STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DRESSER INDUSTRIES, INC.	:	DETERMINATION DTA NO. 812636
for 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 31, 1976 through October 31, 1987.	:	

Petitioner, Dresser Industries, Inc., 201 Ross, P.O. Box 718, Dallas, Texas 75221, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended October 31, 1976 through October 31, 1987.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 23, 1995 at 9:15 A.M., with all briefs to be submitted by September 8, 1995, which date began the six-month period for the issuance of this determination. Petitioner appeared by Morrison & Foerster, Esqs. (Paul H. Frankel, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

ISSUE

I. Whether the Division properly denied petitioner's refund claims on the ground that those claims were barred by the statute of limitations in Tax Law § 1087.

II. Whether the Division's assessment of additional tax pursuant to Article 9-A of the Tax Law arising from an audit of petitioner's recordsshould be cancelled or otherwise modified due to the doctrine of equitable recoupment and fundamental fairness.

FINDINGS OF FACT

Prior to formal hearing, the parties entered into a stipulation, dated February 23, 1995, consisting of 19 separate paragraphs. To the extent they are relevant and material they have

been incorporated into the findings of fact below, except paragraph 19 which has been deleted because it dealt only with procedural matters between the parties which have not materialized.

In addition, petitioner submitted "Proposed Findings of Fact and Conclusions of Law", the latter of which will be treated as legal argument. The former, to the extent that they are not conclusory, immaterial or irrelevant, have been incorporated into the findings of fact below. Proposed findings "9", "12" and "14" were omitted as legal argument on the issues presented for resolution.

1. Dresser Industries, Inc. ("Dresser") was a Delaware corporation whose principal office was located in Dallas, Texas. Dresser supplies products and services used primarily in oil and gas drilling, production, and transmission; gas distribution and power generation; gas processing; petroleum refining and marketing; and petrochemical production. Dresser conducts its business internationally and domestically, including in New York.

2. On January 3, 1972, Dresser formed a 100% owned subsidiary, Dresser International Sales Corporation, which qualified as a Domestic International Sales Corporation ("DISC") pursuant to sections 991 through 997 of the Internal Revenue Code ("IRC"), which were enacted by Congress in 1971 to provide tax incentives for export sales.

3. New York State adopted legislation in 1972 (L 1972, ch 778) which deviated from the Federal DISC provisions in certain respects. Specifically, the State taxed a parent corporation on its DISC's accumulated earnings, as well as the DISC's deemed dividends, while granting the parent corporation a DISC export credit, found in Tax Law former § 210(13)(a). That credit was based, in part, on gross receipts from export products shipped from a regular place of business of the taxpayer located within New York.

The credit as originally enacted was calculated by multiplying DISC accumulated income by four fractions: the deemed unconstitutional New York export ratio (see below); the parent corporation's business allocation formula; the amount of the credit, or, 70%; and the franchise tax rate.

4. Dresser filed Federal tax returns including DISC deemed dividends. Dresser also timely filed corporation franchise tax reports for the years in issue including DISC deemed dividends and DISC accumulated income in its entire net income and claiming DISC export credits in accordance with Tax Law former § 210(13) as originally written. During the years in issue, the Dresser DISC's New York export ratios were as follows:

Tax Year	NY Export Ratio
1976	22.43%
1977	36.20%
1978	26.23%
1979	7.03%
1980	5.64%
1981	10.98%
1982	6.25%

Hence, on its original franchise tax reports, Dresser's DISC export credits were smaller than they would have been had it not computed them with the New York export ratio.

5. Dresser timely filed corporation franchise tax reports for its fiscal years ended October 31, 1976 through October 31, 1985, and claimed DISC export credits in accordance with former section 210(13)(a) of the Tax Law.

6. On April 24, 1984, the Supreme Court of the United States held that, by basing the amount of the DISC export credit on the percentage of the taxpayer's sales origination in New York, the credit mechanism in Tax Law former § 210(13)(a) discriminated against export shipping from other states and thus was violative of the Federal Constitution's Commerce Clause (Westinghouse Electric Corp. v. Tully, 466 US 388, 80 L Ed 2d 388). On remand, the New York Court of Appeals held that the portion of the DISC export credit mechanism that limited the credit to the percentage of the DISC's total sales which originated in New York (i.e., Tax Law former § 210[13][a][2],[3]) was unconstitutional, but that the credit mechanism was otherwise constitutional (Westinghouse Electric Corp. v. Tully, 63 NY2d 191, 481 NYS2d 55) ("Westinghouse II"). The methodology that must be used to calculate DISC export credit after the Court of Appeals' partial invalidation of Tax Law § 210(13)(a) shall be hereafter referred to

as the "Westinghouse II" methodology. The methodology that was called for by the language of Tax Law former § 210(13)(a) shall be referred to as the "pre-Westinghouse" methodology.

7. Following the decisions discussed above, the Internal Revenue Service conducted audits of Dresser's Federal returns for the tax years in issue. For each of the years, the Internal Revenue Service revised Dresser's DISC taxable income and DISC deemed dividends. Petitioner timely filed with the Division forms CT-3360, Federal Changes to Corporate Taxable Income, for fiscal years ended October 31, 1976 through October 31, 1979, and October 31, 1983 through October 31, 1985, on June 19, 1991. For each of these years, the Internal Revenue Service made various adjustments, including adjustments in petitioner's DISC taxable income and/or DISC dividends.

8. The tax claimed to be due (or refund claimed) on the CT-3360's for the years 10/31/76 through 10/31/79 and 10/31/83 through 10/31/85 is as follows:

Period Ended	Tax Due	Refund Claimed
October 31, 1976	--	$53,467
October 31, 1977	--	33,742
October 31, 1978	--	24,083
October 31, 1979	--	52,857
October 31, 1983	--	758
October 31, 1984	$11,649	--
October 31, 1985	222	--

9. Petitioner timely filed summaries of the adjustments made by the Internal Revenue Service for fiscal years ended October 31, 1980 through October 31, 1982 with the Division by letter dated May 12, 1989. For each of these years, the Internal Revenue Service made various adjustments, including adjustments to petitioner's DISC taxable income and/or DISC dividends. Below is a schedule of the tax claimed to be due (or refund claimed) on the CT-3360's for the years ended 10/31/80 through 10/31/82:

Period Ended	Tax Due	Refund Claimed
October 31, 1980	$1,036	--
October 31, 1981	--	$55,846
October 31, 1982	--	62,630

10. In computing the additional tax or refund claimed to be due, as set out above, petitioner entirely recomputed its DISC export credit based on the full amount of its revised DISC income and/or DISC dividends after the Federal changes reported on its CT-3360's and summary schedules, and applying the "Westinghouse II" methodology.

11. The Division performed a franchise tax field audit for the fiscal years ended October 31, 1985 through October 31, 1987, during the course of which the auditor also analyzed the refunds sought by petitioner on its summary schedules and CT-3360's as described above.

12. Based on the aforesaid field audit, the auditor's analysis of the Federal changes reported on petitioner's summary schedules and CT-3360's, the Division issued a Notice of Deficiency, dated April 27, 1992, for the periods ended October 31, 1976 through October 31, 1984. The notice indicated additional taxes due of $91,529.00, payments, credits and offsets of refunds from 1979, 1985, 1986 and 1987 of $148,645.00, interest of $140,282.14, and a balance due of $83,166.14.

13. The Notice of Deficiency reflected the Division's position that the refund application sought by petitioner's CT-3360's and summary schedules was partially time-barred. The auditor applied petitioner's original New York export percentage to previously reported accumulated DISC income on the ground that petitioner was time barred from claiming a refund for the years 1976 through 1984 (Tax Law § 1087[a]) on an item beyond that attributable to the Federal change and petitioner did not qualify for the exception under Tax Law § 1087(c)(2) for more than the increment in accumulated DISC income resulting from the Federal audit (Tax Law § 1087[c][1]). The auditor recalculated petitioner's export credit using only the increment in the accumulated DISC income recorded on the CT-3360's and summary schedules and used these values in the Westinghouse II formula or methodology. In addition, among other adjustments, the notice reflected additional tax applicable to inclusion of Dresser Foreign Sales Corporation,

a foreign sales corporation of petitioner located in Guam, in petitioner's New York combined report for fiscal years ended October 31, 1985 through October 31, 1986.

14. With respect to tax years ended October 31, 1985 through October 31, 1987, which were part of the audit, a tax refund of approximately $93,316.00 plus interest, was indicated in the Consent to Field Audit Adjustment, dated February 7, 1992.

15. Based in part on information presented at a conference held in the Bureau of Conciliation and Mediation Services ("BCMS") on March 31, 1993, a Conciliation Order was issued on December 17, 1993, which eliminated the proposed deficiency of $83,116.14 stated on the notice referred to above and granted a refund of tax in the amount of $29,448.00. The breakdown by period leading to this figure was a follows:

Period Ended	Add'l Tax/Refund Due	Tax Due on Fed. Audit	Total
10/31/87	(71,380)	0	(71,380)
10/31/87	(525)	0	(525)
10/31/86	(14,528)	0	(14,528)
10/31/86	(113)	0	(113)
10/31/85	(5,645)	0	(5,645)
10/31/85	(47)	0	(47)
10/31/84	13,530	0	13,530
10/31/84	95	0	95
10/31/83	6	0	6
10/31/82	21,991	0	21,991
10/31/81	0	8,146	8,146
10/31/80	0	20,766	20,766
10/31/79	0	(6,444)	(6,444)
10/31/78	0	(648)	(648)
10/31/77	0	1,997	1,997
10/31/76	0	3,351	3,351
TOTALS	(56,616)	27,168	(29,448)

None of the above refunds had been paid as of the date of the hearing, February 23, 1995. All were claimed and reclaimed in the March 2, 1994 petition filed in this case.

16. The revision in the Conciliation Order of the amount shown on the Notice of Deficiency was based, in part, on the elimination of the proposed deficiency for the 1985 tax year attributable to the inclusion of Dresser Foreign Sales Corporation in petitioner's combined report. In addition, the DISC export credit for the fiscal year ended October 31, 1985 was

recomputed by applying the Westinghouse II methodology, using the full amount of petitioner's DISC taxable income and DISC dividends as per the Federal changes reported by petitioner. For the other years, the tax asserted by the Conciliation Order was based on a recomputation involving the application of the Westinghouse II methodology to the additional DISC taxable income and DISC dividends reported by petitioner's summary schedules and CT-3360's.

17. Subsequent to the date of the Conciliation Order in this matter, on or about March 4, 1994, petitioner timely filed CT-3360's to report further changes made by the Internal Revenue Service to petitioner's Federal taxable income for the fiscal years ended October 31, 1980 through October 31, 1987. In addition to the changes reported on petitioner's summary schedules discussed above, the March 4, 1994 CT-3360's reflected the final determination of the Internal Revenue Service as to petitioner's Federal taxable income for the fiscal years ended October 31, 1980 through October 31, 1987. These CT-3360's were not the subject of the field audit at issue in this proceeding. Any additional franchise tax reported as due on those CT-3360's is not reflected in the Notice of Deficiency that is referenced above.

18. The amounts remaining in issue are as follows:

	Claim for Refund & Petition (Refund) and/or Tax Due	BCMS Order (Refund) or Tax Due
1976	($53,467)	$ 3,351
1977	(33,742)	1,997
1978	(24,083)	(648)
1979	(52,857)	(6,444)
1980	(36,183)	20,766
1981	(54,902)	8,146
1982	(42,853)	21,991
1983	6	6
1984	13,530	13,530
1984	95	95
1985	(5,645)	(5,645)
1985	(47)	(47)
1986	(14,528)	(14,528)
1986	(113)	(113)
1987	(71,380)	(71,380)
1987	(525)	(525)
TOTALS	(376,694)	(29,448)

19. Petitioner's franchise tax returns (Forms CT-3) for the fiscal years ended October 31, 1976 through October 31, 1984 were all filed and paid prior to October 22, 1985. Petitioner's Metropolitan Transportation Authority Surcharge returns (Forms CT-3M) for the fiscal years ended October 31, 1983 through October 31, 1987 were all timely filed and timely paid.

CONCLUSIONS OF LAW

A. The first issue to be determined is whether the statute of limitations prohibits the recalculation of the DISC export credit using the entire amount of DISC accumulated income including the increase in income as provided in the report of Federal changes. The Division argues that it is proper to use only the increment in DISC accumulated income specified in the Federal changes given the language of the statute in Tax Law § 1087(c)(2). Petitioner interprets the statute more broadly and believes using the entire amount of revised DISC accumulated income ensures that the full amount of the Federal change will be properly reflected in the credit.

Prior to 1984, New York State taxed a parent corporation on its DISC's accumulated earnings and its deemed dividends, but provided a DISC export credit, found in Tax Law former § 210(13)(a). The credit was calculated by taking the accumulated DISC income and multiplying it by the following four percentages: (1) the percentage of the parent's export products shipped from a regular place of business of the taxpayer located within New York, known as the New York export ratio; (2) the parent's business allocation percentage; (3) 70%, the amount of the credit; and (4) the franchise tax rate.

On April 24, 1984, the Supreme Court of the United States held that this scheme was unconstitutional (see, Westinghouse Electric Corp. v. Tully, 466 US 338, 80 L Ed 2d 388) and said that by basing the amount of the DISC export credit on the percentage of the taxpayer's sales originating in New York, the credit mechanism in Tax Law former § 210(13)(a)

discriminated against export shipping from other states and was violative of the Federal Constitution's Commerce Clause.

The New York Court of Appeals, on remand of the matter, held that the portion of the DISC export credit mechanism that limited the credit to the percentage of the DISC's total sales which originated in New York was unconstitutional but that the credit mechanism was otherwise constitutional (see, Westinghouse Electric Corp. v. Tully, 63 NY2d 191, 481 NYS2d 55) ("Westinghouse II"). The methodology which must be used to calculate the DISC export credit after the Court of Appeals' partial invalidation of Tax Law former § 210(13)(a) is the one set forth in that decision. About this fact there is no dispute between the parties.

In fact, the Division issued a Technical Services Bureau Memorandum on November 25, 1985 which discussed the Westinghouse decisions and clarified that subsections (2) and (3) of Tax Law former § 210(13)(a) had been ruled unconstitutional and that the remainder of the section was held to be valid. The memorandum explained that the DISC export credit was extended to all DISC income attributable to a parent corporation regardless of whether or not the DISC activity was within New York State. The memorandum also said that the DISC export credit could be recomputed for all taxable periods for which the limitations included in Tax Law § 1087 had not expired and that corporate taxpayers which had not previously claimed the credit could do so for all taxable periods for which the limitations included in Tax Law § 1087 had not expired.

The Division contends that the limitation on credits and refunds set forth in Tax Law § 1087 prohibits Dresser from taking advantage of that portion of the DISC export credit which was not altered by the Internal Revenue Service on audit due to the specific provisions of Tax Law § 1087(c), which provides, in pertinent part:

> "Notice of change or correction of federal income.-- If a taxpayer is required . . . to file a report or amended return in respect of (i) a decrease or increase in federal taxable income or federal alternative minimum taxable income or federal tax, or (ii) a federal change or correction or renegotiation, or computation or recomputation of tax, which is treated in the same manner as if it were an overpayment for federal income tax purposes, claim for credit or refund of any

> resulting overpayment of tax shall be filed by the taxpayer within two years from the time such report or amended return was required to be filed with the commissioner of taxation and finance . . . . The amount of such credit or refund-
> (1) shall be computed without change of the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based, and
> (2) shall not exceed the amount of the reduction in tax attributable to such decrease or increase in federal taxable income or federal tax or to such federal change or correction or renegotiation, or computation or recomputation or tax."
> (Tax Law § 1087[c].)

The regulation promulgated pursuant to this statutory provision, 20 NYCRR 8-2.3, also provides that the amount of refund or credit shall be limited to the reduction in tax attributable to the Federal change or correction or renegotiation, or computation or recomputation, and shall be computed without change in the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based.

Petitioner does not dispute that it did not file timely refund claims for the tax years 1976 through 1984 and relies upon qualification for the exception set forth in Tax Law § 1087(c) for any recovery whatsoever. The heart of the matter is whether the Division properly calculated the DISC export credits for the closed years using only the Federal adjustments to DISC income in the Westinghouse II formula, excluding the portion previously reported and upon which the credit was calculated using the pre-Westinghouse formula. The rationale for not allowing the use of the Westinghouse II formula for the previously reported DISC income was that petitioner had not applied for a refund for the years 1976 through 1984 and those years were out of statute. Therefore, the Division reasoned that petitioner's refund or credit was limited to the reduction in tax attributable to the Federal change or correction (Tax Law § 1087[c]; 20 NYCRR 8-2.3).

It is determined that there is no reason to reject the plain meaning of the statute and regulation promulgated thereunder.

> "Where the language of the statute is clear and unambiguous, the intent of the framers is to be first sought in the words and language employed, and, if the words plainly and clearly express the sense of the framers, resort need not be had to other means of interpretation." (McKinney's Cons Law of NY, Book 1, Statutes § 76.)

There is no question that petitioner reported the changes in Federal taxable income on its CT-3360's and summary schedules and that the changes resulted from changes in the

accumulated DISC income of petitioner's DISC, which in turn led to changes in petitioner's entire net income and the DISC export credit. Since the years 1976 through 1984 were out of statute for purposes of the refund claims, petitioner's only avenue of recovery was through the exception set forth in Tax Law § 1087(c), subject to the limitation set forth in Tax Law § 1087(c)(2), wherein it specifically limits the amount of the refund to the reduction in tax attributable to the decrease or increase in Federal taxable income. The Division applied the Westinghouse II formula only to the adjustment in accumulated DISC income as reported by petitioner on its Form 3360's, stating that the exact amount of the change in the DISC export credit attributable to the change in petitioner's Federal taxable income must be calculated using only the change in the accumulated DISC income reported by petitioner.

Petitioner contended that the starting point for recalculation of the credit should have been the accumulated DISC income as reported and the increase reported on the CT-3360's. However, it is determined that the original amount reported by petitioner on its returns was not "attributable" to the Federal changes and therefore not properly included in any computation pursuant to Tax Law § 1087(c)(2).

Finding no support in the language of the statute itself or the regulation promulgated thereunder, petitioner argued that the regulation promulgated pursuant to Tax Law § 1083(c)(3) at 20 NYCRR 8-1.2, dealing with the limitation on the Division's assessment where Federal changes have been properly reported, requires that the "item or items" resulting in the Federal change be "tak[en] into account" when determining the amount of tax attributable to the Federal change. Petitioner argues that it is logical to assume that the interpretation of Tax Law § 1083(c)(3) must be identical to that of Tax Law § 1087(c)(3) since it is an "analogous" provision and that the use of the term "item or items" demands that the entire accumulated DISC income previously reported on the returns as well as on the CT-3360's must be used to calculate the credit using the Westinghouse II formula. However, even if one were to accept the premise that the two sections were analogous and that the regulations promulgated under one

applied to both sections of law, the plain language just does not support petitioner's argument. The regulation at 20 NYCRR 8-1.2(b)(3) sets forth the same limitation on the amount of the credit as 20 NYCRR 8-2.3, but elaborates on the amount of tax attributable to the Federal change by instructing the Division to recompute each of the alternative taxes giving consideration to the items resulting in the Federal change. This is not in conflict with the limitation in the prior sentence which limits the amount of the assessment to the amount of the increase in tax attributable to the Federal change.

The Division did give consideration to the changes in accumulated DISC income when recalculating the credit, but it also gave consideration to the fact that petitioner did not timely file refund applications for the years 1976 through 1984 and correctly determined that it should not be permitted to take advantage of the provisions of Tax law § 1087(c) to do what it could have done in prior years but failed to do.

The United States Supreme Court has held that Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a clear and certain remedy for any erroneous or unlawful tax collection" (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 US 18, 39-40, 110 L Ed 2d 17, 37-38).

The Court in McKesson also said:

> "The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 45, 110 L Ed 2d at 41.)

The Division's interpretation of the time limitations on petitioner's application for refund falls within the range of permissible procedural protections discussed in McKesson. Therefore, petitioner's argument that the relevant limitations period should not be applied is rejected.

Apart from the due process analysis utilized in the McKesson case, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a), the income tax provision for limitations on credit or refund, operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question was subsequently determined to be unconstitutional (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119). The court in Fiduciary Trust Co. relied on the principle that there can be no recovery of taxes voluntarily paid, without protest, under a mistake of law. Petitioner herein voluntarily paid the taxes it calculated as due in the years 1976 through 1984 and never protested the formula for determining the DISC export credit, unlike Westinghouse Electric Corp. It also failed to apply for a refund based upon the Westinghouse decisions in a timely manner under Tax Law § 1087(a) -- within three years from the time the return was filed or two years from the time the tax was paid, whichever expired later. Pursuant to the stipulation of the parties herein, all of the returns for the years 1976 through 1984 were filed prior to October 22, 1985, but the claims for refund were not filed until 1989 and 1991.

Therefore, reading the rationale of Fiduciary Trust in conjunction with the limiting language of Tax Law § 1087(c)(2), it is determined that petitioner is not entitled to apply the Westinghouse II methodology to that part of the credit which was out of statute. It can apply the methodology only to the part which was retrievable by means of the exception to Tax Law § 1087(a) set forth in § 1087(c)(2), and therefore only to the extent attributable to the Federal change.

B. Petitioner argues in the alternative that the principles of fundamental fairness require that the objective of the New York corporation franchise tax is to reflect properly a taxpayer's tax liability, citing Tax Law § 211(4); Tax Law § 210(8); People ex rel. Sheraton Bldgs., Inc. v. Tax Commn (15 AD2d 142, 222 NYS2d 192, affd 13 NY2d 802, 242 NYS2d 226); and Tax Law § 1089(g). Petitioner argues that the statute of limitations should not be allowed to grant

the Division the right to disregard the objective of determining the correct tax liability and collect additional taxes where no taxes are due.

Petitioner cited the Supreme Court Case of Lewis v. Reynolds (284 US 281, 76 L Ed 293) in support of its argument. However, the Lewis case involved a return filed by an estate which was audited, resulting in an assessment of additional taxes. The estate paid the assessed taxes and claimed a refund. It was on this refund application that the Commissioner of Internal Revenue found additional tax due with respect to a deduction taken for attorney's fees improperly allowed on the first audit. Therefore, the liability increased as a result of the recomputation of the estate's tax liability. Since the Commissioner already had the estate's funds in its possession, it was permitted to retain the taxes previously collected to satisfy the additional taxes found due, even though beyond the five-year statute of limitations set forth in Internal Revenue Code § 277, as long as it did not exceed the amount which might have been properly assessed and demanded.

Petitioner opined how this doctrine of fundamental fairness was applied by the New York Court of Appeals in National Cash Register Co. v. Joseph (299 NY 200), where the taxpayer was allowed to introduce evidence of tax paid during the same period covered by an assessment. The Court determined that the taxpayer was entitled to a set off against any deficiency finally determined, even though the taxpayer did not file a timely refund claim.

Unlike the instant matter, the two cases cited by petitioner involved instances where the respective governments had timely assessed deficiencies and involved taxes other than corporation taxes. Neither case relied upon a very specific and statutorily provided exception to the statute of limitations like the instant matter, i.e., Tax Law § 1087(c). Petitioner herein conceded that it filed its claims for refund for the years 1976 through 1984 late and acknowleged through its filing of the CT-3360's that it was permitted to file claims for refund only within the terms of Tax Law § 1087(c), and subject to the limitations of Tax Law § 1087(c)(2). Petitioner knew that its right to any refund was dependent upon a statutory

section which also clearly limited its right to a credit or refund to the amount of the reduction in tax attributable to the Federal change. Petitioner was granted a credit for the closed years to the extent allowable by law, and the principles of fundamental fairness have been served by the Division's interpretation of the relevant statutes and regulations, resulting in the refusal to recalculate the entire DISC export credit utilizing the previously reported DISC income in addition to the reported Federal modification. As stated above, that portion could have been claimed in a timely manner but was not, and is not now properly subject to review.

C. The petition of Dresser Industries, Inc. is denied and the Notice of Deficiency, dated April 27, 1992, as modified by the Conciliation Order in finding of fact "15", is sustained.

DATED: Troy, New York
February 15, 1996

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE