STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CAPITAL FINANCIAL CORP.	:	DETERMINATION 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, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1988.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 7, 1993 at 1:15 P.M., with all briefs to be submitted by August 20, 1993. Petitioner appeared by Robert J. DeLasho, Esq., who submitted a brief on behalf of petitioner simultaneous with the conclusion of the hearing on June 7, 1993. The Division of Taxation, appearing by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel), submitted no brief. A request by petitioner's representative to close the record in this matter was received by the Division of Tax Appeals on August 5, 1993. On August 6, 1993, the Administrative Law Judge herein granted petitioner's request.

ISSUE

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.

FINDINGS OF FACT

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 calculated at 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.

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[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.

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."

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

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

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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that the Division had actual notice of petitioner's claims to the unused

credit of which it sought a refund and that such notice played a key role in overcoming what may have existed as a technical defect in the filing documents. Petitioner asserts that Tax Law § 210(17) is unconstitutional and was never intended to deprive taxpayers of claims for overpayment of taxes without due process. Petitioner believes that the Division unconstitutionally deprived it of its property without due process by virtue of not providing a retroactive remedy to obtain its overpayment of taxes.

Petitioner suggests that a 1991 amendment to Tax Law § 1086(a) governing the refund procedure effectively eliminated the unconstitutional deprivation of the taxpayer's property without due process by affording the taxpayer an opportunity to make its claim for refund and avoid the loss of its property rights. Citing pertinent authority, petitioner maintains that the amendment to Tax Law § 1086(a) should be applied retroactively.

The Division supports the position set forth in the denial letter of September 7, 1990 regarding the 1985 carryforward of $119,906.00 and concludes that such unused tax credit is permanently lost. Regarding 1986, the Division questions whether the original "election" to carry forward the unused special additional mortgage recording tax credit can be revoked by the decision to later claim a refund. The Division also asserts that Form CT-43.1 filed for 1988 was effective only to claim a refund for a credit generated by tax paid in that tax year. The Division argues that the 1988 CT-43.1 was ineffective to claim a refund of any of the prior carryforward amounts and since petitioner's amended 1986 Form CT-3 and CT-43.1 were not filed until June 19, 1991, after the statutory time period, petitioner's claim for refund for 1986 must also be denied.

CONCLUSIONS OF LAW

A. Prior to its amendment in 1986, Tax Law § 210(17) allowed a credit against franchise tax imposed by Article 9-A, equal to the amount of the additional mortgage recording tax paid by a taxpayer pursuant to Article 11 and Tax Law § 253(1-a), on mortgages recorded on and after January 1, 1979. If, as a result of the imposition of the "floor" on deductibility, there was any portion of the credit not deductible, it could be carried over to the following year or years and

could be deducted from the taxpayer's liability for such periods.

B. Chapter 638 of the Laws of 1986, effective July 26, 1986, made certain changes to the special additional mortgage recording tax imposed by Article 11 and its related provisions. The amendment of concern herein is that which provides certain instances when a taxpayer may elect to treat unused, i.e., carried forward, special additional mortgage recording tax credits as an overpayment of tax to be credited or refunded in accordance with Tax Law § 1086. The changes pertinent to this inquiry are noted in the following statutory language:

> "in the case of any such credit attributable to special additional mortgage recording tax which is due and paid in any taxable year beginning before January first, nineteen hundred eighty-six, pursuant to the provisions of subdivision one-a of section two hundred fifty-three of this chapter, with respect to a mortgage of real property . . . [applicable herein], such credit shall not be carried over to taxable years beginning on or after January first, nineteen hundred eighty-six. For taxable years beginning on or after such date, and before January first, nineteen hundred ninety, in lieu of carrying over, to the following year or years, the unused portion of credits attributable to special additional mortgage recording tax with respect to such mortgages, the taxpayer may elect to treat such unused portion as an overpayment of tax to be credited or refunded in accordance with the provisions of section ten hundred eighty-six of this chapter . . ." (Tax Law § 210[17][b]; emphasis supplied).

C. For purposes of guidance, the Technical Services Bureau of the Department of Taxation and Finance issued in December 1986, TSB-M-86(9)C entitled "Refundable Special Additional Mortgage Recording Tax Credit" which in part, provided the following direction:

> "The amended section 210.17(b) provides that any credit attributable to the special additional mortgage recording tax . . . which is due and paid in any taxable year beginning before January 1, 1986, shall not be carried over to taxable years beginning on or after January 1, 1986.
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> "For taxable years beginning on or after January 1, 1986, and before January 1, 1990, in lieu of carrying over, to the following year or years, the unused portion of credits attributable to special additional mortgage recording tax . . ., the taxpayer may elect to treat such unused portion as an overpayment of tax to be credited or refunded in accordance with section 1086 of Article 27 of the Tax Law . . . .
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> "Thus, if any special additional mortgage recording tax . . . 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. Any credit or carryover of credit relating to the special additional mortgage recording tax . . . which is due and paid in any taxable period beginning on or after January 1, 1986 and before January 1, 1990 may, at the election of the taxpayer, in lieu of carryover of unused portions of such credit, be credited or refunded to the taxpayer, without interest."

The Tax Appeals Tribunal recognizes that the issuance of a Technical Services Bureau Memorandum is sufficient to announce the Division's change in policy. In a case where there was no amendment of the Tax Law, but rather a change in a long-standing policy of the Division (to be consistent with the existing law) (Matter of Friesch-Groningsche Hypotheek Bank Realty Credit Corp., December 28, 1990, confirmed 185 AD2d 466, 585 NYS2d 867, lv denied 80 NY2d 761; see generally, Matter of USAir, Inc., Tax Appeals Tribunal, January 9, 1992), the Tribunal found that the memorandum "performed the basic function of advising taxpayers" of a given change.

D. With respect to petitioner's claim for the credit attributable to 1985, there are two issues raised by petitioner: whether the amendment to the Tax Law resulted in the deprivation of a property right, and whether such loss can be cured by retroactive application of a procedural change to the overpayment provision (Tax Law § 1086), such that a refund of the 1985 credit is obtainable despite the statutory change to section 210(17).

When petitioner filed its 1985 corporate franchise tax return, it placed the Division on notice that it had entitlement to the credit in question, and that after its application of a portion of such credit to its then current tax liability, petitioner calculated the unused portion and handled the credit in the only tax beneficial manner allowed by law at that time: as a carryforward. Thereafter, the law was amended and eliminated the carryforward provision for tax years beginning prior to January 1, 1986. Petitioner claims this was a deprivation of a property without due process.

The credit was a creature of the Legislature enacted to provide a benefit for those Article 9-A corporations that were required to pay the special additional mortgage recording tax under Article 11, by virtue of their business operations. If an overpayment of such Article 11 taxes had been made, refund provisions under such Article would apply (see generally, Tax Law Article 11). The credit was not generated by nor indicative of an overpayment of taxes by petitioner in which petitioner had a vested entitlement. This view is supported by the amendment language of section 210(17) where it states that the taxpayer "may elect to treat such

unused portion [of the credit] as an overpayment of tax to be credited or refunded . . . ." I disagree with petitioner's classification of the refund sought as a claim for "overpayment of taxes" and its assertion that petitioner is being deprived of a property right in such overpayment. The fact that the credit was no longer tax beneficial to petitioner was unfortunate, however, there was no deprivation of a property right.

Thus, in determining whether the credit for 1985 was eligible for refund or some alternative treatment, the legislative intent of the statute must be determined from the language in its most natural and ordinary sense (McKinney's Cons Laws of NY, Book 1, Statutes § 232). As to the fact that the tax benefit from the unused portion is permanently lost, amended Tax Law § 210(17) is unambiguous, as is the memorandum issued for further guidance. Thus, such amendment is properly applied and will support a finding that petitioner's claim for refund of the unused credit generated in 1985 in the amount of $119,906.00 should be denied absent a determination that the amendment to section 1086, if given retroactive status, revives petitioner's right to a refund of such credit.

E. Petitioner maintains that a 1991 amendment to Tax Law § 1086(a) governing the refund procedure should be retroactively applied to counter the deprivation of petitioner's loss of rights in the total refund claimed. Prior to its amendment in 1991, Tax Law § 1086 provided, in pertinent part, that the Division can take the following action:

> "may credit an overpayment of tax and interest on such overpayment against any liability in respect of any tax imposed by the tax law on the taxpayer who made the overpayment, and the balance shall be refunded by the comptroller out of the proceeds of the tax retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return . . ." (Tax Law former § 1086[a]).

The additional language of section 1086 was provided by chapter 166 of the Laws of 1991 as reproduced below:

> "Provided, however, in the case of any overpayment claimed on a return or report, such refund shall be made only if application therefor is made on such return or report. In the absence of such application, the amount of such overpayment with respect to any taxable year shall be credited against, and considered as, a payment of tax liability with respect to such tax for the succeeding taxable year shall be credited against the estimated tax, if any, for such year (whether or not claimed as a credit in the declaration of estimated tax for such succeeding taxable year). The

> commissioner shall notify the taxpayer that such overpayment has been so credited, and the taxpayer may, prior to the due date (without regard to extensions) of the taxpayer's return or report for such succeeding taxable year, claim a refund of such overpayment."

Petitioner asserts that by its amendment, the Legislature opened the door for taxpayers to avoid a forfeiture of funds by allowing the taxpayer an opportunity to assert its claim for refund following a written notice from the Comptroller. Though the provision retained a statutory limitation for asserting an overpayment claim, petitioner maintains that the amendment provided a constitutionally complying procedure which filled the procedural fault in the existing section 1086(a). I do not share petitioner's assessment of the legislative purpose. Under section 1086 prior to its amendment, taxpayers who failed to designate on their tax returns the application to refund or credit a tax overpayment automatically received a refund. In the case of a corporation which assumed the overpayment was being applied to the subsequent period's estimated taxes, such a policy resulted in a penalty for underpayment of estimated taxes. Under the amended provision, the failure to designate whether the overpayment should be refunded or credited to the next period will result in a credit rather than a refund. The Division must notify the taxpayer of the same and the taxpayer may then file for a refund within a prescribed time frame. The shift from a refund to a credit forward option was expected to generate $5 million during 1991 and 1992, offset by future year reductions (Memorandum in Support of Bill No. S2961). The legislative intent was not to cure a constitutional deprivation and I find no further basis to consider its retroactive application.

F. In a slightly different light, petitioner contends that Tax Law § 210(17) is unconstitutional on its face. The jurisdiction of the Division of Tax Appeals and the Tax Appeals Tribunal, as prescribed in its enabling legislation, does not encompass challenges to the constitutionality of a statute on its face (Matter of Brussel, Tax Appeals Tribunal, June 25, 1992; Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989). At this level of administrative review, it is presumed that statutes are constitutional. Further, petitioner has not presented any evidence to show that such section of the Tax Law was unconstitutionally applied.

G. Petitioner vigorously asserted that the Division had actual notice of petitioner's claim

to the unused credit amounts, which it sought to be refunded. By virtue of the documentation submitted as well as the testimony of petitioner's certified public accountant, petitioner clearly established that it had apprised the Division of the existence of such unused credits. Whether petitioner filed a valid claim for refund will be discussed in conjunction with a body of Federal case law which generally holds that there are circumstances under which a taxpayer's informal claim for refund may be sufficient to meet the jurisdictional prerequisite for a timely-filed claim for refund. The most instructive of these cases are briefly summarized below.

In United States v. Kales (314 US 186), the taxpayer, prior to the deadline for filing a formal refund claim, wrote a letter to the Commissioner advising him that if the Internal Revenue Service revised the valuation of certain stock she would insist on a higher valuation and would claim the right to a refund. The taxpayer subsequently filed a formal claim for refund. The Court held that the letter to the Commissioner constituted a valid, although informal, claim for refund. The Court stated:

> "a notice fairly advising the Commissioner of the nature of the taxpayer's claims, which the Commissioner could reject because too general or because it does not comply with the formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period (citations omitted)" (United States v. Kales, supra at 194).

A second case holding that an informal claim for refund may, under some circumstances, stop the running of the statute of limitations on refund claims is American Radiator & Standard Sanitary Corp. v. United States (318 F2d 915). On the subject of informal claims, the American Radiator Court stated:

> "Informal refund claims have long been held valid. (Citations omitted.) But they must have a written component and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years. (Citations omitted.) . . . [T]he writing should not be given a crabbed or literal reading, ignoring all the surrounding circumstances which give it body and content. The focus is on the claim as a whole, not merely the written component. (Citations omitted.) In addition to the writing, and some form of request for a refund, the only essential is that there be made available sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim" (American Radiator & Standard Sanitary Corp. v. United States, supra at 920).

The American Radiator Court found that notations and schedules attached to the

taxpayer's returns satisfied the requirement that there be a written component to the informal claim. It also found that the requirement that the Internal Revenue Service be adequately apprised of the basis for the taxpayer's claim was met by very specific knowledge gained by a revenue agent in auditing the taxpayer's returns over the period involved. Most significantly, the court found that the agent's audit and report were completed before the expiration of the statute, that his report reflected his recognition that the taxpayer affirmatively anticipated such refunds, and that the agent's computations for later years were affected by his acceptance of these anticipated refunds (American Radiator & Standard Sanitary Corp. v. United States, supra at 921).

The principles stated in the American Radiator opinion were reiterated in two Court of Claims cases, Wall Industries v. U.S. (86-1 US Tax Cas ¶ 9438 [Cl Ct]) and Furst v. U.S. (678 F2d 147). In both cases, the elements necessary to establish a valid informal claim for refund were said to be a written component and facts and circumstances which demonstrate that the Commissioner was on actual notice that a right was being asserted with respect to an overpayment of tax (Furst v. U.S., supra at 151). Addressing these points, the Wall opinion states:

> "While viewed as an appropriate substitute for the timely filed formal claim, the informal claim is nonetheless based on the same fundamental premise that 'notice' to the Commissioner must be provided that a claim for refund is being made, for a sum certain, for a particular taxable period and occurring within the applicable statutory period" (Wall Industries v. U.S., supra).

H. Based on the foregoing discussion, it is concluded that an informal statement may constitute a valid claim for refund or credit of tax under certain circumstances. While no explicit set of criteria has been identified in the cases, at a minimum, certain elements must be present. There must be a satisfactory written component asserting the claim for refund. Either the written component or additional facts and circumstances must provide evidence that the Division was on actual notice that an explicit claim for refund was being made for a definite amount and for a specified taxable period. Such notice must be received by the Division within the statutory period of limitation.

When weighed against this criteria, 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.

I. The Division's denial of petitioner's refund claim to the extent attributable to 1985 in the amount of $119,906.00 is sustained; otherwise the petition is granted pursuant to Conclusion of Law "H", and petitioner shall be entitled to a refund in the amount of $119,369.00 (attributable to 1986).

DATED: Troy, New York
August 20, 1993

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE