

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 31, 1976 and October 31, 1978.	:	

On June 29, 1990 petitioner John Grace & Co., Inc. made a motion to this Tribunal to vacate so much of our decision in Matter of John Grace & Co. (Tax Appeals Tribunal, May 9, 1990) as relates to whether petitioner has, in fact, shown that its estimate of taxes for an extension of time to file its corporate franchise tax return pursuant to Tax Law § 211.1 was proper and to remand the matter to the Administrative Law Judge for further proceedings consistent with a revised Tribunal decision.

In its decision the Tribunal reversed the determination of the Administrative Law Judge and determined that petitioner was correct that the standard for determining the validity of an extension of time in which to file a corporate franchise tax return under Tax Law § 211.1 was whether the taxpayer made a good faith effort to reasonably estimate its taxes. However, the Tribunal determined that while a good faith reasonable estimate was the standard, petitioner did not establish, at the hearing before the Administrative Law Judge, that it met the standard it had advocated.

In support of its motion, petitioner asserts that: (1) at no time during the examination of petitioner's tax return, or at the hearing before the Administrative Law Judge, did the Division of Taxation argue that petitioner had failed to make a good faith estimate of its tax liability for the year at issue; (2) the only defense asserted in the Division's answer to the petition filed by

petitioner was that petitioner failed to meet the mathematical tests of Tax Law § 213.1 and that as a matter of law this made petitioner's application for an extension invalid; (3) the Administrative Law Judge made no finding of fact on the question of good faith and neither party believed this to be an issue; (4) it "was entitled to assume that the Division did not dispute that it made a reasonable good faith effort to estimate and pay its tax for the year" (Petitioner's motion, paragraph 3); (5) notwithstanding the fact that neither party made this an issue, the record at hearing contains evidence suggesting that petitioner did make such an estimate; and (6) given a chance it would be able to demonstrate that it, in fact, made a reasonable good faith estimate of its tax liability when it filed its application.

Finally, petitioner asserts that it would be unfair and inconsistent with basic principles of jurisprudence for the Tribunal to decide this case based on a theory that was argued by neither party in the proceedings below and that was not considered material by the Administrative Law Judge.

We deny petitioner's motion.

We begin with the clearly established principle that the burden of proof was on petitioner to prove that it was entitled to the refund it claimed (Tax Law § 1089[e], 20 NYCRR 3000.10[d][4]). "The burden of proof is the burden which rests upon one of the parties to an action to persuade the trier of the facts . . . that a proposition he asserts is true" (Richardson, Evidence, at 71 [Prince 10th ed]). To satisfy its burden to show entitlement to the refund, petitioner had to establish that it satisfied the extension provisions of Tax Law § 211.1 which require that the taxpayer "pays on or before the date of such filing the amount properly estimated as its tax" (Tax Law § 211.1, emphasis added). Petitioner sought to convince the Administrative Law Judge that a proper estimate included a good faith reasonable estimate, in addition to the mathematical standards at Tax Law § 213. However, simply prevailing on the legal issue of

what the words "properly estimated" mean would not have obtained the refund for petitioner because the burden was on petitioner to show that it had paid this properly estimated amount, i.e., that it had complied with the statutory standard. If, as argued by petitioner, the question of satisfying the standard was not raised at the hearing, then petitioner necessarily had to have the decision rendered against it because the party upon whom the burden of proof rests must lose if no evidence is offered on the point (Martinez, Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases, 39 Hastings L J 239, 245 [1988], citing McCormick, Evidence § 336, at 948 [1984] and Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F2d 541, 547).

Since we conclude that petitioner had the burden to prove that it made a reasonable estimate of its taxes in order to obtain its refund, we find totally without merit petitioner's contention that the burden was on the Division to affirmatively assert that petitioner failed to satisfy this standard. Whether petitioner made a reasonable estimate was an essential element of petitioner's case for a refund, not a defense to it.

In any event, contrary to petitioner's assertion, our review of the record indicates that petitioner did address the issue of whether it satisfied the good faith estimate standard, but it simply failed to offer sufficient evidence to sustain its burden.

At the hearing, petitioner's accountant, who prepared the extension request, testified as to the procedure that should be followed when a taxpayer was making an estimate of its taxes (Tr., p. 31). Although it would appear that a purpose of this witness must have been to provide evidence that petitioner's estimate of its taxes was a reasonable, good faith estimate, the witness was "not asked nor did he explain how he arrived at the estimate that was included with the extension" (Matter of John Grace & Co., supra). Instead, the witness only discussed a hypothetical taxpayer and its estimate of taxes.

Petitioner, in its post hearing brief, asserted that a good faith, reasonable estimate was the standard and stated that the Division "does not contend that petitioner knowingly

underestimated its tax or made significant and misleading statements on its application for extension" (Petitioner's brief at hearing, p. 33). Further, petitioner in its exception to this Tribunal requested we find that "[t]he administrative law judge erred by not finding as a fact that petitioner acted in good faith to properly estimate its tax liability based on the facts available to it at the time that it filed its Form CT-5 . . ." (Petitioner's exception). These efforts reveal that petitioner was aware that it was required to establish at the hearing that it had made a reasonable estimate of its taxes, that it thought it had established this fact, and that it believed that the Administrative Law Judge erred in not so finding.

Based on the above, we conclude that there is absolutely no basis to vacate that portion of our decision which held that petitioner failed to sustain its burden to prove that its estimate was proper.

Accordingly, is is ORDERED, ADJUDGED and DECREED that the motion of petitioner John Grace & Co., Inc. is denied.

DATED: Troy, New York
September 13, 1990

/s/John P. Dugan
John P. Dugan
President

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

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