we find no evidence to show that it was timely filed with the Tribunal during normal business hours of October 20, 1993 as required by our regulations. In short, it was found on the lobby floor on the morning of October 21, 1993.

We deal next with petitioner's exception.

The Administrative Law Judge dealt fully and correctly with the clear and unambiguous language of section 210(17)(b) and the 1991 amendment to Tax Law § 1086(a). We affirm her determination for the reasons stated therein. In short, the unused 1985 credit cannot, by statute, be carried over into 1986.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is dismissed;

2. The exception of Capital Financial Corp. is denied;

3. The determination of the Administrative Law Judge is affirmed; and

4. The petition of Capital Financial Corp. is denied except to the extent indicated in conclusion of law "I" of the Administrative Law Judge's determination, and the denial of petitioner's refund claim is sustained except to the extent indicated in conclusion of law "I" of the Administrative Law Judge's determination.

DATED: Troy, New York
December 29, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner