STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **RAYMOND DALLACQUA** **d/b/a MR. SHELL NO. 6009** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1980 through August 31, 1982.	:	
In the Matter of the Petition of **RAYMOND DALLACQUA** **d/b/a MR. SHELL NO. 6010** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1980 through August 31, 1982.	:	DECISION DTA NOS. 801915/ 801916/801914
In the Matter of the Petition of **RAYMOND DALLACQUA** **d/b/a MR. SHELL NO. 6111** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1980 through May 31, 1982.	:	

Petitioner, Raymond Dallacqua d/b/a Mr. Shell No. 6009, 17 Gaigal Drive, Nesconset, New York 11787, filed an exception to the determination of the Administrative Law Judge issued on April 14, 1988 with respect to his petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through August 31, 1982 (File No. 801915).

Petitioner, Raymond Dallacqua d/b/a Mr. Shell No. 6010, 17 Gaigal Drive, Nesconset, New York 11787, filed an exception to the determination of theAdministrative Law Judge issued on April 14, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through August 31, 1982 (File No. 801916).

Petitioner, Raymond Dallacqua d/b/a Mr. Shell No. 6111, 17 Gaigal Drive, Nesconset, New York 11787, filed an exception to the determination of the Administrative Law Judge issued on April 14, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through May 31, 1982 (File No. 801914).

Petitioner appeared by Katz and Bernstein (Robert Katz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

Both parties filed a brief on exception. Oral argument, at the request of the petitioner, was heard on October 11, 1988.

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

ISSUE

Whether a "plea bargain" between petitioner and the Attorney General of the State of New York whereby petitioner pleaded guilty to the first count of a forty-five court indictment finally and irrevocably fixed the total tax due from petitioner for the periods at issue.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. They are summarized below. We also find facts in addition to those found by the Administrative Law Judge as indicated below.

In January 1982, the Division of Taxation began a concurrent audit for the period March 1, 1979 through November 30, 1981 of three gasoline service stations operated by petitioner: Raymond Dallacqua d/b/a Mr. Shell No. 6009, Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111.

Raymond Dallacqua was a sole proprietor who operated several gasoline service stations, including the three which are the subject of this determination.

In response to its request for books and records, the Division received Mr. Dallacqua's Federal income tax returns reflecting receipts and expenses for the three stations for 1979 and 1980, an operating analysis of petitioner's sales and purchases for the audit period, bank statements, cancelled checks and sales tax returns. In addition, an auditor visited the three stations on February 4, 1982. All of the stations were operating and sold gasoline, oil, soda and cigarettes. Mr. Shell No. 6111 performed repairs on automobiles.

For each station, the auditor compared sales as reported on Mr. Dallacqua's Federal income tax and State sales tax returns with sales shown in its books. There was total agreement among the three. The auditor then compared Mr. Dallacqua's gasoline purchases, as shown in his own records, with a verification of each service station's gasoline purchases provided to the Division by the Shell Oil Corporation ("Shell"). This comparison disclosed that the number of gallons of gasoline purchased by each station was significantly higher than the number of gallons of gasoline Mr. Dallacqua reported selling at each station.

On or about July 20, 1982, the auditor forwarded the results of her audit to the Special Investigations Bureau ("SIB").[1] Although no assessments were issued at this time, the auditor did calculate sales taxes due from Mr. Dallacqua for each of the three stations for the period March 1, 1979 through May 31, 1980 using the following method:

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[1]The Special Investigations Bureau in the Department of Taxation and Finance was responsible for investigating taxpayers suspected of criminal activity as a result of audits conducted by the Department's Audit Division.

(a) Monthly average gasoline selling prices were calculated from petitioner's own books and records by dividing gasoline sales by gallons of gasoline purchased.

(b) Petitioner's gasoline purchases, as recorded in its own records were subtracted from actual gasoline purchases provided by Shell to calculate additional monthly gallonage.

(c) Average monthly selling prices were applied to additional monthly gallonage, resulting in additional monthly gasoline sales.

(d) An error rate was computed for each quarter by dividing additional gasoline sales per quarter by gasoline sales as shown on petitioner's books.

(e) The error rate was applied to total reported sales for each quarter (i.e., sales including gasoline, oil, tires, soda, etc.) to obtain audited additional sales. The appropriate tax rate was applied to the result to obtain sales tax due for each quarter.

On August 24, 1984, Raymond Dallacqua d/b/a Mr. Shell No. 6009, executed a consent extending the period of limitation for assessment of sales and use taxes for the taxable period June 1, 1980 through November 30, 1981 to March 20, 1985. On August 26, 1984, Mr. Dallacqua executed two consents on behalf of Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111, similarly extending the period of limitation for assessment of sales and use taxes for those stations. Mr. Dallacqua had previously executed a series of consents on behalf of the three stations on August 25, 1983 and February 10, 1984, respectively, which prevented the time for assessing the taxable period June 1, 1980 through November 30, 1980 from expiring.

As a result of SIB's investigations, on May 15, 1984, the Grand Jury of Nassau County handed up an indictment charging Raymond Dallacqua with 35 counts of offering a false instrument for filing in violation of Penal Law { 175.35 and 10 counts of violating Tax Law { 1145(b) by willfully filing false sales tax returns. Counts one through nine of the indictment concerned returns filed for Mr. Shell No. 6009. Counts 10 through 22, 36 and 37 concerned returns filed for Mr. Shell No. 6010. Mr. Shell No. 6111 was not included in the indictment.

On November 20, 1984, petitioner pleaded guilty to the first count of the indictment in full satisfaction of the entire indictment. The entire charge was as follows:

> "On or about June 20, 1979, in the County of Nassau and elsewhere in the State of New York, with intent to defraud the State and any political subdivision thereof, and knowing that a written instrument, namely a New York State and local sales and use tax return, Form ST-100, for Mr. Shell #6009 contained a false statement and false information, to wit, taxable sales and services for the period of March 1, 1979 to May 31, 1979 reported in an amount less than the true amount, did offer and present it and cause it to be offered and presented to a public office and public servant, namely the New York State Department of Taxation & Finance, with the knowledge and belief that it would be filed with, registered in and otherwise become part of the records of such public office and public servant."

In response to questions posed to him by an Assistant Attorney General, Mr. Dallacqua also admitted willfully filing false returns on behalf of Mr. Shell No. 6010.

At hearing [before the Administrative Law Judge], Mr. Dallacqua admitted willfully and knowingly filing false sales tax returns on behalf of Mr. Shell No. 6009, Mr. Shell No. 6010 and Mr. Shell No. 6111, during the periods under consideration.

When its investigation was concluded, SIB returned the audit files to the Division for assessment of sales taxes. For each of the three stations, the auditor estimated sales and sales taxes due, using the methodology described above; however, some adjustments were necessitated in each case by missing information. Because third-party verification of purchases was not available after May 31, 1981 for Mr. Shell No. 6009 and Mr. Shell No. 6111, and after November 31, 1981 for Mr. Shell No. 6010, an average error rate was calculated from prior periods and was applied to reported sales for the later periods. In addition, the auditor did not have available sales tax returns for Mr. Shell No. 6009 and Mr. Shell No. 6010 for the period June 1, 1982 through August 31, 1982, and he had no return available for Mr. Shell No. 6111 for the period December 1, 1981 through May 31, 1982. Consequently, for these periods the auditor estimated reported sales based on prior returns.

On February 8, 1985, the Division issued against Raymond Dallacqua d/b/a Mr. Shell No. 6009 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1980 through August 31, 1982, assessing sales tax of $65,021.02 plus interest and a fraud penalty pursuant to Tax Law { 1145(a)(2). On the same date, it also issued a Notice of

Determination and Demand for Payment of Sales and Use Taxes Due against Raymond Dallacqua d/b/a Mr. Shell No. 6010 for the period June 1, 1980 through August 31, 1982, assessing taxes of $110,425.25 plus a fraud penalty and interest. Finally, on February 8, 1985, the Division issued to Raymond Dallacqua d/b/a Mr. Shell No. 6111 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing tax of $62,026.10 plus a fraud penalty and interest.

As proof of his assertion that Mr. Shell No. 6009 and Mr. Shell No. 6111 stopped doing business as of June 1, 1981, Mr. Dallacqua offered a worksheet prepared by SIB. The worksheet shows Shell purchase verifications only through May 31, 1981; however, that same worksheet shows that Mr. Dallacqua filed sales tax returns for Mr. Shell No. 6009 and Mr. Shell No. 6111 for each sales tax period from December 1, 1979 through May 31, 1982.

At hearing, Mr. Dallacqua admitted that he continued to operate Mr. Shell No. 6010 until August 31, 1982, but did not file a return for the period June 1, 1982 through August 31, 1982.

In addition to the facts found by the Administrative Law Judge, we find the following facts.

In response to petitioner's guilty plea the Court imposed the following sentence:

> "It is hereby ordered and adjudged that you, Raymond Dallacqua, having been convicted of the crime of offering a false instrument for filing in the first degree, be sentenced to five years probation with the condition that you make restitution in the sum of $500 a month to the Tax Compliance Bureau continuing the present mode of payment that you have been making so far."

At the conclusion of the June 15, 1987 hearing before the Administrative Law Judge petitioner requested a continuance of the hearing for the specific purpose of allowing him to establish that he "pleaded guilty based on the fact that his plea encompassed all tax periods for all years for the gas station". Petitioner indicated that this would be done through witnesses.

The Administrative Law Judge granted petitioner's request.

On August 24, 1987 petitioner submitted to the Administrative Law Judge a true copy of the indictment #58944 against petitioner and a reiteration of his position that the plea agreement encompassed all tax periods and fixed his total tax liability.

On February 10, 1988, the Administrative Law Judge wrote to the petitioner's representative indicating that the Division of Tax Appeals had not received a request for a continuation of the hearing and that she was leaving the record of the case open until March 1, 1988. On March 21, 1988, the petitioner's representative wrote to the Administrative Law Judge, reiterated his position and stated, ". . . I feel that the documentation I submitted with my August 24, 1987 letter firmly establishes that all of the outstanding assessments were before the Supreme Court and were part of the final adjudication of the case." Although petitioner's representative also indicated that he was prepared to go forward with the case if further proof was needed,

no additional evidence was offered.

No further hearing was held in the matter. No further documents were submitted. In this regard, it is noteworthy that petitioner testified that he was aware of a release offered by the Division fixing his tax liability but that he did not have a copy available.

OPINION

On exception, petitioner asserts that prior to his entering a guilty plea to one count of filing a false instrument an agreement was reached among all concerned parties, including petitioner, SIB, the Assistant Attorney General and the Court, finally and irrevocably fixing the tax due from petitioner at $220,804.62. This agreement purportedly included petitioner's total liability for Mr. Shell No. 6009, Mr. Shell No. 6010 and Mr. Shell No. 6111, for all periods under consideration. Petitioner asserts that the Administrative Law Judge erred in not concluding that the order of Justice Baker irrevocably fixed petitioner's total tax liability at $220,804.62. Petitioner has not taken exception to the conclusions of the Administrative Law Judge that the audit methodology was correct and that the civil fraud penalty was properly imposed.

The Division asserts that no agreement fixing tax was reached and that neither the plea bargain agreement nor the court order precludes the Division from assessing sales tax against petitioner.

The Administrative Law Judge determined that petitioner did not offer evidence to support his interpretation of the plea bargain agreement.

We sustain the determination of the Administrative Law Judge.

The principles concerning plea bargains are clearly enunciated in Chaipis v. State Liq. Auth. (44 NY2d 57). In Chaipis, the defendant was charged with the felony of promoting prostitution. He pled guilty to one count of permitting prostitution, a misdemeanor. He was sentenced to a discharge conditioned upon his continued cooperation with the police and special prosecutor. Mr. Chaipis was promised by the prosecutor "that his cooperation would be brought to the attention of the New York State Liquor Authority with a view towards preserving his liquor license." Mr. Chaipis was also promised, and subsequently received, a permanent certificate of relief from civil disabilities. Subsequently, the State Liquor Authority, relying on petitioner's indictment and conviction, revoked his license notwithstanding letters from the office of special prosecutor and the police department in support of Mr. Chaipis. The Appellate Division sustained the State Liquor Authority. The Court of Appeals reversed on the grounds that while the State Liquor Authority was not bound by the plea bargain agreement it failed to treat "as a highly significant factor" the prosecutor's recommendation in a plea agreement (see also, Bracken v. Axelrod, 93 AD2d 913). The Court stated the basic principles as follows:

> "It is a truism that a guilty plea, . . . must be taken only when the defendant has knowledge and understanding of the consequences of the plea. If the plea be coerced, or if defendant's knowledge of its consequences be not explored sufficiently, the plea may be subject to vacation on proper and timely motion." (Chaipis v. State Liq. Auth.,supra, at 63.)

The Court first addressed the effect of prosecutorial representations within the criminal justice system stating:

> "A corollary of the prohibition on coerced guilty pleas is the obligation of prosecutors not to retract or falter on promises made to a criminal defendant in return for a plea of guilty. Moreover, within the criminal law enforcement system generally a representation made by one agent or agency is binding on another regardless of knowledge of the representation when made. Knowledge and understanding of the consequences of defendant's plea is impossible if the prosecutor is free to change the consequences at will after the plea is entered. Therefore, if a prosecutor makes a representation within the scope of his power, and defendant acts

> in reliance upon the representation, defendant may be entitled to have the representation enforced, at least where merely vacating the plea would result in significant prejudice to defendant." (Chaipis v. State Liq. Auth., supra, at 64 [cites omitted] [emphasis added].)

With regard to the effect of representations on agencies outside the criminal justice system, the Court stated:

> "Different, to some extent, is the prosecutor's representation which extends beyond the power of his office. Enforcement of that type of representation would be unthinkable in some situations, as, for example, a promise by a prosecutor that, in return for valuable testimony about other public officials, a Judge would not be removed from office for bribe receiving. Even in less compelling situations, however, public policy would not permit excesses by a prosecutor to divest an independent body of its lawful discretion.
>
> "The rights of the criminal defendant, however, may not be sacrificed to the conflict between two arms of the State. . . .
>
> "Instead, an earlier promise made by a prosecutor, an agent of the State, must be treated as a highly significant factor when the State agency with the power to enforce the promise is called upon to do so. The mere fact that an agent of the State made a representation to a criminal defendant and the defendant then pleaded guilty, assertedly in reliance on the representation, is entitled to weight." (Chaipis v. State Liq. Auth., supra, at 63, 64 [emphasis added].)

Applying the above principles to this case, we must first ask if the Attorney General made any representations to petitioner concerning the total tax liability covered by the plea bargain and if so, whether the Division, an administrative agency outside the criminal justice system per se, considered and treated the representation as a "highly significant factor" as required by Chaipis.

We deal first with the minutes of petitioner's plea which detail an exchange between the sentencing judge, Mr. Sutter (defense counsel), Mr. O'Reilly (Assistant Attorney General) and petitioner concerning the conditions of the plea.

> "[Judge Baker] Q. I make no commitment with respect to sentence upon taking this plea. Do you understand that?
>
> MR. SUTTER: The record should remain perfectly clear that this is an open plea, there has been no commitment by the Court whatsoever as to what the sentence might be, that there is only but one understanding between counsel with respect to the sentence, and that is that the Attorney General's Office agrees that they will make no recommendation as to what punishment should be imposed, but they reserve the right to advise the Court prior to sentence as to the amount of unpaid and outstanding taxes.

MR. O'REILLY: That's correct, your Honor.

THE COURT: It is an open plea?

MR. SUTTER: Yes, it is.

[Judge Baker] Q. Knowing all that was told you, do you now voluntarily and of your own free will plead guilty to the crime of offering a false instrument for filing in the first degree?

[Mr. Dallacqua] A. Yes.

[Further, Judge Baker stated] 'I am satisfied that the defendant understands the nature of the charges and the nature of the plea, that he's discussed with his attorney his legal rights, that he understands he is waiving his constitutional rights, and that no threats or promises have been made, and that he makes this plea of his own free will. The plea is accepted.'"

Clearly, petitioner indicated he understood the nature of the charges and the nature of the plea satisfying the first principle in Chaipis. With regard to whether a representation was made, as asserted by petitioner, we find nothing here to indicate that the plea represented the totality of petitioner's tax liability or that the Division was precluded from assessing sales tax liability.

We deal next with the wording of the sentence imposed by the court in the criminal proceeding.

"It is hereby ordered and adjudged that you, Raymond Dallacqua, having been convicted of the crime of offering a false instrument for filing in the first degree, be sentenced to five years probation with the condition that you make restitution in the sum of $500 a month to the Tax Compliance Bureau continuing the present mode of payment that you have been making so far."

Contrary to petitioner's assertions, we find nothing in the court's order indicating that the required payments were the total of petitioner's tax liability or precluding the Division from assessing sales tax liability.

In fact, the language of the court order belies petitioner's assertion that the order was meant to fix tax liability at $220,804.62 for all stations for all periods. On its face, the order imposes a probation of five years with the condition of a $500.00 a month payment. Payment of $500.00 a month for five years would total only $30,000.00. Petitioner has offered no evidence indicating the required payment terms of the remainder ($190,804.62) of the alleged fixed tax amount.

We find nothing else in the record to indicate the existence of such agreement. In this regard, we believe it important to point out that petitioner specifically requested a continuance of the hearing to allow time to introduce evidence to support his assertion concerning the existence of the agreement. No such evidence was introduced. In the absence of such agreement we need not address ourselves to the question of whether the Division gave proper consideration to the asserted representations.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Raymond Dallacqua d/b/a Mr. Shell No. 6009, Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111 are denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petitions of Raymond Dallacqua d/b/a Mr. Shell No. 6009, Raymond Dallacqua d/b/a Mr. Shell No. 6010 and Raymond Dallacqua d/b/a Mr. Shell No. 6111 are denied and the notices of determination issued on February 8, 1985 are sustained.

Dated: Albany, New York
March 2, 1989

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

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