Testing the Reach of UCC Article 9: The Question of Tax Credit Collateral in Secured Transactions

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TESTING THE REACH OF UCC ARTICLE 9: THE QUESTION OF TAX CREDIT COLLATERAL IN SECURED TRANSACTIONS

By: Christopher K. Odinet*

INTRODUCTION

Whether you are a small, start-up business taking out your first loan or a large and sophisticated commercial borrower looking to engage in a complex transaction, most borrowers can expect that they will be required to post a certain level of security to the lender for their loans.1 While many lenders may be more willing to advance unsecured funds to borrowers who have valuable assets and large amounts of liquid capital than they would a start-up company with few assets and little to no profits, most borrowers will nonetheless be required to provide some level of collateral to secure their borrowed funds.2 The prudent lender wants to reduce the risk that the borrower will default and fail to repay the loan.3 In the event the borrower defaults, the lender wants to know that something of value—preferably equal to or greater than the value of the loan itself—can be quickly converted into cash to satisfy the debt.4 Thus, the availability of credit, and the ability to post collateral, have gone hand in hand since lending’s most early origins.5 In the financing world, what you get depends, in great part, on what you can give.

As the history of secured financing goes, the most traditional form of collateral was real property.6 The borrower would receive the funds and, in exchange, would grant a security interest in their land.7 This would typically come in the form of a conventional mortgage.8 Alternatively, or along with the mortgage, some lenders would also require that the borrower to grant a security interest in goods or other personal property as well.9 This category of collateral

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2 SANDRA SCHNITZER, STRUCTURING COMMERCIAL LOAN AGREEMENTS, Para. 5 (2d ed. 1990).
6 See COKE, EDWARD. COMMENTARIES ON THE LAWS OF ENGLAND. ("[I]f he doth not pay, then the Land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, . . . and if he doth pay the money, then the pledge is dead as to the Tenant.")
7 See generally id.
8 Id. See also ROBERT M. LLOYD, SECURED TRANSACTIONS (Matthew Bender 1988).
9 See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 24 (1965).
could include anything from farm equipment and cattle, to cars, boats, and planes.¹⁰ These more “movable” types of collateral were usually secured by a chattel mortgage and, in more recent times, a security interest pursuant to article 9 of the Uniform Commercial Code.¹¹

But as time has progressed, business parties have become more sophisticated in their transactions.¹² Deals—which before involved merely the lending of capital and the repayment of principal plus interest, all secured by personal and real property—have been surpassed by business imagination and innovative.¹³ No longer do individuals merely expect to make cash profits from their investments; they receive other forms of value as well.¹⁴ Specifically, individuals can expect to make investments, not only for a return of profit, but also for the receipt of valuable tax credits.¹⁵

The granting of tax credits to encourage individuals to engage in certain activities is a classic hallmark of tax policy in the United States.¹⁶ Individuals and companies with heavy tax

¹⁰ See generally DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY xxv (1987).
¹¹ See ROBERT L. JORDAN, WILLIAM D. WARREN, & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 12–13 (Foundation Press 2000).
¹⁴ SC county approves incentives for Amazon, SAN FRANCISCO CHRONICLE, Dec. 9, 2011; Gary Glancy, Commissioner to discuss economic incentives, BLUERIDGENOW, Dec. 8, 2011; Emily Schettler, IRL developer defends incentives, BOLTCOM says larger TIF discussion is needed, PRESS-CITIZEN.COM, Dec. 7, 2011; Scott Sloan, State incentives approved for expanding companies, HERALD-LEADER, Dec. 10, 2011; Kirsten Valle Pittman & Tim Funk McClatchy, In scramble for new jobs, states bid up incentives, KNOXVILLEBIZ.COM, Dec. 7, 2011; Lauren Pack, Retail developer seek millions in incentives from county, MIDDLETOWN JOURNAL, Dec. 8, 2011.
¹⁶ See Wendy C. Gerzog, On Public Policy Grounds, a Limited Tax Credit for Child Support and Alimony, 11 THE AMERICAN JOURNAL OF TAX POLICY 321 (1994); David T. Ellwood, The Impact of the
liabilities can use tax credits in order to reduce the amount they owe the government. Moreover, tax credits have become even more valuable as commercial lending and government policy has evolved to include programs that heavily incentivize certain activities and industries. Tax credits have become a way of not only reducing one’s tax liability, but also as a way to make a profit.

An investor who loans money or invests into a project which qualifies for certain tax credits can then take those tax credits and use them for the investor’s benefit or sell them on the market to a willing buyer. These investors and buyers use the credits as relief from their high-tax-bracketed liabilities. The ability for highly taxed groups to obtain relief, sometimes substantial, from their tax liabilities makes the holder of tax credits a powerful economic player in the commercial marketplace.

Government policymakers know the value of tax credits and, in turn, have created many different incentive programs whereby investors advance funds for certain projects which are deemed to be in the public good. In return, the investors receive valuable tax credits that can be traded and sold for a profit. Tax credit programs in the United States are as varied and diverse as the American commercial landscape itself. There are credits for purchasers of electric cars and hybrid vehicles, for producers of clean-fuels, new enhanced oil recovery projects, and oil and gas from marginal wells, refiners of low sulfur diesel fuel and fuel from nonconventional sources, inventors of energy efficient appliances, energy-producing equipment, and technology to produce electricity and synthetic gases from coal, biomass, and petroleum, as well as investors in low-income housing and projects in low-income communities. Whatever may be the government policy de jour, one can expect to see a tax credit produced to help push that policy along by giving an incentive to investors in choosing to put their money in this project, as opposed to another. And as long as individuals are looking

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18 IRC § 30 (2011).

19 IRC §30B (2011).

20 IRC § 30C (2011).

21 IRC § 43 (2011).


24 IRC § 45K (2011).


26 IRC § 48 (2011).


28 Id.

29 Id.

30 IRC § 42 (2011).

31 IRC § 45D (2011).

for ways to reduce their tax burden, tax credits will only become more and more valuable.\textsuperscript{33} With legislative bodies at both at the state and local levels continuously producing large quantities of tax credits in order to further their policies, the cash-flushed investor has a myriad of options to pick from when determining which project is worth the investment (and which will produce the most credits).\textsuperscript{34}

Lenders are also wise to the rush by individuals and corporations toward tax credit investments.\textsuperscript{35} An investor might borrower money from a financial institution in order to make an investment in a certain business that intends to undertake a project that qualifies to receive substantial tax credits. The business will receive profits from the success of the project, and, in turn will transfer the tax credits it receives to the investor as repayment. Traditionally the financial institution would require that the typical collateral be posted to secure the loan.\textsuperscript{36} This could include real property, the goods and equipment of the investor, and the investor’s deposit accounts and accounts receivable, to name a few.\textsuperscript{37} However, as lenders have become aware that the true value in the hands of the investor and his business partners is the tax credits, the sufficiency of more traditional forms of collateral has been called into question.\textsuperscript{38} More and more lenders want a security interest in the actual tax credits as a way to secure the loan. While traditional forms of collateral may, if foreclosed upon, help make the lender whole, the potential proceeds from the sale of the tax credits can serve a considerable supplement to this security. The prudent lender, in determining the level of collateral required in order to advance the funds, will assess the entirety of the borrower’s assets and revenues.\textsuperscript{39} The substantial economic value of tax credits produced from certain investments are ripe for the picking in terms of providing the lender with the security that it needs to substantiate the lending of funds. Moreover, some borrowers—who might not necessarily have the requisite level of traditional collateral to entice a lending institution to advance funds—can use the allure of a tax credit allocation to persuade lenders that tax credit collateral will more than secure the loan and provide protections to reduce the lender’s risk.

While tax credit financing may be all the rage in the world of secured transactions, there remains an undercurrent of uncertainty regarding its legal efficacy. The exotic and economically profitable nature of the tax credit as collateral is both what makes them attractive to lenders, but also uncertain to lawyers. Tax credits do not fit neatly into the traditional categories of collateral under the UCC’s article 9. While they may seem to fit into the UCC’s category of “general


\textsuperscript{35} See Vanessa Houlder, Megan Murphy, & Jeff Gerth, Tax wars: A fight worth billions, Sept. 2011, Financial Times.

\textsuperscript{36} See Killian N. Betrowe, Bank Lending, Banking and Financial Developments (Nova Science Publishers, Inc. 2011).

\textsuperscript{37} See William D. Warren & Steven D. Walt, Secured Transactions in Personal Property (Foundation Press 2010).

\textsuperscript{38} For an example of the shift by lenders to require more unconventional forms of collateral, see Claire Philpott & Susan Jahnke, Intellectual property: A new form of collateral, Mar. 6, 2005, Puget Sound Business Journal.

intangibles” because of their amorphous and unique qualities, courts have struggled with how to properly label and deal with these rights.\footnote{See infra Part III and accompanying discussion.} For instance, general intangibles have been held to include copyrights, patents, trademarks, and intellectual property.\footnote{See Lars S. Smith, \textit{General Intangible or Commercial Tort: Moral Rights and State Based Intellectual Property as Collateral Under Ucc Revised Article 9}, 22 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 95 (2005).} However, whether tax credits fall precisely into this category has yet to be determined. Some courts have avoided making an affirmative determination, others have engaged in confusing legal acrobatics to affirm them, and in some cases, courts have denied their use as collateral at all.\footnote{See infra Part III and accompanying discussion.} Moreover, cases on the issue are incredibly sparse.\footnote{Id.} Very little judicial guidance exists in the way of tax credit financing, despite the fact that more and more security agreements are being drafted to include tax credits as a part of the collateral in these types of transactions. In substantial transactions where a great deal of capital is at stake and a large portion of the security is bound up in tax credit allocations, the prospect of a court invalidating the security should give more than just a moment’s pause to lawyer and businessperson alike. Tax credit financing is an emerging trend in today’s business world, but how solid is its foundations?

This Article attempts to lay that foundation by analyzing the theoretical underpinnings of the UCC’s category for general intangibles and showing how classification as a general intangible can and should comport with the legal substance of tax credits as a form of secured financing. Part I investigates the theory and nature that forms the basis of tax credits and their economic value, as well as provides some background and analysis of the UCC’s collateral category for general intangibles. Part II gives an overview of the relatively meager case law on tax credit financing and explains how courts have struggled with this new concept by highlighting the non-uniform and often times inaccurate analyses, as well as pointing out that courts are focusing on the wrong feature of tax credits to support their holdings. Part III calls for courts to jettison their current focus on refundability in analyzing tax credit collateral cases and to adopt a new judicial test which calls for assessing the substantive and procedural transferability of tax credits, thereby giving courts a new and more appropriate framework to use when approaching cases involving tax credits secured transactions. The Article concludes that tax credits should be treated as permissible collateral under article 9 in certain circumstances when the credits comport with a test for substantive and procedural transferability and, further, that courts might be able to use this new two-prong test for transferability when confronted with other types of emerging and nontraditional, general intangible collateral.

**PART I. UNDERSTANDING TAX CREDITS AND UCC ARTICLE 9**

In trying to resolve the question of how courts should deal with security interests in tax credits granted under Article 9, one must first understand the fundamentals of both UCC Article 9 and tax credits themselves. To the extent that the device, the tax credit, fits into the over all scheme, Article 9, requires a delving into the nature, purpose, and history of both.
A. Exploring the Nature of Tax Credits

Tax credits are a public policy function of the overall tax system. In general, the income tax system is meant to form a basis from which the government can derive function for activities related to the public good. A portion of a person or entity’s income is taxed, and the government then allocates the proceeds from this tax for public purposes. The taxpayer’s ability to direct and influence the expenditure of the tax revenues is limited to the political process. Said another way, it is by and large the government itself that directs the funds into various projects and for various purposes, while the taxpayer plays only a supporting role. However, the tax credit can be viewed as the opposite of this dichotomy. Here, it is the individual who chooses where to direct his funds—investing into those projects that he deems to be most productive—and the government plays the secondary role by providing tax incentives to the individual for investing in those projects. The individual controls the choice of expenditure, and the government provides the support through tax relief. Over time Congress has created and reauthorized tax credits for a wide-array of economic and social purposes. Because of the immensely varied special interests that lobby and impact the decisions of Congress, the number and variety of tax credits are wide-ranging and exceedingly diverse. Each credit is designed to influence the taxpayer’s decision making in one way or another. This can be either to encourage the individual to engage in certain activity for which he will be rewarded, or to shy away from certain activities which will not yield any tax benefits.

The mechanics of how these benefits works are simple. After a taxpayer determines his gross income for a given calendar year, he deducts from this number whatever amounts he is entitled to for certain legislatively created deductions, and then multiplies the remaining amount by the applicable rate table for that year. This number will produce the taxpayer’s tentative tax liability. Using this number to subtract from, the taxpayer will then reduce the tentative liability by whatever tax credits he is entitled to receive. Whatever amount remains after all tax credits have been used to reduce the tentative tax liability will be the individual’s final tax liability to the government. Taxpayers prefer tax credits to tax deductions. While the

45 See id.
46 See id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id. at 879.
53 Id.
54 Id.
55 Id.
56 SAMUEL A. DONALDSON, FEDERAL INCOME TAXATION OF INDIVIDUALS 37 (West 2005).
57 Id.
58 Id.
59 Id.
60 Id.
Deduction is also used for social and economic policy purposes (i.e., to encourage or discourage certain activity), the tax credit, as a general matter, has vastly more worth.\textsuperscript{62} Deductions have a much weaker impact on the individual’s tax liability, and have been argued by scholars and policymakers as having a disproportionate benefit to the wealthy.\textsuperscript{63} The tax credit’s value, in part, is what makes them such attractive candidates for collateral in secured transactions.\textsuperscript{64} Specifically, credits reduce the amount tax liability number on a dollar for dollar basis.\textsuperscript{65} If one has $15,000 in tax tentative tax liability, and $10,000 in tax credits, then the final tax liability is $5,000.\textsuperscript{66} However, with deductions, the value is captured on the front end before the marginal rate is applied.\textsuperscript{67} Some scholars have described the tax deduction as being “regressive” in that its value is dependant on the taxpayer’s marginal tax rate and the actual amount of the deduction.\textsuperscript{68} Tax credits, however, because they reduce one’s tax liability dollar-for-dollar regardless of income-level, are more even-handed.\textsuperscript{69}

A particularly valuable aspect of tax credits is that they can sometimes be refundable.\textsuperscript{70} As a general notion, the value of the credit depends on the amount of tax liability one owes.\textsuperscript{71} If the tax credit is greater than the tax liability, then the tax liability is zeroed out and the remaining, unused credits are seemingly worthless.\textsuperscript{72} However, often Congress provides for certain credits to be refundable or carried over for use in the next taxable year.\textsuperscript{73} In other words, once the tax liability has been reduced to nothing, any remaining credits can be returned to the taxpayer by the government in the form of a cash refund or can be claimed to reduce the taxpayer’s liability in the following year.\textsuperscript{74} In the case of refundable credits, since the credits can come in the form of payments, their value does not necessarily depend upon there being tax liability at play. The credits themselves, therefore, have an independent value, separate and apart from the particular qualities of the holder.

In broad terms, there are tax credits for everything from homeownership, education, retirement plans, and healthcare expenses, to charitable giving, life insurance policies, municipal bond investments, and labor.\textsuperscript{75} To name a few, a historically popular credit for investors was the Low Income Housing Credit, which provided for credit to investors in housing for depressed areas and for low-income individuals.\textsuperscript{76} The research credit also provides an attractive opportunity for investors to take advantage of a substantial tax credit for research and experiment

\textsuperscript{62} Id.  
\textsuperscript{63} Id.  
\textsuperscript{64} Id.  
\textsuperscript{65} Id. at 881.  
\textsuperscript{66} See generally id.  
\textsuperscript{67} Id.  
\textsuperscript{68} Id.  
\textsuperscript{69} Id.  
\textsuperscript{70} Id.  
\textsuperscript{71} Id.  
\textsuperscript{72} Id.  
\textsuperscript{73} Id.  
\textsuperscript{74} Id.  
\textsuperscript{76} BORIS I. BITTKER & LAWRENCE LOKKEN, \textit{FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS} S27-42 (Thomson Reuters 2009).
related expenditures.\textsuperscript{77} With the advent of the sustainability movement, more and more tax credits are geared toward incentivizing investment in green and renewable resources.\textsuperscript{78} Examples include a credit for individuals who make energy efficient improvements to their homes, such as installing solar panels of bio-fuel cells.\textsuperscript{79} As the variety and value of tax credits continue to grow, the economic strength of these intangible rights have come into the forefront of the commercial and business scene.

\textbf{B. Combining Tax Credits and UCC Article 9}

While the value of tax credits and the creative ways in which investors are taking advantage of government programs that yield them have increased, the procedure to use them as collateral for financing is a separate inquiry. Understanding the basics of Article 9 and how tax credits fit into the overall Article 9 structure is where the true issue lies.

As a general matter, prior to the advent of the UCC’s Article 9, security in personal property encompassed a myriad of different devices including the chattel mortgage, conditional sales, trust receipts, factors’ liens, and assignments of accounts receivable (all imperfect in their own way).\textsuperscript{80} Each state had their own laws and nuanced provisions on each of these devices, making them provincial and non-uniform across the country.\textsuperscript{81} Around 1952, Professors Grant Gilmore and Allison Dunham—the primary drafters of article 9—went to work on creating a unified system of secured financing in personal property that would completely displace the old patchwork system and create a single, multi-purpose statute from which other states could adopt.\textsuperscript{82} The result was Article 9 of the Uniform Commercial Code.\textsuperscript{83} Article 9 did not intend to do away with the traditional security devices mentioned above, but rather intended to wipe away the differences between them.\textsuperscript{84} The same terms and labels could be used to describe security devices over personal property as had been used in the past, but the difference being that in order for these age-old devices to be effective they must conform to the baseline requirements in Article 9.\textsuperscript{85} The general statement found in section 9-102(1) of Article 9 declares, “This Article applies (a) to any transaction (regardless of form) which is intended to create a security interest in personal property.”\textsuperscript{86} The comment to the section states that, “the principal test whether a transaction comes under this Article is: is the transaction intended to have effect as security?”\textsuperscript{87} In this way, the local and traditional trappings of certain security devices were preserved, while the true effectiveness of the security, whatever labeled used, was dependent upon requirements which were uniform across jurisdictions.\textsuperscript{88}

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} See id. See also IRC §§ 25C, 25D (2011).
\textsuperscript{80} ROBERT L. JORDAN, WILLIAM D. WARREN, & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 12-13 (Foundation Press 2000).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.; see also ROBERT M. LLOYD, SECURED TRANSACTIONS (Matthew Bender 1988).
As stated above, Article 9 relates to transactions involving the granting of security in personal property or fixtures/component parts.\(^8^9\) Particularly significant in the Article 9 process is identifying which type of collateral the personal property in question falls into.\(^9^0\) The rules which govern security in an account receivable is very different than those involved in collateralizing a bus, airplane, or truck.\(^9^1\) For the purposes of analyzing tax credit security, the collateral category that is applicable is that of “general intangibles.”\(^9^2\) This category was added last in the list of Article 9 collateral classes to serve as a catch-all provision.\(^9^3\) Anything which does not come under one of the other categories can, in most cases, be classified under general intangibles.\(^9^4\) These include things in action, such as patent rights, rights to royalties, and rights under certain types of performance contracts.\(^9^5\) Definitionally, Section 9-102(42) of Article 9 states that a general intangible is “any personal property (including things in action) other than goods, accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letters of credit, money, and oil and gas or other mineral rights before extraction.”\(^9^6\) The definition is broad, sweeping, and rather short.\(^9^7\) In essence, if personal property does not fall into one of the other categories, then it probably is a general intangible.\(^9^8\) It is often described as a residual category because of its global effect.\(^9^9\) However, the definition of “account” contained in Section 9-106 states that an account is “any right to payments for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.”\(^1^0^0\) Therefore, an account is always defined as a certain type of right to demand payment, while a general intangible is a right to payment owed for a reason other than the providing of goods and services, or a right of ownership in intangible property that does not involve payment.\(^1^0^1\) Since the definition of account is drawn broadly, one may wonder what exactly general intangibles would cover, and why tax credits would not be classified as accounts.\(^1^0^2\) Examples of personal property which courts have held to be general intangibles include patent rights, trademark rights, rights to tax refunds, rights to refunds for overpayments to an employee pension plan, claims for breach of contract, liquor licenses, federal communications commission licenses, a refundable lease security deposit, a beneficial interest in a land trust, rights under a cable television agreement,

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\(^9^0\) Lester E. Dennon, Secured Transactions Under the UCC 34 (Practicing Law Institute 1965).

\(^9^1\) Id.

\(^9^2\) Id.

\(^9^3\) Id.


\(^9^5\) Id.

\(^9^6\) Id.

\(^9^7\) Id.


\(^9^9\) Id.

\(^1^0^0\) Robert L. Jordan, William D. Warren, & Steven D. Walt, Secured Transactions in Personal Property 177 (Foundation Press 2000).

\(^1^0^1\) Id.

\(^1^0^2\) Id.
and water permits. Sometimes courts arrive at the conclusion that property is a general intangible through unconventional means. For instance, in *United States v. Antenna Systems, Inc.* that court held that drawings, plans, and other technical data produced by engineers were general intangibles rather than goods because the true value of the items was in the intellectual labor which went into creating them, rather than the paper and ink used to write them down. The court also held that supporting materials such as cost estimates, bid information, and proposals were also within the general intangible category because it was the value of the concepts and designs, not the actual documents, which represented the true collateral to the creditor.

In general, lenders will seldom make a loan to a borrower and allow the only security for the loan to be copyrights, trademarks, literary rights, and the like. These general intangibles, while valuable, do not represent the kind of traditional collateral that lenders have come to rely solely upon when advancing funds. However, many lenders will use general intangibles as a kind of back up or supplementary security for the loan, while traditional collateral such as machinery, goods, equipment, and accounts receivable serve as the primary security. That is not to say that lenders have never looked to a general intangible as the sole form of security. If the collateral is a patent right which creates a certain level of dominance in a given market then this type of collateral can be deemed sufficient. This is because the patent—granting exclusivity over a market—produces great value to the borrower. Moreover, a recent trend in the entertainment industry is for producers and their companies to borrower money and secure the funds with the rights in the performance itself. If the show fails, the lender can still seize the production materials and perhaps sell them to another performance medium which can use the material to create a book, movie, or television production. Thus, while not made whole, the lender can use the rights in the show to recoup some of its losses. These lenders have often been termed “Broadway angels” because of their expertise in determining which shows are likely to be successful and, thus, have general intangible rights which would make reliable collateral for a loan. Similarly, publishers often advance money to successful writers in order to fund the writing of their next work. The funds are then secured by the literary rights of the writer, even before the first page is written. The publishing company, using its expertise, makes a

104 Id.
106 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
118 Id. at 121–22.
judgment call on whether the work, because of the writer’s skill, will be successful. The use of general intangibles is not, however, limited to just the arts and literature. A general contractor will often assign his rights to completed performance payments to an insurance company in return for the company’s issuance of a payment and performance bond.

A major subcategory of general intangibles, and one which is implicated in the discussion of tax credit collateral, are payment intangibles. This subcategory is defined in Section 9-102(a)(61) of Article as a “general intangible under which the account debtor’s principal obligation is a monetary obligation.” The key word in the definition is “principal obligation.” It could be said that practically all obligations can involve the payment of money in some form or another. However, merely because the payment of money is implicated in a particular obligation does not mean that it rises to the level of a payment intangible. Rather, the principal obligation of the debtor must be mainly or primarily to pay money. For instance, the right to bring suit under a tort or breach of contract claim could be seen as involving the payment of money to the obligee if he or she is successful on the merits of the suit; however, these type of rights are not payment intangibles because the primarily obligation does not involve a monetary performance. That being said, Article 9 does not give a definition for what constitutes a “principal obligation” as opposed to an accessory or ancillary obligation. Therefore, it is often up to the courts to make the determination of whether the facts and circumstances fit the requirements to be a payment intangible.

It can be argued that tax credits, in certain circumstances, fall into the payment intangible subcategory of general intangibles. If the credit is indeed refundable, then the credit represents a right to receive payment from the government. The government is the obligor and it could be said that the government’s principal obligation as between it and the taxpayer is a monetary one. The government is obligated, once the taxpayer’s tax liability has been reduced to zero and excess credits remain, to pay the taxpayer in money. However, one could also argue that the principal obligation requirement may not be met in many cases, since the initial purpose of the credits is to reduce the taxpayer’s tax liability, and the receipt of excess credits in the form of a refund is only an ancillary purpose. This argument is buttressed by the fact that credits must first go to reduce tax liability before they can be used to create an actual payment. However, the argument is equally compelling on the other side in stating that whether the value is in the

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119 Id.
120 Id.
121 Id.
122 ROBERT L. JORDAN, WILLIAM D. WARREN, & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 180–81 (Foundation Press 2000).
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 See JAMES J. FREELAND, DANIEL J. LATHROPE, STEPHEN A. LIND, & RICHARD B. STEPHENS, FUNDAMENTALS OF FEDERAL INCOME TAXATION 925 (Foundation Press 2006).
132 Id.
133 Id.
reduction of the liability or in the actual payment of money, both obligations are monetary in
nature. In each instance the credit is giving some benefit to the taxpayer through a pecuniary
channel. In both cases the currency or coinage of the government is being used, either directly or
indirectly, to benefit the monetary position of the taxpayer. Hence, the tax credit principally
involves a monetary obligation by the government to the taxpayer. More broadly, even if tax
credits do not always—or even ever—fit into the payment intangible category, they arguably fit
fairly well into the larger general intangible category. As with all general intangibles, the
personal property must not fall within one of the other categories in order to qualify pursuant to
the definition. The most obvious contender is that of an account receivable. However, the
account receivable represents the right to demand payment for goods sold or leased or for serves
rendered, which is not evidenced by an instrument or chattel paper. The tax credit is not given
for the selling or leasing of goods or the rendering of services. They are generated through the
expenditure of capital, chiefly in certain investment areas. Although, an argument can be
made that, in an indirect way, some tax credits are generated through the rendering of services or
through the sale of goods. A New Markets Tax credit which is generated by a qualified active
low-income business that provides services to certain low-income communities may, in a
tangential way, represent payment for the rendering of services. However, the actual
rendering of the services is not what calls for the payment of credits. It is the investment in
the qualified active low-income business which creates the credits. The rendering of services
is part of the qualifications for the business itself to be eligible to receive the investment.

When carefully tracing the activity which actually produces the credits directly, it is compelling
logic to conclude that the tax credits fall into the category of general intangibles, and with some
credits into the subcategory of payment intangibles.

Despite the urgings stated above, whether tax credits fall, be it neatly or not, into the
category of general intangibles or any other Article 9 category has vexed the courts which have
been confronted with the issue. Although the basic concepts behind general intangibles and
payment intangibles appear to contemplate the tax credit scenario, case law has not found such
avenues easy to travel. As explained further hereafter, the judicial analysis relative to these
new forms of collateral is in need of further refinement.

PART II. AN OVERVIEW OF CURRENT TAX CREDIT SECURITY CASE LAW

Because the use of tax credits as collateral is so new to business transactions, there exists
very little case law dealing with the topic. This is likely due, in part, to the fact that many of

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134 Id.
135 ROBERT L. JORDAN, WILLIAM D. WARREN, & STEVEN D. WALT, SECURED TRANSACTIONS IN
PERSONAL PROPERTY 177 (Foundation Press 2000).
137 Id.
139 IRC § 45D (2011).
140 IRC § 45D (2011).
141 IRC § 45D (2011).
142 See infra Part II.
143 See infra Part II.
144 See infra Part II and accompanying discussion.
these tax credit-driven transactions have either succeeded and there has been no need to litigate or foreclose on the security, or, in the alternative, the projects have failed, but the lenders and the borrowers were able to arrange a work-out or the lenders were able to foreclose on more traditional forms of collateral to satisfy the debt (i.e., real estate, equipment, deposit accounts etc.). This lack of case law does not bode well for future courts, in light of the fact that tax credits are becoming so prevalent and their use as security so wide-spread in tax credit related transactions, because there will be little to no established jurisprudence and accompanying analysis to draw from in making their decisions. When a wave of tax credit foreclosures makes its way into the courts, there will be little to no body of judicial precedent and study to rely upon in building a resolution to such collateral liquidations. However, in looking to the current, albeit limited, case law and analysis of the courts which have dealt with tax credit financing, we are able to predict, in part, which issues the courts may struggle with in making the ultimate determination as to the effectiveness of the security. Further, in reviewing the existing case law, we are able to see how the current state of the law in the area of tax credit financing is ill-defined and without an overarching analytical framework from which future courts dealing with the subject can use as a guide.

A. Metric Metals International, Inc. v. Bornstein

The first court to address the question of tax-related financing was the United States Bankruptcy Court decision in Metric Metals International, Inc. v. Bornstein.\textsuperscript{145} In this case the debtor agreed to execute a security agreement in favor of the bank in “all the Debtor’s receivables present and future, whether or not now or hereafter specifically assigned or pledged . . . whether now existing or hereafter created; all proceeds of such Receivables in whatever form, including cash, deposit accounts, negotiable instruments, and other instruments for the payment of money . . . (and) all other accounts due from Account Debtors to Debtor.”\textsuperscript{146} Further, the security agreement included a rider stating, “the collateral for the security interest ‘includes but is not limited to’ accounts and contract rights ‘which ... are created or otherwise arise out of the sale of merchandise or the supplying of services ... in the regular course of (debtor’s) business or otherwise.’”\textsuperscript{147} This includes any of the foregoing classified under the Uniform Commercial Code as ... general intangibles.’”\textsuperscript{148}

When the debtor received a tax refund, the trustee and the bank both made claims to the funds.\textsuperscript{149} The trustee argued that tax refunds did not constitute accounts receivable such as the term was defined in the security agreement because these types of rights were limited to those “which are created or otherwise arise out of the sale of merchandise or the supplying of services.”\textsuperscript{150} The trustee further argued that the inclusion of general intangibles in the collateral description also failed to capture the tax refund because the security agreement only contemplated general intangibles which were related to the receivables arising out of the sale of merchandise or the supplying of services.\textsuperscript{151} Based on this narrow and limited reading of the security agreement, the trustee argued that the tax refunds constituted a type of property which

\textsuperscript{146} \textit{Id.} at 634.
\textsuperscript{147} \textit{Id.} at 635.
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 636.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
was not encumbered.\textsuperscript{152} In contrast, the bank argued that such a restricted reading was incorrect.\textsuperscript{153} Among other things, the bank contended that the security agreement’s statements with regarding to “all other accounts due from Account Debtors” extended the list of eligible account debtors beyond those for merely the sale of merchandise of providing of services.\textsuperscript{154}

The court acknowledged that while there was little to no authority on whether a tax refund constituted a general intangible under Article 9—a similar statement that would be made by other courts addressing tax credit collateralization—commentators and doctrine seemed to be favor a broad reading of the collateral category.\textsuperscript{155} Further the court noted that an indirectly related Colorado appellate case had concluded that the money which was to be collected by a claimant in a lawsuit was deemed to be a general intangible.\textsuperscript{156} The court concluded that the tax refund constituted a general intangible, a security interest in which was properly perfected, and thus the bank had the superior claim to the funds.\textsuperscript{157}

While the court did not specifically address tax credits, its analysis of tax refunds is instructive. Tax refunds are also rights against the government to demand payment in connection with tax laws.\textsuperscript{158} With a tax refund—also called a rebate—the taxpayer typically withholds and pays over to the government a certain amount from their estimated taxes throughout the taxable year and, when calculating his tax liability in light of all deductions, exclusions, and credits, the overall liability is less than the amount actually withheld and paid.\textsuperscript{159} The overage comes back to the taxpayer in the form of a refund from the government.\textsuperscript{160} In other words, the government is returning to the taxpayer the amounts which it paid forward, but did not end up actually owing.\textsuperscript{161} Tax credits operate in a somewhat similar manner. In return for making certain investments or falling into a certain set of qualifiers, the government grants to the taxpayer a credit that can be used to offset his final tax liability.\textsuperscript{162} In the case of refundable credits, the government will actually remit any excess credits to the taxpayer in the form of a refund once all the liability has been extinguished.\textsuperscript{163} The credit refund and the tax refund both represent payments accorded to the taxpayer which can be demanded upon the government.\textsuperscript{164}

Further, Metric Metals was the first court to address tax related rights as they relate to security interests under Article 9.\textsuperscript{165} However, the court in Metric Metals reached its ultimate conclusion with respect to the tax refund in a very summary fashion.\textsuperscript{166} The analysis itself took up all of one paragraph and merely stated that, although there was little to no authority on the

\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. (citing In re Certified Packaging, Inc., 8 U.C.C. Rep. 95 (D.C. Utah 1970); P. Coogan, W. Hogan, & D. Vagts, 1 Secured Transactions Under the Uniform Commercial Code s 5A.09(1) (19--)).
\textsuperscript{156} Id. (citing Board of County Commissioners v. Berkeley Village, 580 P. 2d 1251 (Colo. App. 1978).
\textsuperscript{157} Id. at 637.
\textsuperscript{158} MARVIN JOSEPH GARBIS & PAULA M. JUNGHANS, FEDERAL TAX LITIGATION: CIVIL PRACTICE AND PROCEDURE (Warren Gorham & Lamont June 1985).
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} See supra Part A.I.
\textsuperscript{163} See supra Part A.I.
\textsuperscript{164} See supra Part A.I.
\textsuperscript{166} Id.
matter, case law, namely the Utah case of *In re Certified Packaging, Inc.*, and the commentators Coogan and Hogan leaned toward finding that tax refunds fell within the parameters of general intangibles.\(^{167}\) In the case of *In re Certified Packaging* the court held, in dicta, that security for the loan did not include rights to any tax refunds because the financing statement did not include “general intangibles.” The crux of the case dealt with whether the security interest in accounts receivable would extend to a check by the U.S. government (namely the IRS) to the debtor for its tax refund. The statement that tax refunds fell within the category of general intangibles was made in a brief and conclusory fashion, and did not form a basis for the ultimate disposition of the case. Further, the *Metric Metals* court also looked to the case of *Board of County Commissioners v. Berkeley Village* for the proposition that the money which a claimant expects to recover in a lawsuit is of the kind of right which would constitute a general intangible.\(^{168}\) In turn, the court in *Berkeley Village* buttressed its conclusion upon Pennsylvania\(^{169}\) and Oregon\(^{170}\) state court cases finding that the right to collect money from a potential lawsuit was not the same right as a right to collect under a judgment, and was more akin to the right to the proceeds from a condemnation action.\(^{171}\) All of the foregoing served as the rationale behind the court in *Metric Metals* in reaching the conclusion that the right to a tax refund was a general intangible.\(^{172}\) And, while tax refunds do share many of the same qualities as tax credits, the rationale used by the court in *Metric Metals* to reach this conclusion may not be without weaknesses. The right to collect money from a lawsuit is markedly different from that under a tax rebate. The right to collect from a suit depends upon many subjective factors, such as the deliberations of the trier of fact—be it judge or jury—as well as the arguments and law brought forward by counsel for both sides. Whether the anticipated funds materialize from the suit depends on numerous shifting and uncertain events. However, with a tax refund one is able to calculate with certainty the amount that one will receive. The process merely involves determining one’s gross taxable income, making the appropriate deductions, applying the applicable tax marginal rate, and then reducing this amount by any allowable tax credits. Any amounts which were withheld and paid to the IRS in excess of the amount owed, or any amounts which are left in credits, if applicable, after the reduction of tax liability to zero, results in a tax refund. These determinations are not left to a trier-of-fact, but are rather predictable and certain.

Nevertheless, regardless of the questionability of the case law used to support the proposition that tax refunds should be deemed general intangibles, courts have found comfort in this holding.\(^{173}\) This conclusion would also seem to hold water because of the payment nature of the right. The right to a tax refund involves the principal right of a debtor to collect money from the creditor, and such a right is derived from a personal property right other than a right in connection with goods, accounts, chattel paper, documents, instruments, money etc. If such is the case, then the right to demand a refund of cash from the government based on excess, refundable tax credits would also be deemed a general intangible. While a refund generally is caused by an over paying/withholding of funds through the taxable year and a refund from a tax credit is a separate and independent disposition by the government, both result in the payment of

\(^{167}\) *Id.*  
\(^{168}\) *Id.*  
\(^{172}\) *Id.*  
funds. The only counter to this conclusion, as discussed above, is in the case of non-refundable credits. These are credits that are purely used to reduce tax liability, and any excess credits which cannot be claimed must either be carried forward to be used in the next year, or lost altogether. These, therefore, do not represent a right to demand payment. If a taxpayer does not withhold more than is necessary to fulfill his tax obligations, and if his credits can only be used to reduce tax liability, then there is no right to demand payment. Rather, the only use that the non-refundable tax credit has is to reduce the amount that one has to pay to the government, but does not entail the right to demand payment form the government. However, one could still argue that this merely means that non-refundable credits can only fall into the broader category of general intangibles, and merely cannot be deemed payment intangibles. It is not necessary for the credits to be payment intangibles in order for them to serve as security as general intangibles. Although Metric Metals opened the road for tax credits to be deemed general intangibles, it did not arrive at this ultimate destination. Tax refunds share similarities, but also differences from tax refunds, and thus the final determination was left open for another day.

B. City of Chicago v. Michigan Beach Housing Cooperative

The case that first addressed the question of tax credit financing was in the Illinois appellate court decision of City of Chicago v. Michigan Beach Housing Cooperative. In Michigan Beach Housing Cooperative the developers build a 240 unit low-income housing facility which was financed through a mortgage insured by the U.S. Department of Housing and Urban Development (“HUD”). When the developers defaulted on the loan, HUD foreclosed on the property and the developer declared bankruptcy. In an effort to obtain approval for a plan of reorganization, the developers suggested turning the complex into a cooperative whereby the residents of the complex would manage the facility through a non-profit entity. In order to effectuate the new plan, the defendant-cooperative obtained a loan from the City of Chicago, to be secured by the building and other assets. When the defendant’s financial position looked negative, it approached the City of Chicago (“City”) and HUD in order receive approval of a new plan. The new plan involved operating the building as a rental complex owned by a limited partnership, as opposed to a cooperative, and the City and HUD would grant low-income housing tax credits to the limited partnership in order to syndicate with additional investors.

See supra Part I.


Id. at 880–81.

Id.

Id.

Id.

Id.

Id.

Id.

609 N.E. 2d 881.

174 See supra Part I.


176 Id. at 880–81.

177 Id.

178 Id.

179 Id.

180 Id.

181 The credits at issue in this case are Low-Income Housing Tax Credits (“LIHTC”). “The tax credits derive from Congress’ Tax Reform Act of 1986 (Pub. L. No. 99-154). Each year, State and local agencies are granted low-income housing tax credits by the Federal government. The local entities then award the tax credits to eligible low-income properties. Once awarded, the low-income housing tax credits cannot be transferred from the property to which they were awarded-if they are not used because [if] the property does not become a low-income residence, the Federal government reclaims them. Once tax credits are allocated to a property, the owner can sell limited partnership interests in the property so that investors can take advantage of the tax credits. This is called syndication.” See id. at n.1; see generally I.R.C. 42 (1990); see also Treas. Reg. § 1.42 (1990).

182 609 N.E. 2d at 881.
After the deal was agreed upon, the City and the Illinois Housing Development Authority, as local grantors of the credits, committed a combined $780,000.00 in low-income housing tax credits to the developers.\footnote{Id. at 881.} Shortly thereafter, the City objected to the change of ownership structure from a cooperative to a rental apartment complex owned by a limited partnership.\footnote{Id. at 881–82.} Notwithstanding the City’s objection, the change in ownership was consummated and the new owners of the limited partnership were the defendant, as the general partner, and National Tax Credit Investors II, as the limited partner acting as the syndicated investor.\footnote{Id. at 884.}

Once the City learned of the transfers and syndication of funds, it filed suit to enforce its rights under the loan and security documents.\footnote{Id. at 882.} Among other things, the City claimed it was entitled to recover, under article 9 of the Illinois Commercial Code, from the cash proceeds of the low-income housing tax credits because the debtors had granted an interest in the credits through the loan’s security agreement.\footnote{Id. at 884.} Specifically, the City argued that the syndication funds received by the limited partnership by the investors were, in essence, “proceeds”\footnote{Id. at 885.} of the tax credits.\footnote{See id. at 884 (citing Ill. Rev. Stat. 1991, ch. 26, par. 9-306(2)(3); In re Keneco Financial Group, Inc., 131 B.R. 90, 94 (N.D. Ill. 1991); Farns Associates, Inc. v. South Side Bank, 417 N.E. 2d 818, 821 (Ill. App. ).} The security agreement described the City’s collateral, in part, as “all . . . interests . . . in and to all . . . personal property of any kind or character now or hereafter owned by Borrower and . . . used or useful in connection with the Real Estate and Improvements.”\footnote{Id. at 882.} The City asserted that the low income housing tax credits were general intangible personal property that were used “in connection” with the building.\footnote{Id. at 884.} Thus, the syndication funds would be considered “proceeds” of the tax credits, and thus they too would be security for the loan.\footnote{Id. at 885.}

The court rejected the City’s argument, stating that the security agreement did not cover the tax credits.\footnote{Id. at 885.} Aside from specifically naming them in the description of collateral, the argument that the credits were “in connection with” the real estate subject to the mortgage was “a fire too distant to give any warmth to the city.”\footnote{Id. at 884.} The court observed that the “in connection with” clause was meant to be limited only to those types of personal property which had a physical connection to the building.\footnote{Id. at 884.} While the court could have stopped at this juncture and moved on, it continued to opine on the use of tax credits as collateral in any article 9 transaction.\footnote{Id. at 885.} Specifically, the court stated, “we find the city’s argument unavailing also because income tax credits cannot be intangible personal property subject to a security interest
under Article 9.” The court acknowledged, as is stated many times herein, that “no court has yet to determine\[
\] whether income tax credits constitute general intangibles for purposes of Article 9” but looked to the U.S. Supreme Court’s decision in *Randall v. Loftsgaarden* for instruction. In *Randall* the Court held, for purposes of the Securities Act of 1933, that:

“The tax benefits attributable to ownership of a security initially take the form of tax deduction credits. These have no value in themselves; the economic benefit to the investor—the true ‘tax benefit’—arises because the investor may offset deductions *against* income received from other sources or use tax credits to reduce the taxes otherwise payable on account of such income. Unlike payments in cash or property received by virtue of ownership of a security—such as distributions or dividends in stock, interest on bonds, or a limited partner’s distributed share of the partnership’s capital gains or profits—the ‘receipt’ of tax deductions or credits is not itself a taxable event, for the investor has received no money or other ‘income’ within the meaning of the Internal Revenue Code.”

In furthering its arguments, the City pointed to the various cases affirming the analysis in *Metric Metals*, which held that tax refunds can be used as collateral, in order to further the argument that tax credits could also be used as security. Nevertheless, the *Michigan Beach Cooperative* court rejected the City’s arguments in holding that income tax refunds are “vastly different” than tax credits. “Income tax credits are quite obviously a property right because they constitute a present or future right to receive money which can be freely transferred after receipt” while tax credits do not constitute a right to payment of money, have no independent value, and are not freely transferable upon receipt.

The court in *Michigan Beach Cooperative* made several broad statements with regard to tax credits which are in need of closer review and refinement. First, the court uses the *Randall* case as a guidepost in making its analysis. *Randall* dealt with tax credits (and deductions) in the context of federal securities law. Arguably, the narrowness of this field and the particular facts of *Randall* should caution one from extrapolating broad principles of law from specific scenarios involving the tax benefits derived from ownership in stocks, bonds, and other securities. Secondly, the court states that tax credits and deductions “have no value in

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197 Id.
198 Id.
199 Id.
200 Id. at 885.
201 Id.
202 Id.
203 Id.
204 Id. at 885–86.
205 Id.
206 See id. The court in *Michigan Beach Cooperative* acknowledged that *Randall* was decided as a securities case, but the court point to other cases that have upheld the *Randall* analysis of income tax credits in other scenarios as well. *Id.* See also *Bove v. Worlco Data Systems*, 1987 WL 5717 (E.D. Pa. 1987); see also *Federal Deposit Insurance Corp. v. WH Venture*, 1987 WL 11946 (E.D. Pa. 1987). The distinction which the court does not make, however, is that the *Bove* and *WH Venture* the courts used the *Randall* analysis when reviewing whether damages in a litigation suit should be reduced due to tax benefits that were received in connection with a limited partnership interest. The particular facts at play
themselves” because the benefit derived from these rights requires that there first be income and a tax liability therefrom. The court compares these tax rights to distributions and dividends from the ownership of certain securities which, in and of themselves, constitute independent economic value. However, what the court neglected to realize was that tax credits can and do have independent value in and of themselves. Credits which are non-refundable may require income in order to be useable, but this requirement does not render them worthless to an investor. Merely because there is a requirement of tax liability—a requirement which most all persons and entities would fulfill to some extent or another—does not mean that the credits have no value. There is no requirement in article 9 that collateral have a certain level of value in order to be legally used as security for an obligation. Rather, the type of property must merely have some value and fit within the collateral categories provided in the code. To superimpose an additional requirement of some roving, undefined level of value would be to add to the law in a way that was no envisioned by the drafters of UCC article 9, or the state legislatures which have adopted it. Moreover, tax credits which are refundable do have independent economic value under Michigan Beach Cooperative’s test because they can produce a refund. In this regard they are no different than a tax refund, which the court acknowledged as being valid for the purposes of article 9 collateral. They constitute a right to demand payment because, once earned, they produce a payment from the government which can be enforced by the individual to whom the credits are entitled.

Also, the court in Michigan Beach Cooperative stated that “the investors cannot transfer or sell the tax credits separate from the security [in the entity] itself. . . the tax credits they received along with their interest in the partnership were incidental benefits of that investment-not separate intangible personal property which could collateralize the city’s loan-and whatever benefit they conferred on the investor renders no comfort to the city.” While the court is correct in stating these particular federal low-income housing tax credits are not transferable, rather the investor must actually have an equity interest in the entity that earns the credits, and then have the credits allocated to the investor through the entity, that is not to say that all tax credits are treated this way. Tax credits vary and their assignability and transferability differ depending on the statutory and regulatory provisions governing the tax.

do not bear upon whether a valid security interest can be created in tax credits. While it may seem obvious that no creditor would take a security interest in property which was valueless, it is not for the court to decide whether the “value” in a given piece of personal property rises to the level of sufficiency such that it would be acceptable to a lender. Such determinations are business decisions and are better left to the parties to decide. The only body of law that need be at play in questions of security over personal property is that of Article 9 and its related case law.

207 Id. at 885.
208 Id.
209 See supra Part I.A and accompanying discussion.
210 Id.
211 Id.
212 See id. and accompanying discussion.
213 Id.
214 Id.
216 See supra Part I.A.
credit program. Some credits can only be claimed by the individual who earns them, while some can be transferred to an investor through an equity allocation, provided that the investor must be present as an equity owner in the entity which earns the credits in order to receive the tax benefits, and, further still, some credits are certificated and can be freely transferred as one buys and sells other assets. The exact nature of how the credits can flow and be transferred is not uniform throughout the Internal Revenue Code or between state and federal schemes. Rather, each credit has its own parameters, particulars, and rules that help effectuate the government policy at play in its creation. The court in Michigan Beach Cooperative makes broad statements regarding the sale and transfer of credits which—while perhaps applicable to the federal low-income housing tax credit—are not applicable across the board to all credits. Further, to make such global statements regarding the lack of value of tax credits, regardless of their refundability or assignability, serves as a poor roadmap for future courts to deal with an area of the law that is so unchartered and complex. Unfortunately, in a regime where each tax credit is governed by its own particular set of rules and can vary greatly between federal and state counterparts, the decision in Michigan Beach Cooperative was too aggressive in laying blanket rules and broad policy statements to provide useful and accurate groundwork for future courts to rely upon in dealing with security interests in tax credit transactions.

C. In re Richardson

A more recent case addressing tax credit financing originated in an Ohio bankruptcy court. In the case of In re Richardson the petitioner took out three loans from a bank in anticipation of a future tax refund that the petitioner would receive at the end of the year. As part of the loan application, the bank’s tax agent assisted the petitioner in the preparation of her tax return and had it filed electronically with the IRS. Additionally, the petitioner was required to sign a loan agreement which provided that, among other things, the bank would receive “a security interest in and to my tax refund, my account at the Credit Union into which my tax refund will be deposited, any other accounts at the Credit Union I may have, and any amounts that are deposited into such accounts from time to time.” Under the terms of the

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218 See supra Part I.A and accompanying discussion.
221 See id.
222 See id.
224 See In re Christina Louise Richardson, 216 B.R. 206 (W.D. Ohio 1997).
225 See id. at 208–09 (stating in part, “Here, we examine the largely unregulated practice by financial institutions of lending funds to taxpayers based upon their anticipated income tax refund. While not expressly condoned by the federal government, the practice as far as bankruptcy courts are concerned appears to be growing more popular with debtors who find themselves having to seek the protection under the bankruptcy laws. Too often, already strapped debtors view these programs as a quick answer to their immediate cash problems without the benefit of a long term strategy for addressing the problems at their roots. These debtors very often find themselves worse off than when they started. This case is no exception.”).
226 Id.
227 Id. at 209 (emphasis added).
loan, the IRS would deposit the petitioner’s refund directly into a designated account at the bank, and the bank would then apply the funds toward the repayment of the loan. However, the IRS erroneously deposited the funds directly into the petitioner’s account at the bank instead. Upon receiving the refund, petitioner realized that the bank’s tax agent who prepared her return failed to claim the “earned income tax credit” to which the petitioner was entitled. Petitioner then returned to the bank and requested additional funds be advanced in an amount equal to the refund she would have received if the earned income tax credit would have been included. The bank, which typically did not make loans in connection with the earned income tax credit, agreed to advance the funds at a lesser amount, provided that the petitioner enter into additional loan agreements. Prior to the petitioner’s receipt of the long-awaited refund from the tax credits, she sought protection under chapter 7 of the bankruptcy code. Upon receipt of the refund, petitioner turned the funds over to her attorney instead of forwarding them to the bank.

Among other theories, the bank claimed that it had been granted a security interest in the earned income tax credit. However, the petitioner argued that the bank needed to have actual possession of the tax proceeds in order to be able to establish that the security interest had been perfected under state law. Nevertheless, the bank argued that regardless of whether the interest was perfected, it was still effective between the parties and thus could be enforced against the petitioner who still held the funds. In its analysis, the court characterized the collateral as “the right to receive the proceeds from a check the Debtor received from the IRS representing an earned income tax credit.” The court went on to state that this particular type of security right was analogous to “a right to receive a check representing a refund of excess state unemployment taxes [representing] a kind of property known in the law as a chose in action or a thing in action . . . furthermore, a property right known in the law as a ‘chose in action’ or ‘thing in action’ falls under the definition of ‘general intangible.’” After identifying the rights in the earned income tax credit as a general intangible which could be secured under Article 9, the court went on to analyze whether such a security right had indeed been created. Interestingly, the court held that the language in the loan agreement which granted a security interest “in and to my tax refund” was sufficient to encapsulate rights to the tax credit proceeds as well. Because, in this case, the refund from the tax credit was transmitted to the petitioner through her annual tax refund, the security rights in the broader category of the entire refund necessarily captured any refund benefits derived from the tax credits. The court concluded that the security was effective between the parties, but, since no financing statement had been

\[228\] Id. at 210.
\[229\] Id. at 211.
\[230\] Id.
\[231\] Id.
\[232\] Id.
\[233\] Id.
\[234\] Id.
\[235\] Id. at 219.
\[236\] Id.
\[237\] Id.
\[238\] See id.
\[239\] Id.
\[240\] Id.
\[241\] Id.
\[242\] See id.
filed, it was not effective against third parties.\textsuperscript{243} Since there were no other secured creditors attempting to establish priority over the collateral, the court resolved that the bank had the right to enforce its security rights over the proceeds from the tax credits which came in the form of the refund.\textsuperscript{244}

While the court in \textit{Richardson} held that tax credits were valid as collateral for financing purposes, its analysis did little to help clarify the framework in which these types of collateral are to operate. First, if tax credits are susceptible to collateralization, they most likely fall under the category of general intangibles in article 9.\textsuperscript{245} In order to grant an interest in general intangibles, the debtor must describe the collateral as such within the security agreement.\textsuperscript{246} However, in \textit{Richardson} the debtor granted a security interest in solely the tax refund.\textsuperscript{247} As stated before, the proceeds which are produced from a tax refund amount to a repayment of funds which have been withheld/paid by the taxpayer over the course of the taxable year in excess of what was truly owed.\textsuperscript{248} Further, tax credits which are refundable and which can not be used to reduce the taxpayer’s liability any further (i.e., the total tax liability for the individual is extinguished) also come back to the taxpayer in the form of a payment as part of the annual tax refund.\textsuperscript{249} Thus, the amount which is refunded in a tax refund comes from both excess payments/withholdings beyond that which is owed by the individual and, if applicable, any refundable tax credits which cannot be used to reduce the overall liability.\textsuperscript{250} It is incorrect to presume that an interest in a tax refund will always produce, as a part of such refund, a payment related to tax credits which are being claimed by the individual. Many tax credits can only be used to reduce tax liability and if there are excess credits after the liability has been reduced to nothing they must be carried forward for use in the next taxable year.\textsuperscript{251}

The analysis in \textit{Richardson} suggests that every time a security interest is granted in a tax refund it necessarily also grants a security interest in any credits which are being claimed.\textsuperscript{252} But, the result in \textit{Richardson} is not inconsistent because, under these facts, the tax credit was refundable and was coming to the taxpayer in the form of a payment.\textsuperscript{253} Therefore, it was not difficult for the court to find that the credit proceeds were subject to the security interest in favor of the bank. However, if the tax credit was not one which was refundable, but rather one which must be carried forward for use in another taxable year, then it would be more difficult to say that the loan agreement’s statements about granting a security interest “in and to my tax refund” also contemplated a security interest in any applicable tax credits. The court’s limited analysis glossed over the necessary steps to connect the language in the agreement granting the security with the ultimate holding of the case.\textsuperscript{254} By drawing lines between the interest granting

\textsuperscript{243} Id. at 220.
\textsuperscript{244} Id.
\textsuperscript{245} See \textit{generally} Part II and accompanying discussion.
\textsuperscript{246} See \textit{generally} JAMES J. WHITE & ROBERT S. SUMMERS, \textsc{Principles of Secured Transactions} (West 2007); see also UCC § 9-203(b) (2012).
\textsuperscript{247} See \textit{Richardson}, 216 B.R. at 209.
\textsuperscript{248} See supra Part I.A.
\textsuperscript{249} See \textit{generally} MICHAEL J. GRAETZ & DEBORAH H. SCHENK, \textsc{Federal Income Taxation} (Foundation Press 2008).
\textsuperscript{250} See \textit{id}.
\textsuperscript{251} See supra Part I.A.
\textsuperscript{252} See \textit{In re Richardson}, 216 B.R. 206 (W.D. Ohio 1997).
\textsuperscript{253} Id. at 211.
\textsuperscript{254} See \textit{id} at 219.
provisions in the tax refund and the ultimate conclusion that this included the general intangible that was the earned income tax credit, the court failed to take cognizance of the proper method of attaching a security interest under Article 9 and further helped confuse the ultimate issue.\textsuperscript{255}

Further, a security interest in Article 9—although it does not have to involve the specificity that granting a mortgage over real property must—calls for a description of the of the collateral.\textsuperscript{256} Typically the collateral is described in terms of the general categories laid out in Article 9 (i.e., all accounts, all inventory, all general intangibles).\textsuperscript{257} Sometimes, debtors will name specific types of collateral, such as a specific deposit account, instead of staying “all deposit accounts.”\textsuperscript{258} However, in Richardson, the security agreement did not state “all general intangibles”—which would arguably been an unequivocal grant of a security interest in any tax credits—but rather named a specific type of general intangible—the rights in and to the tax refund.\textsuperscript{259} The court, in its summary analysis, held that this amounted to the granting of a security interest in the tax credits as well, without specifically setting forth how the conclusion was reached.\textsuperscript{260} The implication of this broad rationale is to conclude that every security interest in a tax refund would also include a security interest in and to any tax credits that the taxpayer may be entitled. Under the holding in Richardson, borrowers are left to ponder what exactly the collateral they grant consists of when security is given in a tax refund.\textsuperscript{261} Without more careful discussion and analysis, the question of tax credit financing remains open-ended, if not further muddied.

\textbf{PART III. SUGGESTING A NEW TEST FOR ASSESSING TAX CREDIT COLLATERAL}

As courts have struggled with the issue of how to treat tax credits when used as collateral, the analytical framework at play in supporting each holding leaves much to guesswork.\textsuperscript{262} The courts make parallels to other types of rights in order to make assessments about tax credit collateral, often times in a way that seems inconsistent with the very nature of tax credits,\textsuperscript{263} or, in the alternative, comports which the nature of tax credits, but not necessarily with the nature of the right to which it is being compared.\textsuperscript{264} Moreover, the courts make broad and sweeping pronouncements about the nature of Article 9 collateral in general, even at times suggesting that additional requirements—outside those articulated in the statute—are required in order to properly confect the security right.\textsuperscript{265} Lastly, courts are taking one or more nuances that are particular to a specific tax credit and extrapolating them over the broad field of all tax credits, without carefully considering that not all credits are created equal.\textsuperscript{266} Without a more coherent

\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{See} LESTER E. DENNON, SECURED TRANSACTIONS UNDER THE UCC (Practicing Law Institute 1965).
\textsuperscript{257} \textit{See id.}
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} Richardson, 216 B.R. at 219.
\textsuperscript{260} \textit{See id.}
\textsuperscript{261} \textit{Id.}
\textsuperscript{263} \textit{See City of Chicago v. Michigan Beach Cooperative, 609 N.E. 2d 877 (Ill. App. 1st 1993).}
\textsuperscript{264} \textit{See In re Christina Louise Richardson, 216 B.R. 206 (W.D. Ohio 1997).}
\textsuperscript{265} \textit{See City of Chicago v. Michigan Beach Cooperative, 609 N.E. 2d 877 (Ill. App. 1st 1993).}
\textsuperscript{266} \textit{See id.}
framework from which to work within, courts will continue to struggle and produce varying, inconsistent holdings in tax credit secured transaction cases.267

A. Adjusting the Focus

However, despite these varying analytical fine points which in no small part contribute to the overall thicket of conflicting case law, the one element which all the cases seem to have in common is that the courts are tending to focus, even if by implication, on the refundability of tax credits.268 For instance, in Michigan Beach Cooperative the court held that tax credits have no economic value because there must first be a tax liability in order for the credits to be of use.269 In that case, the court was confronted with Low-Income Housing Tax Credits which are not refundable and can only be used to reduce liability.270 Here the court was focusing in on the specific payment nature of the credit.271 In that case, the credit could not be used to generate a refund, but rather could only be used to reduce the taxpayer’s liability.272 Because of this, the court held that it could not be used as collateral.273 Setting aside the fact that while the Low-Income Housing Tax Credits in this case were non-refundable, not all credits are such and the court’s analysis hinged on the refundability question.274 The focus was on whether this credit could, in essence, ever be used to produce a cash payment.275 Further, in Richardson the court suggested that because the earned income credit produced a cash refund, and because that cash refund would come to the taxpayer in the form of her annual tax refund, an interest in the tax credits themselves had been obtained.276 However, the debtor did not grant an interest in general intangibles in the security agreement, but rather only in the tax refund.277 The court’s holding suggests that because the tax credit came in the form of a refund, then a security interest was effectively in the tax credits because a security interest was taken in the tax refund.278 However, if the tax credit at issue represented a non-refundable right, would the court’s holding be the same? No specific distinction was made as to whether a different type of credit would produce a different result.279 But, here again as in Michigan, the court focused—albeit perhaps subconsciously—on the refundability question.280 Whether the credit was refundable is what determined the courts analysis, or, at the very least, guided it in the court’s ultimate conclusion.281

267 See supra Part II and accompanying discussion.
268 See id.
270 See id.
271 Id.
272 Id.
273 See id.
274 Id.
275 Id.
276 See In re Christina Louise Richardson, 216 B.R. 206 (W.D. Ohio 1997).
277 Id.
278 Id.
279 See id.
280 See id. See also City of Chicago v. Michigan Beach Cooperative, 609 N.E. 2d 877 (Ill. App. 1st 1993).
281 See supra Part II and accompanying discussion.
A key issue at play in the varying results produced by the courts that have faced the tax credit issue is precisely this misfocus on refundability. By focusing on refundability, courts are presupposing that only those tax credits which will produce a refund actually have value enough to be eligible for collateralization. In essence, unless a particular credit can be turned to cash, then it cannot be used as collateral. Further, this conclusion seems to rest on the supposition that a certain threshold amount of value is required in order for a credit to take an interest in certain collateral. As stated herein above, Article 9 does not require a particular level of value in order to be eligible as security; rather, the property must just have some value. These decisions of value are—as they should be—left to the parties to the transaction. The parties themselves are in the best position to determine whether or not what the debtor has to offer is of enough significance to the creditor to entice him to advance funds. Courts ought not look further into the minds of the parties in attempting to ameliorate any miscalculations on the part of the creditor in assessing its own risk. All that Article 9 requires is some level of value and compliance with the procedural aspects of the statute in order to perfect a security interest in personal property. Therefore, the imposition of an additional requirement—one that would seem to be purely judicial and thereby its parameters to only develop through a succession of cases—dealing with value would cause uncertainty in the market and could result in many creditors requiring more collateral than would be traditionally needed to support the loan because of fear that a court might find their determinations on what is sufficient to be invalid because of failure to meet an invisible “value” threshold.

Further, the other essential pillar to the refundability focus is the supposition that tax credits which are not refundable are of no value. Because a credit is merely statutorily relegated to the pure reduction of tax liability would seem, based on the cases above, to disqualify it from collateralization. In fact, many credits are non-refundable and, despite this aspect, are readily traded, bought, and sold on the open market daily. An individual with a

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282 Id.
283 Id.
285 Id.
286 See LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 197 (Aspen Publishers 2009) (stating, “Article 9 places no express limits on what may serve as collateral.”).
287 See generally id.
291 Id.
293 See id.
high tax liability would find no less value in credits which would reduce the amount of money he is forced to pay to the government than a credit which he could use to convert to cash if his liability was zeroed out. The value is the same in either case because it is conveying certain economic benefits—be it the reduction of tax liability or the payment of a refund—to the taxpayer. It is not necessary for the taxpayer to receive a refund in order for credits to be valuable. If that were the case, then all tax credits would be refundable and that is certainly not the case. Further, even refundable tax credits can only produce a refund if that taxpayer’s liability has been reduced to zero. In many cases tax credits are used to reduce a taxpayer’s liability, not completely wipe it out. The easing of the overall liability is valuable to the taxpayer nonetheless.

The courts’ focus on refundability is flawed because it creates assumptions regarding value and variability of tax credits that departs from the economic realities of the transaction. Further, it adds to the requirements for creating a security interest under Article 9 which should not exist. Courts should recognize this focus on refundability and jettison it for a better, more accurate and appropriate approach in analyzing tax credit collateral; specifically, an approach that focuses on transferability.

Cornwall, Should Angel Investors Get Tax Credits to Invest in Small Businesses? WSJ (Mar. 18, 2012) at R5.

298 See id.
300 See id.
303 See generally Part III.A and accompanying discussion.
304 See id.
C. A Two-Pronged Approach to Transferability

Courts should focus on the transferability characteristics of tax credits. This aspect of the credit is what matters in terms of providing security. If the credit can be transferred effectively to a third party, then the credit can be seized in the event of a default and a forced sale can ensue. However, if the movement of the credit is limited to the taxpayer only, then the ability to assign the rights in the credit as collateral for an obligation is impermissible. In essence, a creditor who would take a security right in a non-transferable credit would, in all practical purposes, have a useless security interest because the creditor would be without an avenue to actually possess the credit. The transferable nature is what matters in assessing the viability of the security right, not whether it is refundable. This transferability inquiry involves the intersection of the law of Article 9 and the laws and regulations applicable to the tax credit in question. This examination can be broken down further into its more theoretical and practical aspects. In order to make a full assessment of transferability, a two-pronged approach is suggested, one that looks to the substantive and procedural nature of the granting of the security interest.

First, does the collateralized tax credit meet the substantive transferability prong? In other words, does the statute creating the tax credit and the accompanying tax rules and regulations promulgated thereunder allow for the tax credit to be transferred? As stated before, some tax credits may only be claimed by the person entitled to them and cannot be transferred. This may be for public policy reasons, such as with certain credits that are enacted in order to give economic relief to the poor or those who have suffered from a crisis or natural disaster. In this case, public policy dictates that because the credit is aimed at specific individual population or demographic, it should not be transferable so as to create value for unintended parties. However, also stated above, many creates are transferable because government policy desires for them to be openly traded, exchanged, bought, and sold on the open market in order to further enhance and development the particular activity that the government wishes to

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305 See Lynn M. LoPucki & Elizabeth Warren, Secured Credit: A Systems Approach 38–40 (Aspen Publishers 2009) (“An enforceable right to possession also has strategic value. The creditor who can make a credible threat to dispossess the debtor—even if only temporary—has extraordinary leverage over the debtor. This kind of leverage can flow in the other direction as well. The debtor who can credibly threaten to retain possession of the collateral for a long time, to run up the cost of repossession, or to reduce the value of the collateral before the creditor can gain possession may be able to take advantage of the creditor in post-default negotiations.”).

306 See id. at 40 (“The ability to gain or retain possession during foreclosure can have a value far in excess of the use value of the property during the period in question.”).


encourage. In analyzing this first prong, courts are required to look beyond the mere requirements of Article 9 and delve into the substance of the tax credit itself. This calls for a more intensive analysis which courts of general jurisdiction are often times uncomfortable making because of the specialized nature of tax law. Nevertheless, the nuances of tax credits in the collateral context require a crossing over of disciplines in order to make a full and coherent analysis. Determining whether the credit has the legal properties that allow for transfers to third parties is the first and most foundational question in determining whether it can be effectively collateralized.

Second, does the collateralized tax credit meet the procedural transferability prong? Stated another way, has the creditor and the debtor engage in those activities, made those arrangements, and procured those necessary approvals so as to mechanically allow for the tax credits, in the event of a default, to be seized and sold by the creditor in order to obtain relief. While one may pass the substantive prong, the procedural prong is equally important because it asks the practical question of whether the parties have engaged in the correct activity so as to make the first prong effective. The answer to this prong involves a case-by-case inquiry into the tax credit as well. For instance some tax credits are certificated. When the taxpayer receives the credit it comes in the form of a certificate or other tangible document which evidences the right to claim the credit. If the credit is granted as collateral, the certificate might need to have an addendum or a notation evidencing the fact that it is being used as collateral. Also, typically the regulating agency will need to be notified and to give approval that a third party (i.e., the creditor) is taking an interest in the credits. This is important because in the event there is a default and the creditor seizes the certificates, it will want to ensure that the governmental body will respect the creditor as the owner and not ignore his security right because the government was not involved in approving the granting of those rights. In such a case, perhaps the governmental agency would become an intervening party in the security agreement so as to evidence its intent to recognize the creditor’s right in the event of a seizure. However, some credits, even though they can be substantively transferred, cannot be procedurally transferred for use as collateral. Specifically, many tax credits can only be transferred through an allocation to the members of the taxpayer. For instance, New Market Tax Credits and Low-Income

313 See id. (“Certificated tax credits, on the other hand, are sold to investors like a piece of property. The state provides a certificate indicating a tax credit amount and this certificate is transferable to (almost) anyone. This means that the investor need not be a partner of the entity generating the credit.”).
314 Id. (“Allocated tax credits (a category that includes all federal tax credit programs) are allocated to the owners of a pass-through entity, such as a partnership or limited liability company treated as a partnership for federal income tax purposes. Therefore, to obtain an allocated tax credit, the investor must be a partner in the entity that is generating the tax credit. Most states that have allocated tax credits also allow for a “special allocation” of these tax credits. A special allocation enables the investor to receive a disproportionate amount of state tax credits compared to the partner’s ownership percentage in the entity.”).
Housing Tax Credits can only be allocated in this matter.\textsuperscript{315} When the tax credits are awarded to the taxpayer entity, those credits can be passed through to all or just certain select members of the entity.\textsuperscript{316} Although the credits are being transferred in a sense, they are not being as freely transferred as credits that are certificated.\textsuperscript{317} Rather, they are being passed along through the ownership structure of the entity (i.e., a limited liability company to its members or a partnership to its partners).\textsuperscript{318} Not just any third party can receive the credits; it must actually be someone who has an equity interest in the entity that is entitled to the credits and the transfer comes through the allocation of tax benefits to the members.\textsuperscript{319} In such a case the credits are substantively transferable, but there would be no way to procedurally allow for the credits to be seized by a creditor in the event of a default.\textsuperscript{320} There would be no way for the seizure to take place because the tax law governing the credits would not allow for it.\textsuperscript{321} This is where the intersection of Article 9, which can be completely adhered to in the granting of the security interest in the credits, conflicts with the tax law governing the credits, which does not allow for the practical collateralization of the credits.

The satisfaction of each prong is essential to granting an effective security interest in a tax credit. By adopting this two-pronged approach to transferability, courts will be able to shift through the many questions and considerations involved in the collateralization of tax credits, while still maintaining the integrity of the Article 9 regime. This test provides a guidepost for courts, which generally do not deal with tax issues on a regular basis,\textsuperscript{322} to use in making a full and complete analysis of the issue. Aside from the typical Article 9 perfection and attachment steps,\textsuperscript{323} this extra analysis in assessing the proper collateralization of tax credits resolves the inter-legal issues of tax law and UCC Article 9—issues which reach a critical intersection when dealing with tax credit financing.

CONCLUSION

As commercial policy changes in order to accommodate increasingly complex business transactions, the law governing these transactions must be attune to these desires.\textsuperscript{324} This is particularly true in regard to security rights, which comprise such a substantial portion of commercial transactions today.\textsuperscript{325} As tax credits become more and more a part of our

\begin{footnotesize}
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\item[315] See id.
\item[316] Id.
\item[317] Id.
\item[318] Id.
\item[319] See id.
\item[320] See generally id.
\item[321] Id.
\item[322] See generally Harold Dubroff, The United States Tax Court: An Historical Perspective (Commerce Clearing House 1979).
\item[324] See generally Christopher K. Odinet, Comment, Laying to Rest an Ancien Regime: Antiquated Institutions in Louisiana Civil Law and Their Incompatibility with Modern Public Policies, 70 La. L. Rev. 1368 (2010).
\item[325] See generally Hannah L. Buxbaum, Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform, 8 Uniform Law Rev. 321–40 (2003); Mark Sundahl, Iraq, Secured Transactions & The Promise of Islamic Law, VANDERBILT J. OF TRANSNATIONAL LAW (forthcoming);
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commercial policy, and, in turn, a part of our business transactions, the law must be designed so as to effectively deal with situations where these types of taxation rights are used as collateral. Article 9 of the Uniform Commercial Code was designed to give stability to the law of security rights in personal property. However, the types of collateral that parties once used in business transaction are having to make room for new and non-traditional types of personal property rights. Tax credit financing is becoming a major part of many transactions, but the law governing the collateralization of these credits is uncertain. Courts that have been made to face the issue have come to varying and often times inconsistent conclusions. The result has been the creation of an unpredictable—and in some cases incorrect—body of precedent that causes more confusion than it does stability.

A core fault in courts’ analysis of tax credit financing is the focus on the refundability aspect of tax credits. The honing in on whether the credits can in fact produce a refund—as opposed to merely being for the reduction of tax liability—causes a misfocus in the courts’ examination of the law because it misses the larger and more relevant question of transferability. Credits have value regardless of whether they can produce a refund. The ability of a credit to reduce one’s tax liability carries great value. It is the ability to transfer the credit which matters because it is this aspect that governs whether, in practical terms, the creditor will have the ability to seize the tax credit in the event of a default. Further, this analysis of the transferability side of tax credits should be further broken down into its substantive and procedural aspects. Specifically, courts should ask the question—in addition to making the traditional Article 9 inquiries—of whether the law governing the tax credit allows for it to be transferred to parties other than the taxpayer, and then ask the question as to whether the parties can and have engaged in the type of procedures and activities which would actually allow the creditor to seize and exercise control over the credit in order to monetize it in the event of a default. By undertaking such an analysis that cuts to the heart of whether tax credits truly can be collateralized, courts will have a reasoned and appropriately inter-legal framework to help them in making clear and consistent decisions and private parties will have a roadmap in structuring their commercial transactions.

As commercial transactions become increasingly intertwined with the granting of security rights in tax credits, it is necessary to understand and assess the viability of collateralizing other


326 See ROBERT L. JORDAN, WILLIAM D. WARREN, & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 12–13 (Foundation Press 2000).
327 See generally supra Part I and accompanying discussion.
328 See supra Part II and accompanying discussion.
329 See supra Part II.
330 See supra Part II and accompanying discussion.
331 See supra Part II.
332 See supra Part II.
333 See supra Part II.
334 See supra Part II.
335 See supra Part III and accompanying discussion.
336 See supra Part III.
337 See supra Part III.
338 See supra Part III.
forms of general intangibles as well. Tax credits and other forms of non-traditional collateral were arguably envisioned by the drafters of Article 9, evidenced by their broad defining of general intangibles. However, because this category is so all encompassing, it lacks some of the reliable, intricate, and precise legal rules that many of the other collateral categories, such as deposit accounts and investment property, enjoy in Article 9. Further analysis is required in order to determine whether the two-prong test for transferability that is suggested in this Article could be used to aid courts and private parties in their future understanding of business transactions which involve the collateralization of these and other non-traditional forms of property.

338 See ROBERT L. JORDAN, WILLIAM D. WARREN, & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY (Foundation Press 2000).