STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN GRACE & CO., INC.	:	DETERMINATION
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 and October 31, 1978.	:	

Petitioner, John Grace & Co., Inc., 34 Washington Parkway, P.O. Box 1000, Bethpage, New York 11714, 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 and October 31, 1978 (File No. 800843).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on October 27, 1987 at 9:15 A.M., with all briefs submitted by March 22, 1988. Petitioner appeared by Jerome R. Rosenberg, Esq. The Audit Division appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division erred in deter-mining that petitioner's application for an automatic three-month extension was invalid, even though petitioner paid therewith 100 percent of the estimated tax reflected thereon but less than 90 percent of the tax reflected by its subsequently filed report, resulting in a denial of petitioner's claims for refund, based on a net operating loss carryback, as untimely filed.

On October 27, 1987, 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.

FINDINGS OF FACT

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 (herein-after 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.

2. 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. Pursuant to Tax Law § 211.1, the application for extension was due two and one-half months after the close of the fiscal year, or January 15, 1980.

In fact, it was marked received by the Department of Taxation and Finance on January 18, 1980. The Audit Division accepted this application as timely filed and the Law Bureau did not raise the issue of timeliness. 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 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.

3. 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.

4. 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%

5. 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

6. 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.

7. 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.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 31, 1979. 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 company is referred to as "Grace Recoveries".

8. 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)

9. In a letter dated December 3, 1982, directed to Grace Recoveries Co., Inc., the Audit 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 Audit Division with regard to Grace Recoveries' report for the fiscal years ended October 31, 1979, 1980 and 1981.

10. 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 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."

11. 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.Petitioner incurred a net operating loss during the fiscal year ended October 31, 1979 for New York State purposes of $1,041,263.00. 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.

12. 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:

"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"

13. 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.

CONCLUSIONS OF LAW

A. Tax Law § 1087(former [d]) provided as follows:

> "Overpayment attributable to net operating loss carryback. - A claim for credit or refund of so much of an overpayment under article nine-a as is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due for the taxable year of the loss, or within the period prescribed in subsection (b) [extension of time by agree- ment] in respect of such taxable year, or within the period prescribed in subsection (c) [notice of change or correction of federal income], where applicable, in respect of the taxable year to which the net operating loss is carried back, whichever expires the latest."

In the instant case, the report for the loss year, the fiscal year ended October 31, 1979, was due on or before January 15, 1980, consistent with Finding of Fact "2" and Tax Law § 211(former [1]).

B. Tax Law § 211(former [1]) provided for an automatic extension of three months for the filing of an annual report if the taxpayer, within two and one-half months after the close of its fiscal year, (a) filed with the Tax Commission an application for extension in such form as said Commission prescribed by regulation and (b) paid on or before the date of such filing the amount properly estimated as its tax.

C. Tax Law § 213.1 provides, in pertinent part, as follows:

> "To the extent the tax imposed by section two hundred nine of this chapter shall not have been previously paid pursuant to section two hundred thirteen-b of this chapter,
>
> a. such tax, or the balance thereof, shall be payable to the tax commission in full at the time the report is required to be filed...."

Tax Law § 213.1 further provides, in pertinent part, 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...."

D. The regulations at 20 NYCRR former 6-4.4 promulgated pursuant to Tax Law § 211(former [1]), provided, as follows:

> "(a) An automatic three-month extension for filing an annual report will be granted if the application for automatic extension (form CT-5) is filed and a properly estimated tax is paid on or before the due date of the report for the taxable period for which the extension is requested. (See Section 7-1.3 of this Title -Properly estimated tax.) Failure to meet any of the requirements in this subdivision makes the application invalid and any report filed after the due date will be treated as a late filed report.
>
> (b) An automatic three-month extension for filing a combined report will be granted to a group of corporations authorized to file a combined report provided the application for automatic extension (form CT-5) is filed and a properly estimated tax is paid on or before the due date of the report for the taxable period for which the extension is requested. (See section 7-1.3 of this Title -Properly estimated tax.) Failure to meet any of the requirements in this subdivision makes the application invalid and any report filed after the due date will be treated as a late filed report."

E. The regulation at 20 NYCRR 7-1.3, promulgated pursuant to Tax Law § 213.1, provides, as follows:

> "(a) A taxpayer applying for an automatic three-month extension for filing its tax report must pay on or before the date its report is required to be filed, without regard to any extension of time, its properly estimated tax. The estimated tax paid, or balance thereof, will be deemed properly estimated if the tax paid is either:
>
> (1) not less than 90 percent of the tax as finally determined; or
>
> (2) not less than the tax shown on the taxpayer's report for the preceding taxable year, if such preceding year was a taxable year of 12 months."

F. Petitioner correctly points out that Tax Law § 211.1 does not define the phrase "the amount properly estimated as its tax", refer to Tax Law § 213.1 for the purpose of defining that phrase, or specifically vest in the State Tax Commission (now, the Commissioner of Taxation and Finance) discretion to define the phrase. However, petitioner erred in concluding that the definition of properly estimated tax contained in Tax Law § 213.1 should not and cannot be applied to the same term in Tax Law § 211.1. Petitioner contends that section 213.1 provides only that no addition to tax may be determined to be due, other than statutory interest, where a taxpayer has timely applied for an automatic three-month extension to file and paid with its application an amount not less than 90% of its tax as finally determined or 100% of the tax shown on its annual report for the preceding 12 months.

Petitioner's argument hinges on the phrase contained in Tax Law § 213.1 regarding the application for automatic extension of time to file an annual report which states 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..., or, at the rate of six per centum...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." (Emphasis added.)

Petitioner correctly assumes that the phrase "an amount properly estimated as provided by

said section" refers back to Tax Law § 211.1 but incorrectly assumes that section 213.1 provides that there may be no additions to tax other than statutory interest. Within Tax Law § 213.1 there are several requirements for payment of tax: one that the tax be paid in full at the time the report is required to be filed; another relating to payment of tax by corporations which have ceased to exercise their franchise or be subject to tax; and also a requirement for payment relating to the extension situation applicable to the facts herein. Given this context, when the section speaks of applying for an automatic extension and payment therewith of the "amount properly estimated as provided by said section" (Tax Law § 211.1), it is setting forth the two-pronged requirement for filing an application for extension with emphasis on the payment of tax and interest on the difference between the tax paid and the tax actually due.

Tax Law § 213.1 continues as follows:

"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...."

The "amount so paid" is the amount paid with the application for an automatic extension as referred to in the second paragraph of section 213.1 and, hence, the "amount properly estimated as provided by said section," i.e. Tax Law § 211.1. The phrase "as provided by said section" applies not only to the term "amount properly estimated" but also to the entire phrase "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 an application is filed an amount properly estimated as provided by said section." Tax Law § 211 deals with the filing of reports (e.g., deadlines, fiscal years, etc.) and also extensions of time to file reports (e.g., deadlines and amounts to be paid with the application therefor). Tax Law § 213 deals with the payment of tax and therefore is inextricably linked with section 211, and the two sections must be read together.Ordinarily, the same words used in different statutes on the same subject are interpreted to have the same meaning. (Betz v. Horr, 276 NY 83.) And there is a presumption that similar meaning attaches to the use of similar words as they appear in other statutes of like import. (People v. Bart's Restaurant Corp., 42 Misc 2d 1093; Antinora v. Nationwide Life Ins. Co., 76 Misc 2d 599.) See also, McKinney's Consolidated Laws of NY, Book 1, Statutes § 236, herein it states that:

"[w]here the same word or group of words is used in different parts of the same statute there is a presumption that thE Legislature intended to convey the same conception each time; and in the absence of anything indicating a contrary intention the same meaning will be attached to the similar expressions."

Therefore, to the extent that subdivisions (a) and (b) of 20 NYCRR 6-4.4 refer to 20 NYCRR 7-1.3 for the purpose of defining the phrase "properly estimated tax" they are consistent with section 211 of the Tax Law, and the definition of "properly estimated tax" as set forth in the latter regulation is applicable to the former regulation. Consequently, the Audit Division correctly interpreted and applied the term "properly estimated tax".

G. It is conceded that one of the legislative purposes underlying the enactment of both sections 211 and 213 of the Tax Law was to conform State practices concerning the granting of an automatic three-month extension of time within which to file corporation tax reports to the Federal practice. (See___, Memorandum of State Department of Taxation and Finance and Message of the Governor dated April 30, 1962, accompanying enactment and approval of L 1962, chs 1011-1013, 1962 McKinney's Session Laws of NY, at 3537 and 3681.) However, even in the Governor's message it is conceded that "this provision is similar to the Federal practice". The provision was never meant to be identical. Furthermore, the fact that Federal practice

pursuant to IRC § 6081(b) in some instances may consider the tax to be properly estimated if the taxpayer makes a reasonable good faith effort to estimate its tax liability based upon the facts known to it at the time the application for extension is filed, does not negate the clear and unambiguous statutory definition of an amount deemed "properly estimated" as contained in Tax Law § 213.1 for the same reason. Petitioner's argument that the Audit Division did not assert that it knowingly underestimated its tax or made a significant and misleading statement on its application must fail. Such elements are only applicable to Federal law, not New York Tax Law.

H. Although petitioner timely filed its application for an automatic three-month extension to file its report for the year of the loss, the fiscal year ended October 31, 1979, and paid 100% of the tax liability stated thereon with said application, the amount so paid was not equal to 90% of the tax finally determined for that fiscal period nor to the tax shown on the taxpayer's report for the preceding taxable year, i.e., $52,842.00. Therefore the applica- tion for an extension of time to file was invalid. It is of no consequence that petitioner made an error in its corporation franchise tax report for the period ended October 31, 1979. The fact that petitioner erred in its inclusion of Grace Recoveries in its computation of subsidiary capital, thus overestimating the tax due for the period ended October 31, 1979 and including said sum with its extension application, does not now make said application valid even though it filed a corrected report in 1985, well beyond the time period for doing so. (Tax Law § 1087[a].)Said "corrected" return must be construed as a request for a refund of the overpayment made by petitioner with its application for extension of time to file. Therefore, the three-year statute of limitations would apply pursuant to Tax Law § 1087(a). The tax was finally determined as of the filing of the report for the fiscal year ended October 31, 1979 on August 6, 1980 and petitioner failed to pay therewith 90% of the tax stated due thereon. (Tax Law § 1082[a][1].)

I. Since petitioner's application for an automatic extension of time to file its annual report was invalid, the time for filing its claims for refund based upon the net operating loss sustained during fiscal year ended October 31, 1979 was January 18, 1983. Therefore, since petitioner's claims for refund filed July 18, 1983 were not timely, the Audit Division's denial thereof was proper and is hereby sustained.

Regarding the tax paid in the sum of $4,109.00 plus interest pursuant to the Statement of Audit Adjustment referred to in Findings of Fact "10" and "11", payment was not received within three years of the time the report was due for the loss year 1979. Therefore, in accordance with Tax Law § 1087(d), petitioner's request for a refund is denied.

J. The petition of John Grace & Co., Inc. is denied and the Division of Taxation's denial of the refund claims for fiscal years ended October 31, 1976 and 1978 is sustained.

DATED: Albany, New York
February 9, 1989

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