STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DRESSER INDUSTRIES, INC.	:	DECISION 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., 2001 Ross Avenue, Dallas, Texas 75201, filed an exception to the determination of the Administrative Law Judge issued on February 15, 1996. Petitioner appeared by Morrison & Foerster, LLP (Paul H. Frankel, Esq. and Hollis L. Hyans, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on February 20, 1997 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Pinto took no part in the consideration of this decision.

ISSUES

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

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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.

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.

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.

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.

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.

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.

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.

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.

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	--

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

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.

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.

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.

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.

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.

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.

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.

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.

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)

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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge concluded that because petitioner had not timely applied for a refund for the years 1976 through 1984, petitioner's refund or credit was limited to the reduction in tax attributable to Federal changes or corrections pursuant to Tax Law § 1087(c). While petitioner contended that the starting point for recalculation of its credit should have been the accumulated DISC income as originally reported plus the increase reported on the CT-3360's, the Administrative Law Judge determined that the accumulated DISC income originally reported by petitioner on its returns was not "attributable" to the Federal changes and, therefore, was not properly included in any computation pursuant to Tax Law § 1087(c)(2). The Administrative Law Judge determined that petitioner was not entitled to apply the Westinghouse II methodology to that part of the credit which was out of statute. Rather, that methodology can apply only to that portion of the credit retrievable by means of the exception to Tax Law § 1087(a) which was set forth in Tax Law § 1087(c)(2) and, therefore, only to the extent attributable to the Federal change.

The Administrative Law Judge also concluded that petitioner was not entitled to a setoff against the tax deficiency asserted due. The Administrative Law Judge concluded that the situations presented in the cases relied on by petitioner were distinguishable because Tax Law § 1087(c) provided a very specific exception to the statute of limitations. Since petitioner conceded that it filed its claims for refund for the years 1976 through 1984 late, it knew that its right to any credit or refund was limited by statute to the amount of the reduction in tax attributable to the Federal change. Since petitioner was granted a credit for the closed years to the extent allowable by law, the Administrative Law Judge concluded that "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" (Determination, conclusion of law "B").

Arguments on exception

Petitioner disagrees with the Administrative Law Judge and argues that Tax Law § 1087(c) is not clear on its face. Petitioner argues that in order to properly interpret Tax Law § 1087(c), it is necessary to examine a regulation interpreting an analogous provision of the Tax Law (§ 1083[c]). Petitioner posits that when we consider the provision in that regulation (20 NYCRR 8-1.2[b][3]) requiring the Division to take into account the "item or items" that caused the Federal change when issuing an assessment for a tax deficiency as the result of Federal changes, such "item or items" are not limited to the increases or decreases in DISC taxable income and deemed dividends determined by the Internal Revenue Service. Rather, "item" refers to the entire amount of income, deduction or other accounting category used to determine a taxpayer's tax liability. This interpretation, argues petitioner, is in accord with the construction of the word "item" in other sections of the Tax Law. Applied to Tax Law § 1087(c), petitioner argues that it is appropriate to recompute its originally reported accumulated DISC income using the Westinghouse II methodology, plus the increase in accumulated DISC income reported on the CT-3360's in order to calculate its allowable credit.

In the alternative, petitioner argues that petitioner must at least be allowed to set off its time barred refund claims against deficiencies assessed against it under the doctrine of equitable recoupment. This doctrine would allow the subject of the assessment to be examined in all its aspects so that petitioner's tax liability is based only on taxes actually owed by petitioner. Petitioner argues that its time barred refund claims may be recouped against deficiencies related to the additional DISC income determined by the Internal Revenue Service since the refund claims arise out of the same period on the same transactions under audit. Petitioner disagrees with the Administrative Law Judge's conclusion that the statute of limitations is a bar to application of the doctrine of equitable recoupment. Relying on ***Bull v. United States*** (295 US 247, 79 L Ed 1421), petitioner argues that a recoupment claim is never barred by the statute of

limitations so long as the assessment itself is timely. It is not significant, argues petitioner, that the tax involved is based on petitioner's entire net income rather than on individual transactions. Further, petitioner argues that it is not necessary for a violation of due process to exist for the doctrine of equitable recoupment to apply. Petitioner notes in its brief on exception that only the years ending October 31, 1976 through October 31, 1982 remain at issue herein.

In opposition, the Division argues that the Administrative Law Judge correctly determined that the proper starting point in calculating the amount of any refund based on a Federal audit change of an item of income or expense is the amount of the "change" in that item. Since the original accumulated DISC income amount was reported by petitioner on its original returns, that amount is not "attributable" to the Federal changes reported by petitioner and was, thus, properly excluded in a calculation of the DISC credit attributable to those changes. Further, petitioner makes an unwarranted assumption that when 20 NYCRR 8-1.2(b)(3) instructs that the "item or items" resulting in the Federal change must be taken into account, this regulation means the full amount of the changed item, not just the increment related to the Federal change. This would render the regulation inconsistent with Tax Law § 1083(c), its governing statute.

Additionally, the Division argues that equitable recoupment should not be applied to taxes due pursuant to Article 9-A nor to offset additional liability arising from Federal changes. This would allow petitioner to assert a refund claim for a closed year notwithstanding that the refund was not attributable to a Federal change.

OPINION

We affirm in part and reverse in part the determnation of the Administrative Law Judge.

As to the issue of petitioner's claims for refund based on a complete recomputation of its originally reported DISC export credit using the Westinghouse II methodology and based on the full amount of its revised DISC income and/or DISC dividends after the Federal changes reported on the CT-3360's and summary schedules, we agree with the Administrative Law Judge that the requested refunds are barred by the expiration of the statute of limitations.

Tax Law § 1087(a) provides that a claim for credit or refund of an overpayment under Article 9-A must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. Tax Law § 1087(c) provides, in applicable part, that:

> "[n]otice 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, federal alternative minimum taxable income, or federal tax or to such federal change or correction or renegotiation, or computation or recomputation of tax" (Tax Law § 1087[c]).

In accord with this is the Division's regulation (20 NYCRR 8-2.3) which provides that the amount of refund or credit is limited to the reduction in tax attributable to the Federal change and is to be computed without change in the allocation of income or capital upon which the taxpayer's return was based. To accept petitioner's argument would be to ignore the plain reading of Tax Law § 1087(c). As the Administrative Law Judge stated: "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)" (Determination, conclusion of law "A").

Nor do we accept petitioner's argument that Tax Law § 1083(c)(3), dealing with the limitation on the Division's ability to assess additional tax where Federal changes have been properly reported, supports its interpretation of Tax Law § 1087(c)(3) because these two sections of the Tax Law are "analogous" provisions. We note that both section 1083(c) and

section 1087(c) limit an assessment or refund based on a Federal change to the amount of increase or decrease in New York tax attributable to the Federal change. Similarly, each is to be computed without change of the allocation of income or capital upon which the taxpayer's return (or any additional assessment) was based. The regulation interpreting Tax Law § 1083 provides that the "amount of tax attributable to such Federal change" means the amount determined by recomputing each of the alternative taxes for measuring the tax imposed under Article 9-A, "taking into account the item or items resulting in the Federal change" (20 NYCRR 8-1.2[b][3]). There is no counterpart regulation interpreting Tax Law § 1087(c). As the Administrative Law Judge concluded:

> "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" (Determination, conclusion of law "A").

Petitioner has pointed us to no authority that would disturb the Administrative Law Judge's reasoning and we, therefore, find no basis on which to modify it.

As to petitioner's claim for equitable recoupment, however, we reverse the determination of the Administrative Law Judge. In ***Bull v. United States*** (***supra***), the Supreme Court considered the right of a claimant to assert erroneously assessed and paid estate tax as a credit against a subsequent assessment of income tax in respect to the same transaction. Finding that the United States, through mistake, took more than it was entitled to and that retention of this money was against morality and conscience, the Court held that the claimant had the right to assert the overpayment of the estate tax as a credit against the deficiency of income tax even though the statute of limitations had passed for assertion of a refund claim for the estate tax. The Court stated that: "[t]his is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is

never barred by the statute of limitations so long as the main action itself is timely" (***Bull v. United States, supra***, 79 L Ed, at 1428). This right of equitable recoupment is likewise available to the taxing authority as the Supreme Court held in ***Lewis v. Reynolds*** (284 US 281, 76 L Ed 293) and ***Stone v. White*** (301 US 532, 81 L Ed 1265). In ***Stone***, the Court held that "[t]he statutory bar to the right of action for the collection of the tax does not prevent reliance upon a defense which is not a set-off or a counterclaim, but is an equitable reason, growing out of the circumstances of the erroneous payment, why petitioners ought not to recover" (***Stone v. White, supra***, 81 L Ed, at 1271).

The Division argues that the decision of the Supreme Court in ***United States v. Dalm*** (494 US 596, 108 L Ed 2d 548) precludes application of the doctrine of equitable recoupment in this proceeding because there must be, in addition to a payment of tax under a mistake of law, an inconsistency in theory between the payment of the tax and the assessment. In ***Dalm***, the Court concluded that the doctrine of equitable recoupment did not allow a separate suit for a time-barred refund of gift tax on a transaction after the taxpayer had already settled and agreed to pay income tax on the same transaction. Reviewing its prior decisions in ***Bull*** and ***Stone***, the Court stated: "[i]n sum, our decisions in Bull and Stone stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction" (***United States v. Dalm, supra***, 108 L Ed 2d, at 561). First, we note that the claim for recoupment in the instant case was raised as a defense and not brought as a separate claim for refund. Additionally, the Court in ***Dalm*** did not define the parameters of an "inconsistent" tax claim. However, we believe that petitioner's claim for recoupment of tax overpaid as a result of the constitutional application of the Westinghouse II methodology is an "inconsistent, but now time-barred tax claim" related to the unconstitutional imposition by the Division of tax under the pre-Westinghouse methodology.

This Tribunal has stated, in ***Matter of Turbodyne Corp.*** (Tax Appeals Tribunal, July 3, 1996), that: "[t]he doctrine of equitable recoupment allows a taxpayer against whom a

deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency (***National Cash Register Co. v. Joseph***, 299 NY 200)." While the Division argues that equitable recoupment should not be applied to taxes due pursuant to Article 9-A nor to offset additional liability arising from Federal changes, we find no support that the doctrine of equitable recoupment is limited to only certain taxes or only certain types of refund claims.

In ***National Cash Register Co. v. Joseph*** (***supra***), the Court of Appeals defined "recoupment" as "a deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered" (***National Cash Register Co. v. Joseph***, ***supra***, at 203). The Court held that equitable recoupment does not allow one transaction to be set off against the other. Rather, it permits a transaction which is made the subject of the plaintiff's action "to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole" (***National Cash Register Co. v. Joseph, supra***, at 203). In that case, since the taxing authority had reopened the matter of the taxpayer's sales tax liability and assessed a deficiency, the vendor was given an equitable right to plead a recoupment claim for taxes of the same type which were erroneously paid for the same period. Although the Court used the term "transaction," it did not limit the applicability of the doctrine to discrete incidences of taxation. In ***National Cash Register***, the Court allowed the taxpayer to plead a recoupment claim for overpaid sales taxes for the period April 1, 1936 to September 30, 1940 against the taxing authority's assessment of a deficiency of sales tax for the period September 1, 1935 to December 31, 1940.

The Division has not contested the mathematical calculation by petitioner of its refund claims. Rather, it has contested that such claims are barred by the statute of limitations. It has not, however, introduced any evidence to controvert petitioner's position. Based on the facts of this proceeding, we believe that petitioner has met its burden to demonstrate entitlement to

equitable recoupment of its time-barred refund claims at issue. Since the amount of refunds claimed for the years ending October 31, 1976, October 3, 1977, October 3, 1980, October 31, 1981 and October 31, 1982 exceed the assessments issued for those same years, fundamental fairness requires us to cancel the deficiency assessments for those years.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dresser Industries, Inc. is granted to the extent that the doctrine of equitable recoupment applies, but is otherwise denied;

2. The determination of the Administrative Law Judge is reversed with respect to conclusion of law "B," but is otherwise affirmed;

3. The petition of Dresser Industries, Inc. is granted in accordance with paragraph "1" above, but is otherwise denied; and

4. The Notice of Deficiency, dated April 27, 1992, as modified by the conciliation order, is further modified in accordance with our decision herein.

DATED: Troy, New York
August 14, 1997

_____
Donald C. DeWitt
President

_____
Carroll R. Jenkins
Commissioner