STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
COLTEC INDUSTRIES, INC.	:	DECISION DTA NO. 825211
For Revision of a Determination or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 2008.	:	

Petitioner, Coltec Industries, Inc., filed an exception to the determination of the Administrative Law Judge issued on December 31, 2014. Petitioner appeared by Bousquet Holstein, PLLC (Philip S. Bousquet, Esq., and Paul M. Predmore, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was granted at petitioner's request, but such request was subsequently withdrawn. The six-month period for the issuance of this decision began on September 21, 2015, the date petitioner withdrew its request for oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether certain costs, deducted as expenses by petitioner pursuant to an election under Internal Revenue Code (26 USCA) § 198, are properly includible in the site preparation credit component of the brownfield redevelopment tax credit under Tax Law § 21.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 10 and 11 to more fully reflect the record. As so modified, the Administrative Law Judge's findings of fact appear below. We note that the parties stipulated to the facts herein.

1. Petitioner is a Pennsylvania corporation authorized to do business in the State of New York.

2. Petitioner is the sole member of Garlock Sealing Technologies LLC (Garlock), a single-member limited liability company that manufactures industrial seals and sealing components.

3. Garlock and the New York State Department of Environmental Conservation (DEC) entered into a brownfield site cleanup agreement for remediation of a brownfield site located in Palmyra, New York, and described as the Gylon site.

4. On December 31, 2008, the DEC issued a certificate of completion to Garlock for completing the remedial program at the Gylon site.

5. On December 15, 2009, petitioner filed form CT-3-A, general business corporation combined franchise tax return, for the 2008 tax year. Included with form CT-3-A was form CT-611, claim for brownfield redevelopment tax credit. As the sole member of Garlock, a disregarded entity for federal and state tax purposes, petitioner claimed a brownfield redevelopment tax credit for costs Garlock incurred as part of Garlock's remediation of the Gylon site.

6. The Division requested information to verify petitioner's claim for a brownfield redevelopment tax credit.

7. Provided with petitioner's January 18, 2011 response to the Division's requests was an amended form CT-611 for the 2008 tax year.

8. On the amended 2008 form CT-611, petitioner claimed $2,700,706.00 in brownfield redevelopment tax credits, comprised of a site preparation credit component of $813,921.00 and a tangible property credit component of $1,886,785.00.

	Cost(s) or other basis	Credit component
Site preparation	$ 6,782,677.00	$ 813,921.00
Tangible property	$15,723,205.00	$1,886,785.00
Total		$2,700,706.00

9. The tangible property credit component is not at issue in this matter. The Division allowed, and petitioner agrees, that it is only entitled to $1,588,913.00 of the tangible property credit component for the 2008 tax year.

10. Petitioner deducted the costs that comprised the site preparation credit component on line 26, other deductions, of its 2007 and 2008 forms 1120 in accordance with Internal Revenue Code (IRC) (26 USCA) § 198, then in effect.[1]

11. By letter dated October 25, 2011, the Division disallowed in full the site preparation credit component claimed by petitioner.

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[1] IRC (26 USCA) § 198 (a) provides as follows:

"A taxpayer may elect to treat any qualified environmental remediation expenditure which is paid or incurred by the taxpayer as an expense which is not chargeable to capital account. Any expenditure which is so treated shall be allowed as a deduction for the taxable year in which it is paid or incurred."

IRC (26 USCA) § 198 (b) (1) (A) defines "qualified environmental remediation expenditure," in relevant part, as any expenditure "which is otherwise chargeable to capital account."

12. On or about August 30, 2012, petitioner timely filed a petition with the Division of Tax Appeals. The Division timely filed its answer to the petition and served it on petitioner by letter dated November 14, 2012.

13. The amount of the site preparation credit component has been recomputed by the Division as if the credit was allowed. The computation of the site preparation credit component for the 2008 tax year is not at issue in this matter. Petitioner accepts the site preparation credit component amount as recomputed by the Division on an "as if allowed" basis, i.e., costs in the amount of $5,627,970.00, of which the credit component is $675,356.00.

14. If it is determined that petitioner is entitled to the site preparation credit component of the brownfield redevelopment tax credit for the 2008 tax year for costs that Garlock incurred as part of Garlock's remediation of the Gylon site, then petitioner and the Division agree that a refund of $675,356.00 is due. No interest is payable thereon.

15. Petitioner and the Division agree that their stipulation of facts, together with the exhibits attached thereto, comprise the complete evidence record for the rendering of a determination and decision in this matter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the legislative history and statutes relevant to the brownfield redevelopment tax credit, including the site preparation credit component at issue. The Administrative Law Judge noted that the dispute in the present matter centers on the meaning of the phrase "properly chargeable to a capital account" as used in the definition of "site preparation costs" in Tax Law § 21 (b) (2). She further noted that petitioner elected to expense the costs that comprise the site preparation component of its claim pursuant to IRC (26 USCA)

§ 198. The Administrative Law Judge concluded that, as a result of such election, petitioner's site preparation costs were not "properly chargeable to a capital account" and were, therefore, ineligible for the credit. The Administrative Law Judge determined that this interpretation of Tax Law § 21 was consistent with other credit provisions in the Tax Law. She also found a lack of legislative intent for the combined tax credit and expense deduction that results from petitioner's interpretation.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the issue presented is one of pure statutory construction and that the Administrative Law Judge misconstrued the phrase "chargeable to a capital account" as used in Tax Law § 21 (b) (2). Petitioner argues that the ordinary meaning of this phrase is not "actually charged" to a capital account as the determination effectively holds, but rather "capable of being charged" to such an account. As the costs at issue were capable of being charged to a capital account but for its IRC (26 USCA) § 198 election, petitioner asserts that such costs qualified as site preparation costs under the statute and, accordingly, its tax credit claim should be granted.

Petitioner also contends that the determination failed to consider the remedial nature of the brownfield redevelopment tax credit. Petitioner asserts that remedial statutes must be construed in favor of the intended beneficiaries.

Petitioner argues that its interpretation is consistent with the meaning of "chargeable" as used in various provisions of the Internal Revenue Code and Treasury regulations. Petitioner also contends that its interpretation is in harmony with the statutory language used in other tax credit provisions in the Tax Law.

Petitioner thus contends that its interpretation of the statute at issue is the only reasonable interpretation.

The Division argues that the costs in question were not "properly chargeable to a capital account" because petitioner elected to treat such costs as deductible expenses. Accordingly, the Division argues, the costs in question did not meet the statutory definition of site preparation costs. The Division contends that the language of IRC (26 USCA) § 198 supports its position that the costs in question were not chargeable to a capital account. The Division also asserts that there is nothing in the legislative history of the brownfield cleanup program to support petitioner's position that taxpayers may receive both a credit for site preparation costs and a full deduction of the same costs as expenses. Additionally, the Division argues that a subsequent amendment to the tangible property credit component of the brownfield redevelopment credit scheme further supports its interpretation that site preparation costs must be capitalized to qualify for credit. The Division also argues that its interpretation herein renders the site preparation component consistent with other credits in the Tax Law that require costs to be capitalized in order to obtain a tax credit.

OPINION

Enacted in 2003, the Brownfield Cleanup Program seeks to encourage the remediation and redevelopment of hazardous waste sites, or brownfields, in New York State. Codified as Title 14 of the Environmental Conservation Law (ECL) (***see*** ECL §§ 27-1401 to 27-1431), the program creates a statutory framework designed to facilitate private investment in the cleanup of such sites.

Tax Law § 21, the brownfield redevelopment tax credit, was enacted as part of the Brownfield Cleanup Program legislation. The credit is intended to further encourage private participation in the program by offsetting costs associated with, among other things, site preparation, water treatment expenses, and property improvements (***see*** Division of Budget Report [at pp 20, 39], Legislative Bill Jacket, L 2003 c 1). The credit is allowed with respect to qualified sites[2] and consists of three discrete components: the site preparation credit component (Tax Law § 21 [a] [2]); the tangible property credit component (Tax Law § 21 [a] [3]); and the on-site groundwater remediation credit component (Tax Law § 21 [a] [4]). The present matter involves a denial of the site preparation component of petitioner's brownfield redevelopment tax credit claim.

As relevant here, the site preparation credit component is "the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site" (Tax Law § 21 [a] [2]). During the year at issue, site preparation costs were defined in Tax Law § 21 (b) (2), in pertinent part, as follows:

> "*all amounts properly chargeable to a capital account*, (i) which are paid or incurred in connection with a site's qualification for a certificate of completion, and (ii) all other site preparation costs paid or incurred in connection with preparing a site for the erection of a building or a component of a building, or otherwise to establish a site as usable for its industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes (emphasis added)."[3]

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[2] Tax Law § 21 (b) (1) defines a qualified site as a site for which a certificate of completion has been issued to the taxpayer by the Commissioner of Environmental Conservation pursuant to ECL § 27-1419. The site with respect to which petitioner claimed the credit at issue was such a qualified site (***see*** finding of fact 4).

[3] Tax Law § 21 (b) (2) was amended by L 2015 c 56. The phrase "all amounts properly chargeable to a capital account" was not changed and remains intact in this provision, as revised. Accordingly, as the portion of the statute relevant to the dispute herein has not been amended, references to Tax Law § 21 (b) (2) in this decision are not designated as "former."

As noted, the Division contends that the costs upon which petitioner's claim was based were not properly chargeable to a capital account within the meaning of Tax Law § 21 (b) (2) because such costs were not actually charged to such an account, but were treated as expenses and deducted accordingly. Petitioner takes the position that such costs were properly chargeable to a capital account and petitioner's election to treat such costs as expenses pursuant to IRC (26 USCA) § 198 does not affect the capital character of the costs.

The resolution of this matter thus depends upon the meaning of "properly chargeable to a capital account" as used in Tax Law § 21 (b) (2). This is a matter of statutory interpretation, the purpose of which is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. of City of N.Y. v City of New York***, 41 NY2d 205 [1976] ***citing Matter of Petterson v Daystrom Corp.***, 17 NY2d 32 [1966]). The language of the statute is the clearest evidence of such intent (McKinney's Cons Laws of NY, Book 1, Statutes § 51 [d]). Where no ambiguity exists, "the court should construe it so as to give effect to the plain meaning of the words used" (***Patrolmen's Benevolent Assn. of City of N.Y.*** 41 NY2d at 208). Ultimately, proper statutory construction focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]" (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244, 245 [1994], ***cert denied*** 513 US 811 [1994]).

With respect to tax credit statutes in particular, we note that such provisions are similar to, and should be construed in the same manner as, statutes creating tax exemptions (***see Matter of Piccolo v New York State Tax Appeals Trib***., 108 AD3d 107 [2013]). That is, such statutes must be strictly construed against the taxpayer (***see e.g. Matter of 677 New Loudon Corp. v State***

of NY. Tax Appeals Trib., 19 NY3d 1058 [2012], ***cert denied*** 134 S Ct 422 [2013]). Petitioner has the burden to establish "a clearcut entitlement" to the statutory benefit (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216, 219 [1992]). Indeed, petitioner must prove that the Division's interpretation is irrational and that its interpretation of the statute is the only reasonable construction (***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247 [2007], ***lv denied*** 10 NY3d 706 [2008]). Nevertheless, construction of an exemption or credit statute should not be so narrow as to defeat the provision's settled purpose (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 196 [1975], ***lv denied*** 338 NE2d 330 [1975]).

We find that petitioner has not met its burden. To the contrary, considering that the subject costs were treated as expenses, the Division's position is plainly consistent with the ordinary meaning of chargeable.

As petitioner correctly notes, chargeable means "*capable of* being charged" (***see*** http://www.merriam-webster.com/dictionary/-able [definition of suffix "-able"]). Accordingly, while the subject costs may have been "capable of being charged" to a capital account at the time they were paid, once petitioner made its election under IRC (26 USCA) § 198 to expense such costs, they were no longer "properly chargeable to a capital account." At that point, the costs in question became ineligible for the site preparation credit as they no longer fell within the statutory definition of site preparation costs under Tax Law § 21 (b) (2).

We find strong support for this interpretation in the 2015 amendment to Tax Law § 21 (a) (3-a) (A) (L 2015 c 56). As relevant here, that provision caps the credit available with respect to

the tangible property component of the brownfield redevelopment tax credit at the following amounts:

> "thirty-five million dollars or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation component . . . *and the costs that would have been included in the calculation of such components if not treated as an expense and deducted pursuant to section one hundred ninety-eight of the internal revenue code*, whichever is less . . . (emphasis added)."

The italicized language was added to Tax Law § 21 (a) (3-a) (A) in the 2015 amendment.

It is a fundamental rule of statutory construction that a "statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Law of NY, Book 1, Statutes § 97). Furthermore, a statute and an amendment thereto must be construed together; indeed, for interpretive purposes, the amendment and the statute "must be viewed as one law passed at the same time" (McKinney's Cons Law of NY, Book 1, Statutes § 192).

Reading Tax Law § 21 (a) (3-a) (A), as amended, in conjunction with Tax Law § 21 (b) (2) pursuant to the foregoing principles makes clear that the interpretation of Tax Law § 21 (b) (2) adopted herein is in harmony with Tax Law § 21 (a) (3-a) (A), as amended, while petitioner's interpretation is not. Indeed, if petitioner's construction of Tax Law § 21 (b) (2) is correct, then the 2015 amendment to Tax Law § 21 (a) (3-a) (A) is unneeded. That is, if costs expensed under IRC (26 USCA) § 198 are includible in the site preparation component, as petitioner asserts, there would be no reason for the 2015 amendment. A construction that renders statutory language superfluous is to be avoided (***Matter of Branford House v Michetti***, 81 NY2d 681, 688 [1993]).[4]

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[4] Nor can it reasonably be argued that the 2015 amendment to Tax Law § 21 (a) (3-a) (A) implicitly changed the meaning of "all amounts properly chargeable to a capital account" in Tax Law § 21 (b) (2). Such a "repeal by implication" is "distinctly not favored in the law" (***Alweis v Evans***, 69 NY2d 199, 204 [1987]).

Petitioner cites various federal provisions (***e.g.***, IRC [26 USCA] § 198 [b] [1] [A], Treas. Reg. [26 CFR] § 1.150-1 [b]) to support its contention that "properly chargeable to a capital account" as used in Tax Law § 21 (b) (2) refers to the character of the cost, which is determined at the time the cost is paid. According to petitioner, if a cost is capital in character, such character does not change even if such cost is subsequently treated as an expense for tax purposes. While, prior to the 2015 amendment to Tax Law § 21 (a) (3-a) (A), this may have seemed a reasonable construction of Tax Law § 21 (b) (2), such amendment brought the Legislature's intent with respect to the brownfield redevelopment tax credit into sharper focus and made clear that petitioner's construction is untenable. As discussed, "properly chargeable to a capital account" for purposes of Tax Law § 21 (b) (2) refers to the treatment of the cost, not its character.

As to petitioner's argument that we should construe the statute in its favor considering the remedial purpose of the Brownfield Cleanup Program, we note that we are compelled to adhere to the statutory language.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Coltec Industries, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Coltec Industries, Inc. is denied; and

4. The Division of Taxation's denial of petitioner's claim for credit, dated October 25, 2011, is sustained.

DATED: Albany, New York
March 18, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner