

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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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. :

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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. :

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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. :

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In the Matter of the Petition :  
of :  
NICK MIRAS, OFFICER OF :  
515 BAY SERVICE STATION, INC. :  
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of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period September 1, 1979 :  
through August 31, 1982. :

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



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In the Matter of the Petition

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.

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In the Matter of the Petition

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.

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Petitioners Leonidas Miras and Nick Miras, officers of 515 Bay Service Station, Inc.,

1395 Gardiners Drive, Bayshore, New York 11706, and petitioner 515 Bay Service Station, Inc., 515 East Main Street, Bayshore, New York 11706, filed petitions 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 Leonidas Miras and Nick Miras, officers of 172 Rihea Corp., 1395 Gardiners Drive, Bayshore, New York 11706, and petitioner 172 Rihea Corp., 172 Howells Road, Bayshore, New York 11706, filed petitions for revision of determinations 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.

A consolidated hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 6, 1990 at 1:45 P.M., with all briefs to be submitted by April 15, 1991. Petitioners submitted their initial memorandum of law on March 1, 1991 and reply memorandum of law on April 15, 1991. The Division of Taxation submitted its memorandum of law on March 28, 1991. Petitioners appeared by Goodkind, Labaton & Rudoff, Esqs. (Mark S. Arisohn, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

#### ISSUE

Whether the terms and conditions of a "plea bargain" agreement entered into between petitioners Leonidas and Nick Miras and an assistant attorney general of the Criminal Prosecutions Bureau, wherein petitioners pleaded guilty to a Class "A" misdemeanor of Attempting to Offer a False Instrument for Filing in the First Degree, also limit petitioners' civil tax liability under the Tax Law.

#### FINDINGS OF FACT

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:

<u>Audit Period</u>	<u>Date of Notice</u>	<u>Statutory Interest</u>	<u>Total Amount Due Including 50% Fraud Penalty and</u>
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 in Finding of Fact "2". 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 indicated in Finding of Fact "2", 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:

<u>Audit Period</u>	<u>Date of Notice</u>	<u>Statutory Interest</u>	<u>Total Amount Due Including 50% Fraud Penalty and</u>
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 indicated in Finding of Fact "8". 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:<sup>1</sup>

- (a) Notices dated December 20, 1982 - the tax deficiency was reduced from \$94,029.41 to \$79,536.52.
- (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.<sup>2</sup>
- (c) Notices dated December 20, 1984 to Leonidas and Nick Miras - the tax deficiency

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<sup>1</sup>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.

<sup>2</sup>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.

was reduced from \$30,468.63 to \$15,843.91.<sup>3</sup>

(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
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

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<sup>3</sup>It appears from the record that petitioner 515 Bay Service Station, Inc. has not petitioned the notice dated December 20, 1984.



First Degree, a Class "A" misdemeanor, a lesser included offense under the counts of the indictment.

By letter dated December 8, 1986, Joseph J. Hester, the assistant attorney general prosecuting the criminal charges against petitioners, set forth the "promises and conditions" relating to the guilty pleas and convictions of petitioners. These conditions included a period of probation and restitution "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".

With regard to Nick Miras, the letter stated that:

"[f]or 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 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 amount of \$173,039.64...."

Similarly, the letter noted that Leonidas Miras would admit liability up to \$60,635.47 for sales and use tax not paid and consent to restitution up to that amount as fixed by the Department of Probation and Department of Taxation and Finance.

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 that 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"

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 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.<sup>4</sup>

Similarly, Nick Miras stated in the affidavit that his confession of judgment in the amount of \$12,000.00<sup>5</sup> was based on his filing of

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<sup>4</sup>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.

<sup>5</sup>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.

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."

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" (Transcript, 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" (Transcript, 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" (Transcript, 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."

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that the agreement to limit their criminal and civil tax liabilities was the major inducement for them to enter guilty pleas. They assert that there is uncontroverted evidence that their total civil tax liability was to be limited to the amount set by the Probation Department as restitution. They contend that neither the letters from the Probation Department nor the affidavit from Adrian Hunte have any bearing on the issue because the "Probation Department's letters speak in generalities, were written by one who lacked any knowledge of the events and are pure hearsay" and the "Hunte affidavit does not dispute the terms of the plea

bargain" (Pet. brf. at 5). Petitioners conclude that the Division offered no proof controverting petitioners' evidence but only speculations that were unjustified as to why petitioners' proof should not be accepted.

The Division argues that petitioners have not met their burden of proving by clear and convincing evidence that the Division represented to them that the restitution ordered by the court would limit their civil sales tax liability. The Division contends that Mr. Arisohn's testimony is inconsistent with the chronology of events and, therefore, is suspect and may not serve as sufficient evidence to meet petitioners' burden of proof. The Division further argues that the best evidence of any promises regarding the agreed sentence would have been the sentencing minutes which petitioners failed to produce.

#### CONCLUSIONS OF LAW

A. At the commencement of the December 6, 1990 hearing, petitioners' counsel asserted that they were not challenging the audit methodology establishing their sales tax liability. In addition, they conceded that petitioners Leonidas and Nick Miras were persons responsible for the collection of sales tax in this case. Thus, the only issue asserted in their petitions and at hearing was whether the plea bargain agreement limited petitioners' tax liability to the amount of the court-ordered restitution recommended by the Probation Department.

B. Before petitioners may obtain relief in the form of specific performance by the Division of the terms of a plea bargain agreement, it must first be established that such an agreement existed. The New York Court of Appeals has held that:

"[i]t is a settled rule of law in this State that off-the-record promises made in the plea bargaining process will not be recognized where they are flatly contradicted by the record, either by the existence of some on-the-record promise whose terms are inconsistent with those later urged or by the placement on the record of a statement by the pleading defendant that no other promises have been made to induce his guilty plea. We have repeatedly emphasized the necessity of placing all promises on the record, in order to assure the continued validity and usefulness of the plea bargaining process in our criminal justice system." (Matter of Benjamin S. v. Kuriansky, 55 NY2d 116, 447 NYS2d 905, 907 [citations omitted].)

The court further noted that it is "the defendant's burden, on pain of losing the claimed promise, to inform the Judge accepting the plea of all promises that were made to induce his plea that are

not otherwise revealed" (id. at 908; see also, People v. Blum, 122 Misc 2d 94, 469 NYS2d 296, 298).

Here, petitioners assert that in return for their guilty pleas, the restitution determined by the Probation Department satisfied the civil tax liabilities for all the sales tax quarters in question in addition to the sales tax quarters for which petitioners were under indictment. However, petitioners have produced neither sentencing minutes nor any other document to verify this claimed promise by the Division. The need to have some documentation of such claimed promises placed on the record is underscored by the situation at hand. Reliance on the "sometimes faulty memories of counsel...without independent verification, cannot be tolerated" (People v. Danvy G., 61 NY2d 169, 473 NYS2d 131, 133).

C. The only documents in the record containing the terms of the plea agreement were the affidavits of confession and the letter dated December 8, 1986 from Joseph J. Hester, the assistant attorney general, wherein it was stated that Leonidas and Nick Miras would admit liability up to \$60,635.47 and \$173,039.64, respectively, and pay restitution in an amount to be fixed by the Probation Department and the Division of Taxation (see, Finding of Fact "16").<sup>6</sup> In the affidavits of confession by Leonidas and Nick Miras, they confessed judgment in the respective amounts of \$6,000.00 and \$12,000.00. As noted supra, these amounts were handwritten above the respective typed amounts of \$60,635.47 and \$173,039.64 that were crossed out and initialled in the margins by three parties who appeared to be Joseph J. Hester, Adrian Hunte and the respective petitioner (Finding of Fact "20"). These documents provide verification of petitioners' attorney's testimony only to the extent that the Division agreed to reduce Nick Miras' tax liability of \$173,039.64 to \$12,000.00 for the sales tax quarters referred to in the indictment (Finding of Fact "14") in return for his guilty plea and Leonidas Miras' tax

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<sup>6</sup>The Probation Department's restitution reports, dated January 9, 1987, also referred to the \$60,635.47 and \$173,039.64 of tax due and that the restitution to be paid on those amounts would be determined by the Probation Department and Division (Finding of Fact "18").

liability of \$60,635.47 to \$6,000.00 for the sales tax quarter referred to in the indictment (Finding of Fact "14") in return for his guilty plea.

The fact that the Division participated in determining the amount of the reduction is significant. Also significant is the fact that the relevant documents simply refer to the reduction of petitioners' respective tax liabilities in the stated amounts without any reference to criminal versus civil liability. Thus, from this evidence, there is no basis to determine that reduction of the tax liability with regard to these stated amounts was only for the purpose of settling petitioners' criminal charges and not for the purpose of reducing the underlying civil liabilities that were in the same amounts. While Adrian Hunte stated, in the affidavit submitted subsequent to the hearing, that she did not enter into any agreement "to set or limit the New York State civil tax liability of Leonidas and Nick Miras", this blanket denial does not comport with the documentation with regard to the stated amounts set forth in the affidavits of confession. It is clear from the Hester letter dated December 8, 1986 and the affidavits of confession that the Division participated in the determination of those reduced amounts for the individual petitioners. Therefore, the Division should be held to its bargain.

However, there is no verification that the Division or Attorney General agreed to limit Leonidas and Nick Miras' respective liabilities for the fraud penalties or interest due in connection with the reduced amounts or for any of the tax assessed in the notices with regard to the sales tax quarters that were not included in the counts of the indictment.

D. The petitions of 172 Rihea Corporation are denied and the notices of determination and demands for payment of sales and use taxes due dated May 20, 1983, December 20, 1983, June 20, 1984, December 20, 1984 and April 25, 1985 are sustained.<sup>7</sup>

E. The petitions of 515 Bay Service Station, Inc. are denied and the notices of determination and demands for payment of sales and use taxes due dated December 20, 1982,

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<sup>7</sup>The notices that are sustained in Conclusions of Law "D" through "I" are subject to the reduced amounts contained in the respective conciliation orders (see, Findings of Fact "5" and "11").

June 20, 1984 and March 20, 1985 are sustained.

F. The petition of Leonidas Miras, as officer of 172 Rihea Corp., is granted with respect to the tax quarter ended August 31, 1981 only to the extent indicated in Conclusion of Law "C" and is otherwise denied. The remaining petitions of Leonidas Miras, as officer of 172 Rihea Corp., are denied and the notices of determination and demands for payment of sales and use taxes due dated June 20, 1984, December 20, 1984 and April 25, 1985 are sustained, with the exception of the reduction in the tax quarter ended August 31, 1981 as indicated in Conclusion of Law "C".

G. The petitions of Leonidas Miras, as officer of 515 Bay Service Station, Inc., are denied and the notices of determination and demands for payment of sales and use taxes due dated December 20, 1982, June 20, 1984, December 20, 1984, March 20, 1985 and May 21, 1984 are sustained.

H. The petitions of Nick Miras, as officer of 172 Rihea Corp., are granted with regard to the tax quarters ended May 31, 1981 and November 30, 1981 only to the extent indicated in Conclusion of Law "C" and are otherwise denied, and the notices of determination and demands for payment of sales

and use taxes due dated June 20, 1984, December 20, 1984 and April 25, 1985 are sustained, with the exception of the reduction of the tax for the quarters ended May 31, 1981 and November 30, 1981 as indicated in Conclusion of Law "C".

I. The petitions of Nick Miras, as officer of 515 Bay Service Station, Inc., are granted with regard to the tax quarters ended May 31, 1981, August 31, 1981 and November 30, 1981 only to the extent indicated in Conclusion of Law "C" and are otherwise denied, and the notices of determination and demands for payment of sales and use taxes due dated December 20, 1982, June 20, 1984, December 20, 1984, March 20, 1985 and May 21, 1984 are sustained, with the exception of the reduction in the tax quarters ended May 31, 1981, August 31, 1981 and November 30, 1981 as indicated in Conclusion of Law "C".



DATED: Troy, New York

9/5/91

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ADMINISTRATIVE LAW JUDGE