STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN GRACE & CO., INC.	:	DECISION
for a Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended October 3l, l976 and October 3l, l978.	:	

Petitioner, John Grace & Co., 34 Washington Parkway, P.O. Box l000, Bethpage, New York ll7l4, filed an exception to the determination of the Administrative Law Judge issued on February 9, l989 which denied its petition for a redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended October 3l, l976 and October 3l, l978 (File No. 800843). Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler (Peter L. Faber, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioner and the Division filed briefs on exception. At the request of petitioner, oral argument was heard on November l5, l989.

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

ISSUES

I. Whether a request for an automatic extension to file a report may be valid if it is not accompanied by payment of l00% of the preceding year's tax or at least 90% of the tax as finally determined.

II. Whether petitioner has shown that the estimate it made with its application for extension was proper.

FINDINGS OF FACT

We accept and repeat the findings of the Administrative Law Judge except for the modification indicated below.

We modify the findings of the Administrative Law Judge as follows:

> On October 27, l987, the representatives of petitioner and the Division of Taxation entered into astipulation of facts. The facts contained in the stipulation and the exhibits attached to the stipulation have been incorporated into the findings of fact below.[1]
>
> Petitioner, John Grace & Co., Inc ("John Grace"), at all times material hereto, was a heating and ventilating contractor located in Bethpage, New York. During the fiscal years ended October 31, 1976 and October 31, 1978 (hereinafter the "audit period") petitioner utilized the accrual method of accounting and a taxable year ending October 31 for purposes of determining its income tax liability.
>
> With respect to its taxable period ended October 31, 1979, petitioner timely filed an Application for 3 Month Extension for Filing Tax Report (Form CT-5) with the New York State Department of Taxation and Finance.[2] Said application was with respect to the franchise tax report of John Grace and the two other members in its combined group, Hicksville Metal Products, Inc. and BRC Electrical Corp., and reflected the following information:

Preceding year's tax:	
$52,842	
Line 1 or the estimated tax for taxable period for which this extension is requested:	679
If Line 2 is over $1,000: 25% of Line 2 - First Installment for taxable period following that covered by this application:	0
Combined Filers Only: Number of authorized combined members	

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[1] The Administrative Law Judge included a paragraph before the Findings of Fact section of the determination which read as follows:

> "On October 27, l987, the representatives of petitioner and the Division of Taxation entered into a stipulation of facts which is set forth as the Findings of Fact, infra."

This paragraph has been modified to include it in the Findings of Fact section as it contains facts required for the record here. In addition, the paragraph has been rewritten to make it clear that the Findings of Fact are not an exact copy of the stipulation submitted by the parties.

[2] Pursuant to Tax Law § 2ll.l, the application for extension was due two and one-half months after the close of the fiscal year, or January l5, l980. In fact, it was marked received by the Department of Taxation and Finance on January l8, l980. The Division accepted this application as timely filed and the Law Bureau did not raise the issue of timeliness.

2 x minimum tax	500
Total - Line 2 plus Lines 3 and 4	1,179
Prepayments	979
Balance Due - Line 5 minus Line 6	200

John Grace paid the balance due of $200.00 with the application for extension.

Pursuant to a timely filed request for an additional extension of time for filing its tax report for the taxable period ended October 31, 1979, John Grace and its combined subsidiary corporations were granted an extension for filing by the State Tax Commission to October 15, 1980, on the condition that their original extension meet the requirements for a valid automatic extension.

John Grace filed its combined corporation franchise tax report for the taxable period ended October 31, 1979, on or about August 6, 1980, together with the report of Hicksville Metal Products, Inc. and the report of BRC Electrical Corporation for the same taxable period. As filed, the combined report for the taxable period ended October 31, 1979 reflected the following: "Schedule A - Computation of Tax and Payments of Estimated Tax":

1. Allocated net income $0.00 x 10%	$ 0.00
2. Allocated capital $0.00 x .00178	0.00
3. Alternative base $0.00 x 10%	0.00
4. Minimum	250.00
5. Allocated subsidiary capital $924,451 x .0009	832.00
6a. Tax: largest of 1, 2, 3 or 4 plus 5	1,082.00
b. Less tax credits	0.00
c. Net tax	1,082.00
7. First installment for period following that covered by this report	
a. Enter line 3 from Application for Extension, Form CT-5, IF FILED	0.00
b. Enter 25% of Line 6 if Application for Extension, Form CT-5, WAS NOT FILED and Line 6c is over $1,000	0.00
8. Total - line 6c plus 7a or 7b	1,082.00
9. Prepayments	679.00

10. Balance line 8 less line 9
403.00
11. Interest
0.00
12. Additional Charge
0.00
13. Balance Due
403.00
14. Overpayment: Line 9 less Line 8
0.00
15. Entire Net Income (1,041,263)
16. Business allocation percentage 100%
17. Issuer's allocation percentage 26.12%

The combined report for the taxable period ended October 31, 1979 reflected in schedule C, "Subsidiary Capital and Allocation", the following information with regard to Grace Recoveries, Inc.:

Employee Identification Number	11-2381001	
Percentage of voting stock owned	100%	
Average fair market value		$636,897.00
Current Liabilities	0	
Net Average Fair Market Value		$636,897.00
Issuer's allocation	100%	
Value allocated to New York State		$636,897.00

As filed, the combined reports of Hicksville Metal Products, Inc. and BRC Electrical Corp. for the taxable period October 31, 1979 each reflected a total tax of the minimum due of $250.00. Concurrent with the filing of its combined report for the taxable period ended October 31, 1979, John Grace paid a total tax to the State Tax Commission of $1,582.00, comprised of $1,082.00 designated as net tax and $500.00 representing the $250.00 minimum tax due from both Hicksville Metal Products, Inc. and BRC Electrical Corp, less prepayments of $1,179.00 for a balance of $403.00 as shown to be due on the corporation franchise tax report.

At all times, Grace Recoveries, Inc. was a wholly-owned subsidiary of John Grace, but for New York State tax purposes was treated as a non-combined subsidiary of petitioner.[3]

[3]Grace Recoveries, Inc. was the name reflected on schedule C of the parent John Grace & Co., Inc.'s corporation franchise tax report for the fiscal year ended October 3l, l979. However, the name of the company as set forth on its corporation franchise tax report for the same period was listed as Grace Recoveries Co., Inc. Hereinafter, the

Grace Recoveries, Inc. timely filed its corporation franchise tax report for the fiscal year ended October 31, 1979 which reflected the following items:

Line 1 Allocated Net Income	($579,863.00)
Line 2 Allocated Capital	(492,697.00) x .00178
Line 6a Tax	250.00
Line 15 entire net income	(579,863.00)

In a letter dated December 3, 1982, directed to Grace Recoveries Co., Inc., the Division requested a "rider" to Grace Recoveries' corporation franchise tax report for the periods ended October 31, 1979, October 31, 1980 and 1981 in order to verify the current liabilities claimed by Grace Recoveries in its reports. Grace Recoveries responded in a letter dated March 2, 1983 from their accountant, Allen E. Weiner, which was accompanied by the information requested by the Division. No further action was taken by the Division with regard to Grace Recoveries' report for the fiscal years ended October 31, 1979, 1980 and 1981.

Petitioner's combined corporation franchise tax report for the fiscal year ended October 31, 1978 was audited by the New York State Corporation Tax Bureau, resulting in the issuance of a Statement of Audit Adjustment dated July 10, 1981 which set forth a tax deficiency of $4,109.00 for the period ended October 31, 1978 with interest of $869.99 for a total balance due of $4,976.99. The following explanation was offered:

"Combined business income per report	$547,256.00
Add interest on bank accounts and municipal bonds	36,064.00
Adjusted combined business income	583,320.00
Tax at 10%	58,332.00
Tax on subsidiary capital per report	571.00
Total tax	58,903.00
Less adjusted investment tax credit	1,952.00
Net tax	56,951.00
Tax per report	52,842.00
Deficiency	4,109.00

> Section 210.2(b)(3) of Article 9A [sic] of the tax law provides that if the investment allocation percentage is zero, interest on bank accounts and interest on obligations of the United States and its instrumentalities, and of New York and its political subdivisions shall be multiplied by the business allocation percentage. In addition, the additional investment tax credit is allowed on property acquired on or

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company is referred to as "Grace Recoveries".

> after 1/1/76. Therefore, the additional investment tax credit claimed for the period ended 10/31/75, has been disallowed and your tax has been adjusted to the amount shown in the above computation."

John Grace paid the deficiency set forth on the Statement of Audit Adjustment in the sum of $4,976.99 by check dated July 21, 1981. On July 18, 1983, petitioner filed a Claim for Credit or Refund of Corporation Tax Paid (Form CT-8) for the fiscal year ended October 31, 1976 in the amount of $7,655.00, based on a net operating loss carryback from its fiscal year ended October 31, 1979.[4] In addition, on the same date, petitioner filed a Claim for Credit or Refund of Corporation Tax Paid (Form CT-8) for the fiscal year ended October 31, 1978 in the amount of $53,034.00, based on a net operating loss carryback from the fiscal year ended October 31, 1979.

On August 23, 1983, the Department of Taxation and Finance denied petitioner's claims for refund based on a net operating loss carryback from October 31, 1979 to October 31, 1976 and October 31, 1978. The letter contained the following salient language with regard to the Department's reasoning for the denials:

> "Your report for the period ended October 31, 1979, filed on August 6, 1980, was due on January 15, 1980, as your extension filed on January 18, 1980 was not valid. The total tax payment for the period for which this extension was requested did not equal or exceed the tax for the preceding taxable period or equal 90% of the tax as finally determined.
>
> Therefore, in accordance with Section 1087(d) of Article 27 of the Tax Law, your request for carryback of the net operating loss from October 31, 1979 is not timely and is therefore denied.
>
> Under Section 1089(c) of Article 27 of the Tax Law, no petition for the recovery of the tax, penalty or other sum which is part of the claim for which this notice of disallowance is issued, may be filed more than two years after the date this letter was mailed."

On or about February 28, 1985, a corrected Corporation Franchise Tax Report (Form CT-3) for petitioner's fiscal year ended October 31, 1979 was filed with the Department of Taxation and Finance. Said corrected report reflected the following information:

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[4]Petitioner incurred a net operating loss during the fiscal year ended October 3l, l979 for New York State purposes of $l,04l,263.00.

"Schedule A - Computation of Tax and Payments of Estimated Tax"

4. Minimum		$250.00
5. Allocated Subsidiary Capital $287,554.00 x .0009	259.00	
6a. Tax		509.00
b. Less Tax Credits - CT-46		259.00
c. Net Tax		250.00"

With its brief, petitioner submitted proposed findings of fact. All of petitioner's proposed findings of fact have been incorporated herein except for numbers 6, 24, 25 and 26 which are conclusory in nature, and numbers 1, 19 and 20 which are irrelevant.

OPINION

The Administrative Law Judge found that petitioner did not have a valid extension for the filing of its annual report because it had not paid with its extension application 90% of the tax ultimately due on its subsequently filed report. This conclusion was based on the Administrative Law Judge's finding that the phrase "the amount properly estimated as its tax" in Tax Law section 2ll.l is to be defined by reference to Tax Law section 2l3.l(b)(a) as either not less than 90% of the tax as finally determined, or not less than the tax on the taxpayer's report for the preceding year.

Petitioner argues that it made a good faith estimate of its tax which is all that is required by Tax Law section 2ll.l and that its application for an extension of time to file its report is not invalid merely because it did not make sufficient payments to avoid the penalty provisions in section 2l3.l. In any event, petitioner argues that the mathematical tests of section 2l3.l are only safe harbors and that since a taxpayer can avoid the penalties in this section by showing that it had reasonable cause for its estimate based on all the facts and circumstances, it can also satisfy the requirements of section 2ll.l in the same manner.

The Division of Taxation asserts that the determination of the Administrative Law Judge is correct, arguing that the only way to obtain a valid extension under section 2ll.l is to pay under one of the methods contained in section 2l3.l, i.e., at least 90% of the tax due for that tax year or l00% of the tax for the preceding year.

We affirm the determination of the Administrative Law Judge but not for the reasons stated in the determination.

The portion of Tax Law section 2ll.l which is relevant to this proceeding reads as follows:

> "An automatic extension of three months for the filing of its annual report shall be allowed any taxpayer if, within the time prescribed by the preceding paragraph, such taxpayer files with the tax commission an application for extension in such form as said commission may prescribe by regulation and pays on or before the date of such filing the amount properly estimated as its tax."[5]

Tax Law section 2l3.l provides as follows:

* * *

> "If any taxpayer, within the time prescribed by section two hundred eleven of this article, shall have applied for an automatic extension of time to file its annual report and shall have paid to the tax commission on or before the date such application is filed an amount properly estimated as provided by said section, the only amount payable in addition to the tax shall be interest at the rate set by the tax commission pursuant to section one thousand ninety-six of this chapter, or, if no rate is set, at the rate of six per centum per annum upon the amount by which the tax, or the portion thereof payable on or before the date the report was required to be filed, exceeds the amount so paid. For purposes of the preceding sentence:
>
> "a. an amount so paid shall be deemed properly estimated if it is either (i) not less than ninety per
>
> centum of the tax as finally determined (computed without regard to any credit allowable under subdivision fourteen of section two hundred ten of this chapter), or (ii) not less than the tax shown (computed without regard to any credit allowable under subdivision fourteen of section two hundred ten of this chapter) on the taxpayer's report for the preceding taxable year, if such preceding year was a taxable year of twelve months; . . . ." (Emphasis added.)

Petitioner's first argument is that Tax Law section 2ll.l requires only that a taxpayer must pay with its application for extension for the filing of its annual report "the amount properly estimated as its tax." As this phrase is not otherwise defined in section 2ll.l, petitioner argues that it means that if a taxpayer has made a good faith effort to estimate the amount of tax it

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[5] The statute was amended in l985 to increase the length of time of an automatic extension to six months (L l985, ch 542).

believes would be due with the final report, and pays that amount, its extension is valid. This, petitioner asserts, is the logical legislative intent for if the Legislature had intended a different standard, such as to define "amount properly estimated" as limited to the two standards contained in section 2l3.l, it would have said so. In addition, petitioner claims that its interpretation is in accord with the reason for having an automatic extension provision, that is, that the taxpayer does not have enough information to exactly calculate its tax, since if it did, it would not need an extension of time to file its report. Asserting that it made a good faith effort to estimate its tax, petitioner urges that its application for extension is valid and its time to file a refund claim is correspondingly extended. Petitioner finds additional support for its argument in the substantially identical Internal Revenue Code provision (Internal Revenue Code § 608l[b]) which has been interpreted to require only that the taxpayer make a reasonable good faith estimate of its tax liability. Petitioner asserts that since section 2ll.l was based on this provision it should be interpreted in the same way.

Petitioner's second argument is that even if it is determined that the payment requirements of section 2l3.l must be satisfied for an extension application to be timely filed, petitioner has met those requirements. Petitioner asserts that the two mathematical tests in section 2l3.l are merely safe harbors and, since a taxpayer can avoid the penalties for underestimating by showing that it made a proper estimate based on all the facts and circumstances, it can also show that its extension was valid by the same method.

We find that in order to obtain a valid extension under section 2ll.l a taxpayer must pay with its application for extension an amount that is its reasonable estimate of the amount due based on the information available to the taxpayer at the time the application is filed. Our conclusion is based on our analysis of the interplay between Tax Law sections 2ll.l and 2l3.l, as read in relation to Tax Law section l085, as well as the tax policy reasons for these provisions.

The Tax Law clearly allows for the possibility that a taxpayer may not be able to file its return on the original due date. In fact, section 2ll.l provides for two ways in which an extension

may be obtained. The Tax Commission (now the Division of Taxation) may grant a reasonable extension of time for filing reports whenever good cause exists, or an automatic extension shall be allowed if the taxpayer complies with two conditions: (1) files an extension form, and (2) pays an amount "properly estimated as its tax". The Division argues that this phrase is defined in section 2l3.l as at least 90% of the tax as finally determined or l00% of the preceding year's tax and that unless one of these conditions is met the extension is invalid. The sentences in section 2l3.l to which the Division points in support of its argument deal only with whether or not interest alone will be added to the tax if the amount paid with the extension application is less than the amount due when the report is filed. If the amount has been "properly estimated" as provided by section 2ll.l, the amount payable in addition to the tax shall be only interest. Section 2l3.l then goes on to say that for the purpose "of the preceding sentence" an amount "shall be deemed properly estimated" if it is not less than 90% of the tax as finally determined or l00% of the preceding year's tax.

We do not agree that the phrase "amount properly estimated" in section 2ll.l and 2l3.l was intended to limit the amount a taxpayer must pay with its extension application to one of the two alternatives in section 2l3.l. We believe that the purpose of these alternatives is to provide a safe harbor for the taxpayer who wishes to avoid the possibility that it will have to pay penalties if there has been an underpayment of tax with its extension application. The taxpayer who fails to pay with its extension application an amount conforming to one of these alternatives may be subject to penalties under section l085 of the Tax Law for failure to pay tax shown on a return and for failure to file a return when due. This statutory scheme fulfills the tax policy purposes of sections 2ll.l and 2l3.l, which are that although a taxpayer may need additional time in which to complete its return, the State is entitled to its tax on the date it was originally due. The penalty provisions are intended to provide monetary punishments for failing to make such payments and to make the State whole for any loss associated with not having its tax funds on the due date.

The safe harbors provide a guaranteed way to avoid the penalties for a taxpayer who cannot determine with sufficient accuracy the amount it will owe.

It must be noted that even a taxpayer who has underestimated its tax and whose estimate does not conform to one of the alternatives in section 2l3.l can avoid the penalties in section l085 by showing that its failure to estimate correctly was due to "reasonable cause". (See, Matter of McDonnell Douglas Corporation, Tax Appeals Tribunal, May 4, l989; Matter of Chemical New York Corporation, State Tax Commn., September 2, l983.) In other words, a taxpayer who has applied for an automatic extension of time to file has three ways in which to avoid a penalty for failing to pay with its extension request the amount finally due on its report: (1) it can pay 90% of the amount it ultimately owes (that is make a calculation that is fairly close to its actual tax with a little leeway for error); or (2) it can pay l00% of the amount it owed for the preceding year, an amount that can be known with certainty but which may be much more or much less than the amount due in the current tax year; or (3) having not done one of the above, it can show that it had reasonable cause for failing to pay the amount ultimately due with its return.

The Division argues that the taxpayer can do any of the three above to avoid penalties, but it can do only the first two in order to have a valid extension. The problem with this reasoning is that it seeks to read sections 2ll.l and 2l3.l together for some purposes but not for all. In the Division's and the Administrative Law Judge's interpretation, the reasonableness of the taxpayer's estimate is relevant only when the issue is the validity of the extension for the purpose of assessing penalties, but not when the issue is the validity of the extension for the purpose of determining when a refund claim may be filed. We cannot agree that this is the result envisioned by the Legislature.

We find support for this conclusion in federal interpretation of the similar provision of the Internal Revenue Code. The Administrative Law Judge and the Division conclude that federal law is not relevant to this issue because the state tax law was not intended to exactly conform to the federal code in this area and that further, the Internal Revenue Code does not contain a

section similar to section 2l3.l. Although the safe harbors in section 2l3.l do not appear in the Internal Revenue Code, the Internal Revenue Code regulations contain a presumption that reasonable cause for failure to pay the amount due exists if the taxpayer paid with its automatic extension request 90% of the amount shown on its return. (I.R.C. Reg. § 30l.665l-l[c][4]). In addition, although we agree that federal interpretations of similar provisions in this area do not conclusively mandate the same interpretation of the state tax law, the legislative history makes it clear that, in general, substantial conformity was intended. (Memorandum of State Department of Taxation and Finance, l962 McKinney's Session Laws of New York, at 3537-3538; Message of Governor dated April 30, l962 accompanying enactment of Chapter l0l1 - l0l3 of Laws of l962 at 368l-3684.) In the absence of compelling reasons or clear legislative direction, we find that with regard to this particular provision, federal guidance is relevant. Further, in our view, the federal interpretation which finds that an extension is valid if the taxpayer's estimate was reasonable is correctly applied to the State provision (see, Hudspeth v. Commr., T.C. Memo 1985-628, 51 TCM 175; Crocker v. Commr., 92 TC 899).

The Department's regulations are in accord with this interpretation. Section 6-4.4, entitled, "Extension of time for filing reports", indicates that an automatic extension will be granted if the application form is filed and "a properly estimated tax" is paid. This phrase is not defined at this point in the regulations; instead, one is referred to section 7-l.3, entitled "Properly estimated tax". Section 7-l.3 indicates that a properly estimated tax must be paid and that the estimated tax will be "deemed properly estimated" if it is either not less than 90% of the tax as finally determined or not less than the tax for the preceding year (20 NYCRR 7-l.3). The use of the word "deemed" in the regulations, as in the statute, is unnecessary if the two alternatives are the only permissible ways to fulfill the requirement of paying the properly estimated tax. Thus, the Division exercised its rule making authority only to define two definite ways to properly estimate tax (safe harbors) and did not attempt to define the entire range of meaning of this

phrase. Given this situation, we conclude that "properly estimated" tax includes a reasonable estimate of tax as well as the two defined safe harbors.

The appropriateness of our interpretation is particularly apparent when the circumstances of the case before us are examined. Whether a taxpayer has estimated correctly cannot be determined until the return has actually been filed. At that point, the Division's only real interest in the validity of the extension or the amount of the estimate paid with the extension relates to whether the taxpayer should be assessed penalties. Under most circumstances, the result of having an invalid extension is that the taxpayer may be assessed an additional penalty under Tax Law section l085 for failure to file a return. However, the taxpayer may avoid this penalty by showing that its failure to more accurately estimate was due to reasonable cause. Under the Division's theory, having an invalid extension would appear to have additional consequences only in the extremely limited circumstances presented by the case before us. This is so because the statute of limitations for filing a regular refund claim is three years from the time the return is filed (Tax Law § l087[a]). Therefore, the time to file most refund requests is not affected by whether the extension was valid or invalid. However, petitioner's refund claims involve a net operating loss carryback. Such claims must be made within three years from the time the return was due (including extensions).[6] (Tax Law § l087[d].) If the extension is invalid, the time in which a taxpayer can make its claim is reduced by three months (or the length of the extension).[7] In the Division's view, a taxpayer with this type of refund claim cannot overcome the challenge to the timeliness of the claim by showing reasonable cause for its failure to more accurately estimate with its extension request even though it could make such a showing to overcome any

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[6]The time in which the Division may issue a deficiency attributable to a net operating loss carryback is not so limited. Pursuant to Tax Law section l083(c)(4), a deficiency may be assessed at anytime that a deficiency for the taxable year of the loss may be assessed, a time period which is calculated from the time the return is filed (Tax Law § l083[a]).

[7]This is the scenario here. Petitioner filed its claims in the last few months before the three years would have expired if the original extension was valid. The Division did not assess petitioner with a penalty for underpayment of its estimate or for failure to file a return because its extension was invalid. The question of the validity of petitioner's extension appears to have arisen only because of petitioner's refund claims.

penalties assessed for the same failure. This view contradicts the notion of an "automatic extension" and we are not aware of any particular rationale for a distinctly harsher rule on extensions for this extremely small group of taxpayers.

The Division argues that the Tribunal has already decided the issues presented here in Matter of McDonnell Douglas Corporation (supra). We do not agree. McDonnell Douglas involved a penalty for failure to timely file a report due to the petitioner's underpayment of its estimated tax with its automatic extension application. The issue presented was whether petitioner established that it had reasonable cause for its underestimate so as to avoid payment of the penalty, and the arguments in that case focused on the facts presented by the petitioner to show that it had reasonable cause. The arguments presented in the case before us concerning the meaning of "properly estimated" as used in Tax Law section 211.1 were not presented or considered in McDonnell Douglas, nor was an interpretation of section 211.1 necessary to the decision in that case. Therefore, the Tribunal has not decided the issue presented here. A decision of the Tribunal is not persuasive authority for an issue not specifically argued or considered by it (see, Velez v. Taxation & Finance, 152 AD2d 87, 547 NYS2d 444, 445).

We now turn to whether petitioner has established that its extension request was valid by showing that its estimate was reasonable and, therefore, a proper estimate. We find that under the facts in this case petitioner has failed to show that it made a good faith effort to properly estimate its tax. Although petitioner has argued from the inception of these proceedings that its estimate was reasonable and its representatives have frequently stated that petitioner's estimate was made in good faith, evidence in support of its argument is lacking in the record. Although the accountant who prepared the application for extension, and the subsequently filed report, testified at the hearing he was not asked nor did he explain how he arrived at the estimate that was included with the extension. Although he stated that he knew that an estimate with an extension must be the best estimate possible in light of all the information then available, he did not say that that is what he did in preparing the estimate for John Grace. Although he said that

John Grace was a substantial company with many complications and that it would not necessarily be an easy calculation, he did not say why he was not able to estimate with more accuracy. The tax was estimated at $679.00. To this number was added the minimum tax for the two subsidiaries in the combination for a total estimated tax of $1,179.00. No explanation was provided by petitioner as to how the $679.00 was calculated. The accountant was not asked to explain the reasons for the calculation at the hearing nor are the reasons otherwise apparent from the documents submitted. Having raised the issue as a defense to the Division's decision that the refund claim was untimely, petitioner had the opportunity to explain how the estimate was made and to produce facts to support its claim that it had acted reasonably and made a proper estimate as required by Tax Law section 211.1. This it failed to do. Although the fact that the numbers here were small and the difference between the tax as estimated and the tax ultimately paid was only $403.00 could be a strong factor in support of a finding of reasonable cause, it cannot do so in the absence of any other evidence establishing that petitioner acted in good faith. We find that petitioner has failed to carry its burden of proof with regard to whether it made a proper estimate with its extension application and that, therefore, petitioner's extension application was not valid and petitioner's refund claims should be denied as untimely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Grace & Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of John Grace & Co., Inc. is denied; and

4. The refund claims filed by John Grace & Co., Inc. on July 18, 1983 are denied.

DATED: Troy, New York
May 9, 1990

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

/s/Maria T. Jones
Maria T. Jones
Commissioner

Dissenting Opinion in the Matter of the Petition of
JOHN GRACE & CO., INC.
John P. Dugan (dissenting):

I concur in the conclusion of the majority but dissent from the majority's reasoning with regard to section 211.1 of the Tax Law. The crux of the matter in this case is the validity of petitioner's application pursuant to Tax Law section 211.1 for an extension of time to file its corporate franchise tax report. It has particular meaning in this case because petitioner's claim for refund involves a net operating loss carryback and must be made within three years from the time the return was due (including extensions). (Tax Law § 1087[d].) Thus, if the extension is not valid, the time for filing the refund is the original due date of the return which means that the refund application would not be timely. This is to be compared with the statute of limitations for filing a regular refund claim for franchise tax which is three years from the time the return is filed (Tax Law § 1087[a]).

The Administrative Law Judge determined that petitioner's extension was not valid because petitioner did not "properly estimate" its tax due, i.e., pay at least ninety percent of the tax finally determined to be due, when it filed its request for an extension as required by section 211.1. Accordingly, the Administrative Law Judge measured the timeliness of the refund from the time the return was due and concluded it was not timely.

Petitioner asserts that section 211.1 requires only that a taxpayer must pay with its application for extension for the filing of its annual report "the amount properly estimated as its tax". As this phrase is not defined in section 211.1, petitioner argues that it only requires a taxpayer to make a good faith effort to estimate the amount of tax it believes would be due with its final report and if it can show good faith in this regard the extension is valid. Petitioner asserts that the mathematical tests of section 213.1 are only safe harbors and that since a taxpayer can avoid penalties in this section by showing that it had reasonable cause for its estimate based on all the facts and circumstances, it can also satisfy the requirements of section 211.1 in the same manner.

The Division asserts that it has defined the term "properly estimate" in its regulations (20 NYCRR 6-4.4[a]) and such definition is limited to the two alternatives in section 213.1. As a result, the Division asserts that petitioner can show reasonable cause for its failure to more accurately estimate the tax paid with its extension request only to overcome any penalties assessed for failure to timely file. However, such a showing does not serve to validate the extension.

I agree. Tax Law section 211.1, which relates to the time for filing reports as relevant to this proceeding, reads as follows:

> "An automatic extension of three months for the filing of its annual report shall be allowed any taxpayer if, within the time prescribed by the preceding paragraphs, such taxpayer files with the tax commission an application for extension in such form as said commission may prescribe by regulation and pays on or before the date of such filing the amount properly estimated as its tax."

Tax Law section 213.1, which relates to payment and lien of tax, as relevant provides as follows:

> "if any taxpayer, within the time prescribed by section two hundred eleven of this article, shall have applied for an automatic extension of time to file its annual report and shall have paid to the tax commission on or before the date such application is filed an amount properly estimated as provided by such section, the only amount payable in addition to the tax shall be interest at the underpayment rate set by the tax commission pursuant to section one thousand ninety-six of this chapter ... For purposes of the preceding sentence:
>
> "a. an amount so paid shall be deemed properly estimated if it is either (i) not less than ninety per centum of the tax as finally determined ... or (ii) not less than the tax shown ... on the taxpayer's report for the preceding taxable year ..." (emphasis added).

Section 211.1 does not define the phrase "properly estimated". Section 213.1 defines the term and refers to section 211.1. The Division's regulations define "properly estimate" by reference to its regulation in part 7-1.3 entitled "Properly estimated tax." That regulation repeats the definition of "properly estimate" used by the Legislature in section 213.1 (see, 20 NYCRR 6-4.4[a] entitled "Extension of time for filing reports" which indicates that an automatic extension

will be granted if the application form is filed and "A properly estimated tax" is paid. This section refers to section 7-1.3 entitled "Properly estimated tax").

In my opinion the Division's regulations indicate that an amount paid with an extension request is "properly estimated" if it meets one of the two alternatives in section 213.1. I cannot agree with the majority's view that the use of the term "deemed" in the regulations, as in the statute, is unnecessary if the two alternatives are the only permissible ways to fulfill the requirement of paying the properly estimated tax.

This view overlooks the plain reading of the words in both the statute and the regulations, i.e., that "an amount so paid shall be deemed properly estimated if it is either" ninety per centum of the tax as finally determined or not less than the tax shown on the taxpayer's report for the preceding taxable year." The emphasis placed on one word, "deemed", by the majority, in my opinion, results in a strained interpretation.

Nor am I persuaded, as the majority asserts, that the Division's interpretation is flawed or inconsistent with the intent of the legislature because "it seeks to read sections 211.1 and 213.1 together for some purposes but not for all." I find no evidence that the Legislature intended that the same grounds be available to a taxpayer for proof of reasonable cause for waiver of penalty and for proof of validity of an extension to file tax. In short, the fact that the Division in its regulations relies on the two alternatives in the statute as the means to prove the validity of an extension while providing broader grounds under the reasonable cause standard embodied in section 1085 of the Tax Law for waiver of penalty merely reflects a judgment by the Division that the two issues are different.

The reasons for which a penalty may be asserted are delineated in Tax Law section 1085. If penalty is asserted for failure to file a return on or before the prescribed date (§ 1085[a][1]), penalty can be waived if the taxpayer can show that such failure was due to reasonable cause and not due to willful neglect. The Division's regulations are instructive with regard to what

constitutes reasonable cause (see, generally, 20 NYCRR 46). As relevant here, the regulations provide that where a taxpayer:

> "(a) makes a timely application for an extension of time to file the return;
>
> "(b) makes a good-faith effort to properly estimate the tax due; and
>
> "(c) pays with the application for extension of time for filing any unpaid balance of the tax as estimated;
>
> "an inability for reasons beyond the taxpayer's control to obtain and assemble essential information may constitute reasonable cause for failure to file a return and for failure to pay the amount shown as tax on the return, where such inability precluded the taxpayer from properly estimating the tax as finally determined thereby invalidating the extensions of time for filing the return. In support of this ground as a basis for reasonable cause, the taxpayer or the taxpayer's representative must indicate why the estimated tax could not be predicated on the preceding year's tax, indicate what information was unavailable and explain the reason or reasons why such information was unavailable, despite reasonable efforts by or on on behalf of the taxpayer to obtain the missing information. It must further be explained how the original estimation of tax was derived and what, if any, allowances were included in the estimation to provide for the unknown tax liability." (20 NYCRR 46.1[e][ii], emphasis added.)

Cleary, the regulations indicate that the Division is aware of defining "properly estimate" for purposes of extensions of time for filing returns and has determined that proof of reasonable cause and the resulting waiver of penalty does not result in a finding that the return is timely filed or that the extension is valid but only that reasonable cause for untimely filing exists so that penalty should not be imposed.

Petitioner would have us conclude that if he can show that his failure to properly estimate was due to reasonable cause then his return was timely filed. I cannot agree. The fact that a taxpayer proves reasonable cause for waiver of the penalty does not lead to the conclusion that the extension is also valid. The only result is that although the taxpayer failed to file the return on time, he will be relieved from paying a monetary penalty for that failure.

DATED: Troy, New York

May 9, 1990

/s/John P. Dugan

John P. Dugan

President