STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**LEONIDAS MIRAS,
OFFICER OF 172 RIHEA CORP.**

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 March 1, 1980 through May 31, 1982.

In the Matter of the Petition

of

**LEONIDAS MIRAS, OFFICER OF
515 BAY SERVICE STATION, INC.**

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 September 1, 1979 through August 31, 1982.

In the Matter of the Petition

of

**NICK MIRAS,
OFFICER OF 172 RIHEA CORP.**

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 March 1, 1980 through May 31, 1982.

In the Matter of the Petition

of

**NICK MIRAS, OFFICER OF
515 BAY SERVICE STATION, INC.**

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 September 1, 1979 through August 31, 1982.

DECISION
DTA NOS. 807150, 807151, 807152, 807153, 807154, and 807155

| | |
|---|---|
| In the Matter of the Petition<br>of<br>**172 RIHEA CORP.**[1]<br>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 March 1, 1980 through May 31, 1982. | : |
| In the Matter of the Petition<br>of<br>**515 BAY SERVICE STATION, INC.**[1]<br>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 September 1, 1979 through August 31, 1982. | : |

Both the Division of Taxation and petitioners Leonidas Miras and Nick Miras, officers of 515 Bay Service Station, Inc. and 172 Rihea Corp., 1395 Gardiners Drive, Bayshore, New York 11706 filed exceptions to the determination of the Administrative Law Judge issued on September 5, 1991 with respect to the petitions of Leonidas Miras and Nick Miras as officers of 172 Rihea Corp. and 515 Bay Service Station, Inc. for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through August 31, 1982.

Petitioners appeared by Goodkind, Labaton, Rudoff & Sucharow, Esqs. (Mark S. Arisohn, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Both parties filed briefs on exception. Petitioners' request for oral argument was granted and subsequently cancelled at the request of both parties.

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

[1]Although petitioners included the case numbers pertaining to 172 Rihea Corp. and 515 Bay Service Station, Inc. on their exception, petitioners do not dispute the tax liability of the two corporations in their exceptions.

## *ISSUE*

Whether the terms of a plea bargain agreement entered into by petitioners limited petitioners' tax liability under the Tax Law.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact "16" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioners 515 Bay Service Station, Inc. and 172 Rihea Corp. were retail gasoline filling stations at separate locations that were owned and operated by petitioners Leonidas and Nick Miras, who are father and son.

After an audit, the following notices of determination and demands for payment of sales and use taxes due were issued to petitioner 172 Rihea Corp. by the Division of Taxation ("Division") as indicated below:

| Audit Period | Date of Notice | Tax Due | Total Amount Due Including 50% Fraud Penalty and Statutory Interest |
|---|---|---|---|
| 3/1/80 - 8/31/80 | 5/20/83 | $115,166.37 | $214,298.39 |
| 9/1/80 - 2/28/81 | 12/20/83 | 116,358.90 | 219,202.61 |
| 3/1/81 - 8/31/81 | 6/20/84 | 132,872.02 | 252,583.83 |
| 9/1/81 - 11/30/81 | 12/20/84 | 110,001.03 | 212,232.27 |
| 12/1/81 - 5/31/82 | 4/25/85 | 67,942.81 | 132,086.50 |

The Division also issued notices of determination and demands for payment of sales and use taxes due separately to Leonidas Miras and Nick Miras, as officers of 172 Rihea Corp., for the same audit periods and in the same amounts as indicated above. In addition, the Division separately issued to each Leonidas and Nick Miras a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 21, 1984, for the audit period December 1, 1981 through February 28, 1982, which assessed tax due in the amount of $6,159.00, plus penalty and interest, for a total amount of $9,447.45.

Initially, petitioner 172 Rihea Corp. timely challenged the notices of determination dated May 20, 1983, December 20, 1983 and June 20, 1984 by separate petitions alleging that the audits were based on arbitrary markups and that the sales tax returns were true and correct.

Petitioner 172 Rihea Corp. also timely challenged the two remaining notices listed above, but, with regard to the notice dated December 20, 1984, it alleged that the assessment was erroneous because it went out of business in August 1981. With regard to the notice dated April 25, 1985, the corporation alleged that it went out of business on February 1, 1982 and, therefore, the assessment for the period February 1, 1982 through May 31, 1982 was in error.

After conciliation conferences, the Division recomputed the tax assessments as follows:

(a) Notices dated May 20, 1983 - the tax deficiency was reduced from $115,166.37 to $113,124.63. Penalty and statutory interest were sustained.

(b) Notices dated December 20, 1983 - the tax deficiency was reduced from $116,358.90 to $109,099.62. Penalty and statutory interest were sustained.

(c) Notices dated June 20, 1984 - the tax deficiency was reduced from $132,872.02 to $101,410.05. Penalty and statutory interest were sustained.

(d) Notices dated December 20, 1984 - the tax deficiency was reduced from $110,001.03 to $53,080.46. Penalty and statutory interest were sustained.

(e) Notices dated April 25, 1985 - the tax deficiency was reduced from $67,942.81 to $65,495.54. Penalty and statutory interest were sustained.

Petitioner 172 Rihea Corp. timely petitioned the respective conciliation orders, alleging that the Division of Taxation erred by refusing to be bound by a plea bargain agreement made in connection with related criminal proceedings.

From the record, it appears that petitioners Leonidas and Nick Miras each petitioned the Division of Tax Appeals only with respect to the notices dated June 20, 1984, December 20, 1984 and April 25, 1985. The notices dated December 20, 1983, separately addressed to Leonidas Miras and Nick Miras, were returned to the Division indicating that delivery was not made.

The Division issued to petitioner 515 Bay Service Station, Inc. notices of determination and demands for payment of sales and use taxes due as indicated below:

| | Total Amount Due Including 50% Fraud Penalty and |
|---|---|

| Audit Period | Date of Notice | Tax Due | Statutory Interest |
|---|---|---|---|
| 9/1/79 - 8/31/80 | 12/20/82 | $ 94,029.41 | $156,329.12 |
| 9/1/80 - 2/28/81 | 12/20/83 | 72,058.91 | 135,531.15 |
| 3/1/81 - 8/31/81 | 6/20/84 | 66,174.20 | 131,221.71 |
| 9/1/81 - 11/30/81 | 12/20/84 | 30,468.63 | 58,785.15 |
| 12/1/81 - 8/31/82 | 3/20/85 | 132,830.82 | 251,056.32 |

The Division also issued separate notices of determination and demands for payment of sales and use taxes due to Leonidas and Nick Miras, as officers of 515 Bay Service Station, Inc., for the same audit periods and in the same amounts as listed above. In addition, the Division issued to each Leonidas Miras and Nick Miras a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 21, 1984, which assessed tax due in the amount of $4,292.00, with penalty and interest, for a total amount due of $6,583.61 for the audit period December 1, 1981 through February 28, 1982.

Initially, petitioner 515 Bay Service Station, Inc. filed timely petitions with respect to the notices of determination dated December 20, 1982, June 20, 1984 and March 20, 1985, alleging that the estimation of tax by the Division was arbitrary, that the sales tax returns filed were correct and that the assessment was improper because the corporation went out of business on August 1, 1981. Leonidas Miras and Nick Miras separately filed timely petitions contesting the notices of determination dated December 20, 1982, June 20, 1984, December 20, 1984 and March 20, 1985 on the same grounds asserted in the petitions of 515 Bay Service Station, Inc. In addition, Leonidas and Nick Miras each filed timely petitions with respect to the notices dated May 21, 1984.

After conciliation conferences, the Division recomputed the tax assessments as follows:[2]

(a) Notices dated December 20, 1982 - the tax deficiency was reduced from $94,029.41 to $79,536.52.

[2]The notices dated December 20, 1983 were apparently never delivered to the three petitioners. Therefore, petitions were never filed with respect to these notices; however, adjustments were made by the Division based on information obtained at the conciliation conferences reducing the assessment from $75,058.91 to $46,342.79.

(b) Notices dated June 20, 1984 to 515 Bay Service Station, Inc. - the tax deficiency was reduced from $66,174.20 to $39,571.82.[3]

(c) Notices dated December 20, 1984 to Leonidas and Nick Miras - the tax deficiency was reduced from $30,468.63 to $15,843.91.[4]

(d) Notices dated March 20, 1985 - the tax deficiency was reduced from $132,830.82 to $26,039.77.

Petitioners timely filed petitions with respect to the conciliation orders alleging that the Division erred by refusing to be bound by the plea bargain agreement made in connection with related criminal proceedings.

At the hearing held on December 6, 1990, petitioners' counsel stated that petitioners were not contesting the audit or audit methodology or that petitioners Leonidas Miras and Nick Miras were persons required to collect tax pursuant to Tax Law § 1131. The only issue presented at hearing and in the petitions filed was whether petitioners' respective liabilities were limited by the amount of restitution agreed to in the respective plea bargain agreements in connection with criminal prosecutions against Leonidas and Nick Miras.

On June 6, 1986, the Grand Jury of Nassau County indicted Leonidas Miras and Nick Miras accusing them of the crime of Offering a False Instrument for Filing in the First Degree, in violation of Penal Law § 175.35. The indictment contained six counts of the penal law violation with regard to underreporting on New York State and local sales and use tax returns (ST-100) as follows:

| | | |
|---|---|---|
| Count One: | Nick Miras - 515 Bay Service Station, Inc. | 3/1/81-5/31/81 |
| Count Two: | Nick Miras - 172 Rihea Corp. | 3/1/81-5/31/81 |
| Count Three: | Nick Miras - 515 Bay Service Station, Inc. | 6/1/81-8/31/81 |
| Count Four: | Leonidas Miras - 172 Rihea Corp. | 6/1/81-8/31/81 |

[3]The notices, dated June 20, 1984 and May 21, 1984, to Leonidas and Nick Miras covered the respective audit periods March 1, 1981 through August 31, 1981 and December 1, 1981 through February 28, 1982. The two conciliation orders, dated April 14, 1989, refer to these two notices but appear to indicate a broader audit period than covered by the notices by including the quarter of September 1, 1981 through November 30, 1981, which was covered in the notices dated December 20, 1984. The conciliation orders state that the tax was recomputed to $59,557.42.

[4]It appears from the record that petitioner 515 Bay Service Station, Inc. has not petitioned the notice dated December 20, 1984.

| | | |
|---|---|---|
| Count Five: | Nick Miras - 515 Bay Service Station, Inc. | 9/1/81-11/30/81 |
| Count Six: | Nick Miras - 172 Rihea Corp. | 9/1/81-11/30/81 |

On June 11, 1986, petitioners Leonidas and Nick Miras were arraigned and pleaded not guilty to the indictment. On November 6, 1986, petitioners appeared before the court and each entered a guilty plea for the crime of Attempting to Offer a False Instrument for Filing in the First Degree, a Class "A" misdemeanor, a lesser included offense under the counts of the indictment.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> The Division submitted into evidence a letter, dated December 8, 1986, written by Joseph J. Hester, the assistant attorney general prosecuting the criminal charges against petitioners. The letter, addressed to Mark Arisohn, petitioners' attorney, sets forth the "promises and conditions relating to the guilty pleas and conviction" of petitioners Nick and Leonidas Miras[5] to the class "A" misdemeanor of Attempting to Offer a False Instrument for Filing in the First Degree in satisfaction of the felony indictment. The letter, in pertinent part, is set forth below:
>
> "Dear Mr. Arisohn:
>
> In accord with the direction of the Court on November 5, 1986, I am writing to set forth the promises and conditions relating to the guilty pleas and conviction of the [Leonidas Miras and Nick Miras] defendants in this case on November 5th.
>
> * * *
>
> 1. Sentence shall be to a period of probation.
>
> 2. Restitution, as a condition of probation, in an amount to be determine[d] by the Department of Probation of the County of Nassau and the Department of Taxation and Finance of the State of New York. For the purpose of determining the amount of restitution defendant admits that, by virtue of his acts, as charged under counts one, two, three, five and six of the indictment, up to [$173,039.64 and 60,635.47, respectively] owed in sales and use taxes were not paid as required by law. The defendant expressly consents to restitution as fixed by the two above-named agencies up to the

[5]The letter also addresses the plea agreement entered into with George Dounias, who is not a party to the present action.

> amount of [$173,039.64 and 60,635.47, respectively] . . . .
>
> * * *
>
> 4. At sentencing defendant[s] will execute a confession of judgment in favor of the Department of Taxation and Finance in the same amount as the amount of restitution."

The letter concluded with the following paragraph:

> "The amount of $233,675.11, the amount of sale [sic] and use taxes not paid as a result of the acts of the defendants, as charged in the indictment and in accord with the evidence before the Grand Jury, is allocated among the various counts of the indictment, in accord with the same evidence, as follows:
>
> | | |
> |---|---|
> | Count One | $18,939.04 |
> | Count Two | 69,529.08 |
> | Count Three | 10,801.93 |
> | Count Four | 60,635.47 |
> | Count Five | 15,299.55 |
> | Count Six | 58,470.04"[6] |

A copy of the December 8, 1986 letter was forwarded by Mr. Hester to Adrian Hunte, an attorney with the Division of Tax Enforcement with the Department of Taxation and Finance.

In two documents, dated January 9, 1987, which are entitled the Nassau County Probation Department Restitution Summary signed by Gloria Miller (the restitution investigator for the Probation Department), it was stated with respect to Nick Miras that:

> "Mr. Hester of the N.Y. State Attorney General's Office, explained that the total amount of tax due from the defendant is $173,039.64. He also indicated that it had been decided by his office and the Department of Taxation and Finance, that the Probation Department should determine the amount of Restitution to be paid, based on the defendant's ability to pay."

The same statement was made in the document with respect to Leonidas Miras except that the total amount due from him was stated as $60,635.47.

On January 15, 1987, the court sentenced Leonidas Miras to three years' probation and restitution in the amount of $6,000.00 to be paid through probation at the rate of $175.00 per

---

[6]We modified finding of fact "16" to reflect more details of the December 8, 1986 letter.

month, the thirty-fourth payment to include the balance plus a 5% surcharge. Similarly, on that same date, the court sentenced Nick Miras to three years' probation and restitution in the amount of $12,000.00 payable at a rate of $350.00 for 33 months and the thirty-fourth payment for $450.00 plus a 5% surcharge.

In their respective Affidavits for Judgment by Confession, dated January 15, 1987, Leonidas Miras and Nick Miras confessed judgment in favor of the Department of Taxation and Finance in the respective amounts of $6,000.00 and $12,000.00. In both affidavits, the respective petitioners recited that the confession of judgment arose out of certain facts. In the affidavit of Leonidas Miras, he stated that he signed and forwarded sales tax returns to the Department of Taxation and Finance for the period June 1, 1981 through August 31, 1981 with respect to Rihea Corp. which he knew to contain false and inaccurate figures. He also stated that, as a result of this underreporting, he owed the Department of Taxation and Finance additional sales tax monies in the amount of $6,000.00.[7]

Similarly, Nick Miras stated in the affidavit that his confession of judgment in the amount of $12,000.00[8] was based on his filing of sales tax returns which contained false and inaccurate figures with regard to 172 Rihea Corp. and 515 Bay Service Station, Inc. for the period March 1, 1981 through November 30, 1981.

In a letter dated March 5, 1987, Gloria Miller, the restitution investigator on behalf of the Probation Department, wrote to Mr. Ed Goldberg of the Department of Taxation and Finance advising him that the court directed Leonidas Miras to pay restitution in the amount of $6,000.00. The letter also stated the following:

> "You should also be aware that any payment made as restitution or reparation pursuant to the Court's order does not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment which you might decide to pursue."

---

[7]The amount of $6,000.00 was handwritten in ink above the typed amount of $60,635.47 which was crossed out. This change was initialled in the margin by three parties who appear to be Leonidas Miras, Joseph J. Hester and Adrian Hunte.

[8]The amount of $12,000.00 was handwritten in ink above the typed amount of $173,039.64 which was crossed out and initialled in the margin by three parties who appear to be Joseph J. Hester, Nick Miras and Adrian Hunte.

This same statement was included in a similar letter advising Mr. Goldberg that the court directed Nick Miras to pay restitution in the amount of $12,000.00.

At hearing, petitioners' counsel, Mark S. Arisohn, testified that he was retained by Nick and Leonidas Miras in early 1986 in connection with a pending Grand Jury investigation. He stated that he had a series of negotiation meetings with Joseph J. Hester to reach an agreement limiting the extent of the criminal charges. As stated by Mr. Arisohn:

> "there was a large tax period that was under investigation, and we agreed that the indictments that would come down would be limited in scope to a few of the periods in question.... We agreed that the indictment to be returned, which in turn would then be negotiated for a plea, would limit the exposure of the Defendants to certain few of these periods. In addition, as we got closer to negotiating an overall settlement of the case, I raised the concern that the overall tax liability here for the individual clients was a tremendous amount of money, and they would be more inclined to plead guilty to the criminal charges if we could, at the same time, resolve the civil tax consequences to the individuals" (Tr., p. 56).

Mr. Arisohn testified that at this stage of the negotiations a representative from the Division of Taxation, Adrian Hunte, participated in further plea negotiations "where an ultimate plea bargain was arrived at". According to Mr. Arisohn's testimony, an agreement was reached among the three parties -- petitioners, Mr. Hester and Ms. Hunte -- which encompassed petitioners' overall civil as well as criminal liability. As stated by Mr. Arisohn:

> "In other words, while it was recognized by all parties here that the overall tax liability of the individuals was for many periods and in many hundreds of thousands of dollars it was agreed between my clients, the Attorney General's Office, and the Department of Taxation and Finance that in return for a guilty plea, which was in the interest, by the way, of the Department of Taxation and Finance to resolve this case, the overall tax liability of my clients for all other periods, all the periods under investigation would be limited to the maximum of the tax due on the various counts of the indictment and, in turn, to be limited by the amount by which the Probation Department found my clients were able to afford to pay by way of restitution" (Tr., pp. 57-58).

Mr. Arisohn claimed that it was based on the agreement to limit the civil as well as criminal liability that he recommended to his clients that they enter a plea of guilty to the Class "A" misdemeanor and pay the restitution. He testified that:

> "it is absolutely clear to me that the major inducement to plead guilty here and avoiding on both sides, necessarily would have been a lengthy trial and difficult issues of proof, was the fact by my clients to limit their ultimate tax exposure. And I recall having detailed conversations about that with both Mr. Hester and Adrian Hunt of the Department of Taxation and Finance.
>
> "There was really no doubt in anybody's mind about what we were doing here, indeed I recall Judge Orenstein, who was the Judge in Nassau County, commenting how pleased he was to see the Department of Taxation and Finance involved in the plea negotiations" (Tr., pp. 58-59).

Subsequent to the hearing, the Division's counsel, with the Administrative Law Judge's permission, submitted an affidavit of Adrian Hunte that described her involvement in the plea negotiations as follows:

> "I was assigned to the Matter of Leonidas and Nick Miras for advisory purposes only in 1987 shortly prior to sentencing of the defendants, as the case had been prosecuted by the New York State Attorney General's Office.
>
> "My duties as an Associate Attorney did not include any determination of the New York State civil liability, nor at any time did I enter into any agreement, whatsoever, with Leonidas Miras and Nick Miras or their legal representatives to set or limit the New York State civil tax liability of Leonidas and Nick Miras."

## ***OPINION***

In the determination below, the Administrative Law Judge held that the criminal plea agreement entered into by petitioners, which required restitution payments for a portion of unpaid sales tax, effectively released petitioners from liability for the balance of the unpaid sales tax stated in the indictments. The basis for the Administrative Law Judge's conclusion was that the Division had participated in determining the amount of restitution. The Administrative Law Judge further held that petitioners failed to prove a larger agreement to preclude the Division from pursuing the unpaid sales tax for periods not included in the indictments.

On exception, petitioners state that they have produced sufficient evidence that an agreement existed among petitioners, the Attorney General's office, and the Division, that in return for petitioners' plea of guilty to a class "A" misdemeanor of Attempting to Offer a False

Instrument for Filing in the First Degree, petitioners' total tax liability for all periods would be limited to the amount of their respective restitution payments.

In its exception, the Division argues that petitioners have not met their burden of proving by clear and convincing evidence that the Division was a party to an agreement to limit petitioners' civil liability for any of the quarters in the audit period.

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

We note at the outset that because petitioners concede the proper issuance of the notices of determination, as well as the reasonableness of the Division's audit methodology, the burden rests on petitioners to prove by clear and convincing evidence that, as a result of the plea agreement, the amounts assessed against them are erroneous (see, Matter of N.T.J. Liquors, Tax Appeals Tribunal, May 7, 1992; see also, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451; Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991). If this burden is not met, then the assessments must be sustained.

Petitioners claim that their liability for unpaid sales tax was limited as a result of a plea agreement concerning related criminal charges. Thus, in considering the effect of such an agreement on petitioners' tax liability, we must examine the standards by which plea agreements are analyzed. The New York State Court of Appeals has repeatedly emphasized the necessity of placing all promises included in a plea agreement on the record, in order to assure the continued validity and usefulness of the plea bargaining process in the criminal justice system (Matter of Benjamin S. v. Kuriansky, 55 NY2d 116, 447 NYS2d 905, revg 83 AD2d 630, 441 NYS2d 698; People v. Frederick, 45 NY2d 520, 410 NYS2d 555; People v. Selikoff, 35 NY2d 227, 360 NYS2d 623, cert denied 419 US 1122). Moreover, Criminal Procedure Law ("CPL") 220.50(5) states that:

> "[w]hen a sentence is agreed upon by the prosecutor and a defendant as a predicate to entry of a plea of guilty, the court or the prosecutor must orally on the record, or in writing filed with the court, state the sentence agreed upon as a condition of such plea."

The Court of Appeals has stated that "once the terms of a plea bargaining agreement are placed on the record, judicial recognition of additional promises or terms of the agreement will not be forthcoming except in a rare case" (Matter of Benjamin S. v. Kuriansky, supra, 447 NYS2d 905, 907).

Based on the above authority, it is clear in this case that the record created to document the plea agreement should be, at the least, a significant source of the promises which comprised the agreement.[9] However, in this case petitioners failed to submit the record of the plea agreement into evidence at the hearing before the Administrative Law Judge. In addition, petitioners' attorney testified that, although he was present for the guilty plea and sentencing of each petitioner, he never requested the record from these proceedings, nor did he deny that such a record existed.

In the case at hand, petitioners' main source of documentary evidence of a plea agreement limiting their tax liability is two identically worded "affidavits for judgment by confession" signed by the respective petitioner (see, Exhibits "Z" and "CC"). These affidavits contained typewritten figures of $60,635.47 and $173,039.64, respectively, representing the amounts to which judgment was confessed.[10] However, these figures were crossed out, with the amounts of $6,000.00 and $12,000.00, respectively, written in.[11] These revised amounts were initialled in the margins. Petitioners allege that these documents were initialled by Joseph J. Hester, representing the Office of the Attorney General, Adrian Hunte, representing the Division, and the respective petitioner.

---

[9]A prosecutor's representation affecting another State agency, such as a promise to limit a criminal defendant's tax liability, does not bind the agency with the power to enforce the promise. Nevertheless, an earlier promise made by a prosecutor, an agent of the State, must be treated as a "highly significant factor" when the agency, in this case the Division of Taxation, is called on to enforce the promise (Matter of Chaipis v. State Liq. Auth., 44 NY2d 57, 404 NYS2d 76).

[10]These amounts represented unpaid sales tax for the periods March 1, 1981 through November 30, 1981 as charged in the indictment.

[11]It is apparent that the amounts on the respective affidavits were revised to correspond with the restitution amounts.

Petitioners allege that the initialling of the altered amounts on these affidavits establishes an agreement between the Division and petitioners to limit petitioners' tax liability to the amounts stated therein. However, we refuse to attribute any meaning to these affidavits beyond that indicated by the record before us.

The letter of Assistant Attorney General Joseph J. Hester, dated December 6, 1986, describes the purpose of the affidavits. The letter outlines three components of the plea agreement: 1) the sentence agreed to was probation; 2) restitution was a condition of that probation; and 3) petitioners were required to execute a confession of judgment for the amount of the restitution. This letter does not recite as a promise or condition of the guilty pleas that petitioners' tax liability was being reduced. Rather, it shows that the confessions of judgment signed by petitioners were acts of compliance with a condition of their sentences; they were not part of an agreement to reduce petitioners' civil liability. Accordingly, we find that the affidavits confessing judgment, interpreted within the context of the Hester letter, not only fail to prove petitioners' characterization of the plea agreement, but support the opposite conclusion that the agreement did not limit petitioners' civil liability.

The Administrative Law Judge, in limiting petitioners' civil liability on the assessed amounts included in the criminal indictment to petitioners' restitution payments, found the following facts to be significant: first, that the Division participated in determining the amount of the payments and second, that the restitution amounts were established without any reference to civil or criminal liability. However, the burden to clarify whether the civil proceeding was resolved or discontinued as a result of the plea agreement lies with petitioners, not the Division.

We recently discussed this point in Matter of N.T.J. Liquors (supra), a case factually similar to the present case. There, the Division was present at the criminal plea proceeding of a taxpayer prosecuted for knowingly filing a false sales and use tax return. As in this case, the restitution amount agreed upon as part of the sentence was less than the amount listed in the underlying Notice of Determination. After acknowledging that it was the petitioner's burden to

prove that the plea agreement precluded the Division from collecting the balance of the tax due, we stated:

> "[i]n the absence of any such evidence, we cannot conclude that the plea bargain consisted of anything more than a reduction in the charges from felonies to misdemeanors, a sentence of "restitution" instead of a fine, and additional time to pay. There is no support in this record for a conclusion that the Division agreed, either expressly, or through the District Attorney's office, that as a result of being charged with criminal offenses relating to its tax paying responsibilities, petitioner was to pay less in tax than it was required to pay based on the uncontested audit. Whatever was said about the amount due during the criminal proceeding can hardly be said to encompass the total amount that petitioner owed in sales taxes as reflected in the notice of determination absent any specific indication during the sentencing or any proof at the hearing below . . ." (Matter of N.T.J. Liquors, supra, emphasis added).[12]

It should also be noted that the testimony of petitioners' attorney, Mark Arisohn, does not prove petitioners' case. Mr. Arisohn testified that an agreement was reached by petitioners, Mr. Hester and Ms. Hunte during the plea negotiations, which encompassed petitioners' overall civil as well as criminal liability. The Court of Appeals has frowned on this method of proof as hindering the pursuit of certainty in the plea bargaining process. In concluding that off the record statements claimed to have been made by the sentencing judge could not alter the terms of a plea agreement contained on the record, the court stated: "reliance upon the sometimes faulty memories of counsel . . . without independent verification, cannot be tolerated" (People v. Danny G., 61 NY2d 169, 473 NYS2d 131, 133, revg 95 AD2d 989, 464 NYS2d 618).

Finally, we agree with the Administrative Law Judge's conclusion that the assessments for periods not covered by the indictment were not settled by the plea agreement, as petitioners have presented no evidence other than Mr. Arisohn's uncorroborated testimony that the Division or the Attorney General agreed to limit these assessments.

---

[12]Petitioners' burden in this case is also consistent with the presumption created by statute. New York Penal Law § 60.27(6) states:

> "[a]ny payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment."

Thus, for the reasons set forth above, we hold that petitioners have failed to meet their burden of proving that their tax liability was limited by the plea agreement made with the Division and the Attorney General.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leonidas Miras and Nick Miras, officers of 172 Rihea Corp. and 515 Bay Service Station, Inc. is denied;

2. The exception of the Division of Taxation is granted;

3. The determination of the Administrative Law Judge is reversed to the extent that the determination granted: the petition of Leonidas Miras, as officer of 172 Rihea Corp. for the tax quarter ended August 31, 1981; the petition of Nick Miras, as officer of 172 Rihea Corp. for the tax quarters ended May 31, 1981 and November 30, 1981; and the petition of Nick Miras, as officer of 515 Bay Service Station, Inc. for the tax quarters ended May 31, 1981, August 31, 1981 and November 30, 1981, but the determination is otherwise sustained;

4. The petitions of 172 Rihea Corp., 515 Bay Service Station, Inc., Leonidas Miras, as officer of 172 Rihea Corp., Leonidas Miras, as officer of 515 Bay Service Station, Inc., Nick Miras, as officer of 172 Rihea Corp. and Nick Miras, as officer of 515 Bay Service Station are denied; and

5. All of the notices of determination, as modified by the respective conciliation orders, are sustained.

DATED: Troy, New York
October 22, 1992

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

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

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