STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.

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NICK MIRAS,
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ORDER
DTA NOS. 807150, 807151, 807152, 807153, 807154, AND 807155

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The Division of Taxation, by its representative, William F. Collins, Esq. (Gary Palmer, Esq., of counsel), has brought a motion, returnable November 26, 1991 and dated October 23, 1991, pursuant to 20 NYCRR 3000.5(a)(6) and Rule 4404(b) of the CPLR, requesting that the Administrative Law Judge, Marilyn Mann Faulkner, (1) reconsider her determination in the above-captioned case dated September 5, 1991, or grant a partial new hearing and (2) set aside so much of the determination as (a) granted the petition of Leonidas Miras for the tax quarter ending August 31, 1981, (b) granted the petition of Nick Miras for the tax quarters ending May 31, 1981 and November 30, 1981 and (c) held that the Division of Taxation participated in a plea bargain agreement limiting the civil tax liability of Leonidas Miras and Nick Miras for the respective tax quarters ending August 31, 1981, May 31, 1981 and November 30, 1981. Based upon the affidavit of Gary Palmer and affirmation by Adrian C. Hunte in support of the motion and upon an affidavit by Mark S. Arisohn in opposition to the motion, the following order is rendered.

In the determination at issue, it was stated in Conclusion of Law "C" that it was clear from a letter dated December 8, 1986 by Joseph J. Hester, assistant attorney general, and the Affidavits for Judgment by Confession that the Division of Taxation participated in a plea bargain with respect to a criminal action that resulted in reduced amounts of tax liability for the individual petitioners. The Division argues in its motion that new evidence exists tending to demonstrate the erroneous factual basis of this conclusion of law. Specifically, the Division questions footnotes 4 and 5 to Finding of Fact "20" which stated that petitioners' reduced tax liabilities that were contained in the respective Affidavits of Judgment by Confession were initialled in the margins by three parties, two of whom appeared to be Joseph J. Hester and Adrian Hunte, an attorney with the Division of Tax Enforcement of the Division of Taxation. The new evidence to which the Division refers is an affirmation by Adrian C. Hunte stating "unequivocally that [she] did not initial and [her] initials do not appear on either affidavit in any location." Based on the affirmation by Adrian C. Hunte, the Division contends that there is a compelling basis to reconsider Finding of Fact "20" and Conclusion of Law "C", or, alternatively, that the hearing should be reopened to receive evidence on the identity of the

persons who initialled the Affidavits of Judgment by Confession.

In opposition to the motion, petitioners argue that the motion was untimely inasmuch as it was not brought within 15 days after the determination as required by CPLR 4405; that whether Adrian C. Hunte's initials appear in the margins of the affidavits is irrelevant to the determination; and that the affirmation of Adrian Hunte does not constitute "new evidence" justifying either a reconsideration or a new hearing. Petitioners note that the Division was given an opportunity to submit into the record a post-hearing affidavit by Adrian Hunte and that the information now submitted as "new evidence" was available at the time Adrian Hunte submitted this post-hearing affidavit.

OPINION

With regard to the timeliness of the motion, section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in relevant part, as follows:

> "Motion Practice. (a) General. To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR....
>
> * * *
>
> (6) The appropriate sections of the CPLR regarding motions, where not in conflict with this Part, are applicable to the motion being made."

Thus, the Division may bring a motion for reargument or a new hearing inasmuch as such motion is appropriate under CPLR 4404 and CPLR 5015. Rule 4404 provides, in pertinent part, as follows:

> "(b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue."

In addition, CPLR 5015, entitled "Relief from judgment or order", provides, in pertinent part:

> "(a) Grounds. The court which rendered a judgment or order <u>may relieve a party from it upon such terms as may be just</u>, on motion of any interest person with such notice as the court may direct, <u>upon the ground of</u>:
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> * * *
>
> (2) <u>newly-discovered evidence</u> which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404..." (emphasis added).

Petitioners contend that because the Division brought the motion pursuant to CPLR 4404, it must make the motion within 15 days after the Administrative Law Judge's determination as prescribed by CPLR 4405.

Although 20 NYCRR 3000.5(a) provides generally that a party may bring the type of

motion in administrative hearings that is permissible under the CPLR, the regulation does not prescribe that the time limits under the CPLR are also applicable. Indeed, the regulation also provides that:

> "[a]ll motions must be made, on notice to the adverse party, within 90 days after the service of a pleading by the adverse party unless a different time period is otherwise prescribed for a particular motion by this Part" (20 NYCRR 3000.5[a][1]).

Even though a determination is not a pleading, it would appear that the timeliness of a motion before the Division of Tax Appeals should be guided by this 90-day rule unless a different time period is prescribed by the regulation. Furthermore, the Division of Taxation could have brought this motion under CPLR 5015 which is not bound by the 15-day rule set forth in CPLR 4405.[1] Therefore, inasmuch as the motion was brought within 90 days of issuance of the determination, it is timely.

The next issue is whether the motion should be granted on the ground of newly-discovered evidence which, if introduced at hearing, would probably have produced a different result. It is clear that the "new" evidence submitted was available at the time of the hearing. The Division argues, however, that:

> "[i]t was not anticipated by the Division that the identity of the persons making those initials would effect [sic] the outcome of this matter and no evidence as to the identity of the persons whose initials appear on the affidavits was offered by either party."

The fact that the Division did not anticipate how evidence would be viewed does not convert its offer of <u>further</u> evidence into "<u>new</u>" evidence that was not available at the time of the hearing.

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[1]Moreover, the application of the time limits in CPLR 4405 would not be appropriate in this administrative context inasmuch as it prohibits a court of law from entertaining the motion under CPLR 4404 after submission of an appeal from the final judgment. Here, petitioners submitted to the Tax Appeals Tribunal an exception to the determination at issue and the Division of Taxation requested an extension of time to serve an exception. By letter dated October 7, 1991, Roberta Moseley Nero, Secretary to the Tribunal, wrote to the parties and stated that in light of the fact that the Division of Taxation was bringing a motion before the Administrative Law Judge, further proceedings regarding the exceptions in the case would be held in abeyance until January 6, 1992.

It should be noted that the Affidavits of Judgment by Confession were offered into evidence by the Division itself and the Division also had an opportunity to submit a post-hearing affidavit by Adrian Hunte for the purpose of explaining her involvement in the plea negotiations on behalf of the Division of Taxation.

In any event, even if such evidence were considered "new" evidence under the theory offered by the Division of Taxation, this evidence would not change the outcome of the determination. In Finding of Fact "20", it was not found that Adrian Hunte initialled the changes reducing the tax liabilities contained in the respective Affidavits of Judgment by Confession. Instead, footnotes 4 and 5 stated that it appeared that Adrian Hunte initialled the changes along with petitioners and Joseph J. Hester, the Attorney General representing the Division of Taxation. Absent any evidence in support of or in contradiction to this observation, no further findings could be made with respect to the initials contained in the margins of the affidavits in question. Thus, the weight given to this observation was minimal and Conclusion of Law "C" did not rely on who initialled the changes in the margins of the affidavits, instead the affidavits were relied on only to the extent they reflected the final agreed-upon reduction in the amount of tax petitioners were to pay for those tax quarters. Also significant was that no mention was made in these affidavits that this reduction of petitioners' tax liabilities did not affect their civil tax liabilities for those same tax quarters.

The conclusion that the Division of Taxation participated in determining petitioner's restitution was based in part, on the letter dated December 8, 1986 by Joseph J. Hester which set forth the "promises and conditions" relating to the guilty pleas and convictions of petitioners. In that letter, Mr. Hester stated that the conditions of the guilty pleas 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" (see Finding of Fact "16"). A copy of the letter was forwarded by Mr. Hester to Adrian Hunte, the attorney with the Division of Tax Enforcement (Finding of Fact "17"). In addition, two documents, dated January 9, 1987, which were entitled the Nassau County Probation

Department Restitution Summary signed by Gloria Miller (the restitution investigator for the Probation Department), contained the following statements indicating that the Division of Taxation participated in determining petitioners' restitution:[2]

> "Mr. Hester of the N.Y. State Attorney General's Office, explained that the total amount of tax due from the defendant [Nick Miras] 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."

A similar statement was made in the second document with respect to Leonidas Miras (see Finding of Fact "18"). From these two documents, signed by Gloria Miller, it is apparent that the Division of Taxation was involved in the reduction of the amount of tax liability. At the very least, these documents, as well as the December 8, 1986 letter, evidenced that this impression was clearly given by Joseph J. Hester, who represented the Division of Taxation in these criminal proceedings. It was these three documents which led to the conclusion that Adrian Hunte's disclaimer did not comport with the documentation. Adrian Hunte was given a copy of the December 8 letter wherein it was represented that the Division of Taxation would determine the amount of restitution. This representation was also made to Gloria Miller from the Probation Department. By Adrian Hunte's silence alone, she condoned the reduced amounts finalized in the Affidavits of Judgment by Confession. These three documents preceded the Affidavits of Judgment by Confession, dated January 15, 1987, which finalized the reduced amount of tax liability for the tax periods in question without any mention that such restitution relieved them only of their criminal liability for those tax periods and not their civil liability. Therefore, based on this sequence of events, the testimony of petitioners' attorney (see, Findings of Fact "22" "23" and "24") and the Affidavits of Judgment by Confession, which on their face relieved petitioners of the full amount of tax liability to which they confessed, it was concluded that the Division participated in a manner that was sufficient to hold it to the bargain struck in

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[2]The December 8 letter and two documents signed by Gloria Miller were submitted into evidence, with permission, by the Division of Taxation along with its post-hearing brief.

the Affidavits of Judgment by Confession.

Accordingly, the Division of Taxation's motion for reconsideration or a partial new hearing is denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE