STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTOPHER P. DEFEO	:	DETERMINATION DTA NO. 815772
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 December 1, 1991 through August 31, 1994.	:	

Petitioner, Christopher P. DeFeo, 250 Continental Drive, New Hyde Park, New York 11040, filed a 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 December 1, 1991 through August 31, 1994.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 23, 1997 at 1:30 P.M., with petitioner's reply brief received on April 13, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

ISSUES

I. Whether a plea bargain between petitioner and the Attorney General of the State of New York, whereby petitioner pleaded guilty to grand larceny in the second degree and conspiracy in the fourth degree based on collecting and not remitting sales tax on behalf of Ghost Motorcycle Buy-Rite Sales Corp., limits petitioner's tax liability under the Tax Law.

II. Whether petitioner is collaterally estopped from denying that he was a person required to collect sales and use taxes on behalf of Ghost Motorcycle Buy-Rite Sales Corp. after pleading guilty to grand larceny in the second degree and conspiracy in the fourth degree based on collecting and not remitting sales tax on behalf of Ghost Motorcycle Buy-Rite Sales Corp., and, if not so estopped, whether petitioner has proven he was not such a person.

III. Whether petitioner is collaterally estopped from challenging the amount of tax at issue to the extent of the tax determined to be due as restitution in accordance with his plea bargain, and, if not so estopped, whether petitioner has proven he is entitled to adjustments for the sales of several motorcycles included in the audit that petitioner contends were stolen and not sold.

IV. Whether petitioner is collaterally estopped from arguing that he should not be held liable for a fraud penalty based on the guilty plea, and, if not so estopped, whether the Division has met its burden of proving fraud.

V. Whether interest and penalty should be abated based on petitioner's assertion that he was unable to obtain the books and records utilized in the audit from the Division of Taxation for the period from 1992 until 1997, despite his numerous requests.

VI. Whether the restitution payments made by petitioner should have been applied to the period at issue.

FINDINGS OF FACT

1. On May 28, 1996, the Division of Taxation ("Division") issued a Notice of Determination ("notice"), notice number L-012047795, to petitioner in the amount of $42,840.91 in tax, $25,150.27 in interest and $35,961.95 in penalty, for a total balance due of $103,953.13 as of that date. The notice covered sales and use taxes for the period December 1, 1991 through

August 31, 1994 and was issued to petitioner as a person required to collect sales and use taxes pursuant to Tax Law § 1131(1) and § 1133(a) for Ghost Motorcycle Buy-Rite Sales Corp. ("Buy-Rite").

2. During the period at issue Buy-Rite was in the business of motorcycle sales and service. Petitioner described his employment with Buy-Rite as being a truck driver, and his duties as delivering new vehicles and picking up vehicles in need of service.

3. The audit that was the basis for the notice covered the period March 1, 1984 through August 31, 1994. Two other notices arising out of the same audit were issued to petitioner as a responsible officer or person for Buy-Rite. Notice number L-012204220 was for the period March 1, 1984 through November 30, 1990 and set forth a tax due of $175,124.84. Notice number L-012204219 was for the period December 1, 1990 through November 30, 1991 and set forth tax due of $82,094.10. The total tax due for the three notices combined was $300,059.85, as originally issued. The Division issued three separate notices for the audit period because of different powers of attorney on file for the different time periods.

4. Petitioner requested a conciliation conference and on January 17, 1997 a conciliation order was issued recomputing the statutory notice to $14,786.63 in tax due, with interest and penalty to be computed at the applicable rate. The revised consent and the report on tax conferences indicate that for the period March 1, 1992 through August 31, 1994 the tax due was recomputed to $1,963.75 and the penalties for those periods were canceled based on petitioner's efforts to "rectify filing errors during those periods" (Division's Exhibit J, attachment). For the period December 1, 1991 through February 29, 1992, the Division agreed to one adjustment only, tax was adjusted from $13,246.95 to $12,822.88 to reflect that some of petitioner's customers resided in areas charging a lower sales tax rate than the Suffolk County rate upon which the

Division's figures were based. There were no adjustments concerning penalty and interest. The $14,786.63 listed as tax due in the conciliation order consists of $1,963.75 in tax due for the period March 1, 1992 through August 31, 1994, plus the $12, 822.88 in tax due for the first quarter of the notice. Payments were made and credited to the notice at issue in the amount of $2,393.68.

Petitioner filed a petition with the Division of Tax Appeals contesting the amount of $12,822.88, the remaining disagreed tax for the quarter December 1, 1991 through February 29, 1992. This amount and this quarter are all that are at issue in the present matter, together with the interest and penalties on such amount.

5. At the conclusion of the hearing in this matter both petitioner and the Division were granted time to submit additional documents. Petitioner submitted a copy of a reward poster for certain stolen motorcycles, which is marked and accepted as petitioner's Exhibit 3; a Consolidated Statement of Tax Liabilities dated January 12, 1998, which is marked and accepted as petitioner's Exhibit 4; and, a satisfaction of judgement dated March 23, 1998, which is marked and accepted as petitioner's Exhibit 5.[1] The Division submitted eight sales tax returns and a vendor registration card, which are marked and accepted as Division's Exhibit Q; and, a transcript of plea proceedings that took place on September 13, 1995 in Nassau County, County Court regarding indictment number 87530, which is marked and accepted as Division's Exhibit R.

6. The Division's initial investigation in this matter included Buy-Rite, Ghost Motorcycle Sales Corp. and Ghost Cycles, Inc. According to the Division there were four principals involved

[1]The satisfaction of judgement was submitted with petitioner's reply brief and after the time for submission of additional documents had passed. It is accepted, however, as the document is dated in March of 1998 and therefore was not available any sooner and the Division did not object to its introduction.

with these three corporations: Salvatore DeFeo (petitioner's father), Salvatore DeFeo, Jr. (petitioner's brother), petitioner and Theodore Griffin. The investigation began with the Division's attempting to establish an appointment with one of the principals. After a year or more of trying to establish contact with these corporations in order to conduct a sales tax examination to no avail, the case was turned over to the Division's Tax Enforcement Division ("TED") as a potential fraud case.

7. Indictments were brought against all four principals charging them with grand larceny in the second degree and conspiracy in the fourth degree based on their actions in collecting sales tax and then not forwarding such monies to the State for the period December 1, 1987 through February 29, 1992. After initially pleading not guilty, all four defendants determined to change their plea and did so before the Honorable Ira H. Wexner, County Court Judge, Nassau County Court,on September 13, 1995.

November 8, 1995 was set as the date for sentencing. The amount of restitution to be paid to the Division was set at $188,000.00. A $50,000.00 payment was made in connection with the sentencing, leaving approximately $138,000 unpaid. Restitution/Reparation Judgment Orders were entered against the four criminal defendants in the amount of $34,612.19 each. Each of the defendants agreed that they were jointly and severally responsible for the entire amount of the restitution. Petitioner was also sentenced to five years probation. Petitioner was to pay $575.00 per month for five years commencing on December 8, 1995. A Satisfaction of Judgement entered March 18, 1998, in the office of the County Clerk of Nassau County, indicates that the judgment entered against petitioner in the amount of $34,612.19 has been paid in full.

8. By memorandum dated December 5, 1995, Robert L. Shepherd, Deputy Commissioner, TED, informed the Audit Division of the New York State Department of Taxation and Finance,

Division of Taxation ("Audit Division") of the conclusion of the criminal case and referred the matter to the Audit Division. An audit of Buy-Rite and the other two companies was then conducted by Mr. Michael Fetcho, a Sales Tax Auditor 1 with the Division. This audit culminated in the notice at issue in this matter being issued on May 28, 1996.[2]

9. The tax due set forth in the notice was calculated using several different methods. For the last 10 quarters (the period March 1, 1992 to August 31, 1994), the auditor utilized the figures set forth in the books provided by petitioner regarding motorcycle sales and nontaxable sales (a test was conducted to verify the accuracy of the nontaxable sales). There were only two adjustments made to these figures for this 10-quarter period. The first was an adjustment of $820.47 in use tax based on self-use of demonstration vehicles. The second adjustment was the addition of $13,450.36 in taxable sales, explained in the audit report as follows:

> In addition to the reported book taxable sales, it was computed that an additional $13,456 in retail sales are being assessed. A third party verification from Cagiva Motorcycles, a supplier, had two vehicles costing $10,765, which could not be shown to be in the inventory of unsold vehicles nor sold via their record of MV50 documents. The costs were increased based on a markup of 25% which was computed on the gross profit analysis. (Division's Exhibit E, p.10.)

The Division introduced a document entitled "Complete Schedule SUMMARY OF ADDITIONAL TAX DUE" (Division's Exhibit G). This is a listing of tax due by sales tax period broken down by the basis of the tax liability asserted (for example, taxable per books, TED, self use of demo's, etc.). There is an entry of $13,450.36 for the sales tax period June 1, 1994 through August 31, 1994. The basis of the tax liability asserted for this entry is listed as "Additional Taxable". While there is a $5.64 difference between this entry and the amount set

[2]As previously discussed, there were other notices issued as a result of this audit that are not relevant to the current discussion.

forth in the audit report, it is determined that this is the entry for the motorcycles discussed in the audit report. This determination is based on the closeness of the amounts and a review of the other columns in the Division's Exhibit G, which leads to the conclusion that there is simply no other column that these motorcycles could have appeared in.

Petitioner's tax liability for these quarters was resolved at conference, and has, in fact, been paid. These quarters are not at issue in the current proceeding.

10. For the first quarter of the notice, the period of December 1, 1991 through February 29, 1992, the only quarter remaining at issue, the auditor utilized the information provided by TED to calculate tax due. TED basically collected information from three sources. The initial source was from documents obtained from the vendor's business by search warrant. Most of these documents were invoices. Based on these documents TED determined that there was $10,846.76 of sales tax that was collected from customers but not remitted to New York State. Questionnaires were then sent out to alleged customers by TED. The information on petitioner's customers was obtained from New York State Department of Motor Vehicles (hereinafter "DMV") records. The second source of information utilized by TED were those questionnaires returned by customers that had documentation as to purchases from petitioner and sales tax paid. Based on these documents TED determined that there was an additional $1,919.12 of sales tax that was collected from customers but not remitted to New York State. The third source of information utilized by TED were questionnaires returned by customers who provided information based upon memory, but did not have documentation. Based on these questionnaires TED determined that there was an additional $57.00 of sales tax that was collected from customers but not remitted to New York State.

In calculating the amount of restitution due in the criminal proceedings, TED only utilized the amount of $10,846.76 for this quarter — the amount of tax due based only upon the vendor's records. The secondary source documentation, consisting of the questionnaires returned with and without documentation, was not utilized for the purpose of calculating restitution.

The auditor in this case calculated the tax due using all three types of information. The total due as calculated on the notice was $13,246.95. As a result of the conference the Division adjusted the amount of tax claimed to be due to $12, 822.88. The original amount was incorrect because it was calculated using a rate of tax assuming that all petitioner's customers were located in Nassau County. The rate was adjusted to reflect the actual rates for the localities where petitioner's customers resided.

11. As discussed in Finding of Fact "7" all four defendants in the criminal proceeding pleaded guilty to grand larceny in the second degree and conspiracy in the fourth degree on September 13, 1995. The record of those proceedings was submitted by the Division. During the course of those proceedings, each of the four defendants was represented by his own counsel. New York State was represented by Assistant Attorney General Victor Genecin.

Judge Wexner questioned each of the defendants regarding his age, educational background and general understanding of the charges. The judge specifically asked each defendant if he had received adequate time to speak with his lawyer and whether he was "satisfied with the way in which your lawyer has represented you" (Division's Exhibit R, p. 8). Petitioner responded in the affirmative to these questions. The judge, through a series of questions, asked all four defendants if they were aware of their right to a trial, of the people's burden to prove their guilt beyond a reasonable doubt in the event of a trial, that it was not necessary for any of them to testify at a trial, that they were entitled to see, hear and question the

witnesses against them and present their own witnesses. When asked if he understood that by changing his plea he gave up all these rights, petitioner again responded in the affirmative. Petitioner, by responding to the judge's question, indicated that he was not threatened or forced in any way to change his plea to guilty.

12. Judge Wexner then questioned all four defendants individually regarding the alleged crimes and began by stating "I will not accept your pleas unless you are, in fact, guilty" (Division's Exhibit R, p.21). The questioning of petitioner went as follows:

> THE COURT: Mr. Christopher DeFeo, let me ask you what occurred as far as you are concerned between December 1st, 1987 and February 29th, 1992 in Nassau County as it relates to moneys that were received from customers for sales tax of sales of motorcycles.
>
> CHRISTOPHER DeFEO: I didn't give it to the state.
>
> THE COURT: You knew that the sales taxes were collected?
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> CHRISTOPHER DeFEO: Yes.
>
> THE COURT: You knew that they were supposed to be turned over to the state?
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> CHRISTOPHER DeFEO: Yes.
>
> THE COURT: The business was being operated in Nassau County?
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> CHRISTOPHER DeFEO: Yes.
>
> THE COURT: And you knew that you were violating the law by not remitting the amount to the State of New York?
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> CHRISTOPHER DeFEO: Yes.
>
> THE COURT: And you were aware of the fact along with the others, namely, your father and your brother, Salvatore Junior, and Mr. Theodore Griffen --
>
> CHRISTOPHER DeFEO: Yes.
>
> THE COURT: — that the moneys were collected and not remitted?

CHRISTOPHER DeFEO: Yes.

THE COURT: And that it was a violation of the law to participate in the activities that you were doing by collecting the sales tax and not remitting the same?

CHRISTOPHER DeFEO: Yes.

THE COURT: And do you acknowledge that the $188,000.00 represents an amount that was not paid after being collected?

CHRISTOPHER DeFEO: Yes.

THE COURT: And you are willing to be jointly and severally responsible, together with the others?

CHRISTOPHER DeFEO: Yes.

THE COURT: And do you know if the others that I have just named were aware of the fact that the moneys were collected and not remitted?

CHRISTOPHER DeFEO: Yes. (Division's Exhibit R, pp. 34-36.)

Further on in the proceedings the judge continued his questioning of petitioner as follows:

THE COURT: . . . Incidentally, Mr. Christopher DeFeo, were you an officer of any of the three named corporations?

CHRISTOPHER DeFEO: Yes.

THE COURT: Which one?

CHRISTOPHER DeFEO: Ghost Motorcycle Buy-Rite Sales Corp.

THE COURT: What was your title?

CHRISTOPHER DeFEO: President.

THE COURT: You were not an officer of the other two corporations?

CHRISTOPHER DeFEO: No. (Division's Exhibit R, p. 40.)

13. During the questioning of Salvatore DeFeo, petitioner's father, Mr. Scaring, the attorney representing Salvatore DeFeo, objected consistently to questions from Assistant Attorney General Genecin concerning his client's role in the corporations. For example:

> MR. SCARING: . . . What I don't want to happen here is for Mr. Genecin, who indicated at a bench conference that there is some agenda that the civil division has in store, the civil tax auditors have in store. I don't want Mr. Genecin to use this as a mechanism to prepare a civil case. The purpose of this discussion here is to make sure that the defendant is guilty of the crimes that he is pleading guilty to, which I believe he has clearly stated in his allocution to the Court. This open-ended question by Mr. Genecin, I believe is inappropriate.
>
> MR. GENECIN: Your Honor, the record should be clear that I do not represent the civil collection functions of the tax department and have no interest in any measures that they may take with respect to this case. My sole concern is with the sufficiency of the plea here, and it should be clear that the entities that were responsible for collecting the sales tax were three corporations that had certificates of authority from the Department of Taxation and Finance.
>
> I want the record to be clear here that each of these defendants had the role of a responsible individual within those corporations and that each of those, that each of the defendants personally was responsible for collecting and also for remitting the taxes and that the defendants plead to conspiring, that is to say, working together to make sure that those taxes were, one, collected from customers, and, two, not remitted to the State of New York (Division's Exhibit R, pp. 24, 25.)

Furthermore, when Assistant Attorney General Genecin asked Salvatore DeFeo whether the other three defendants served as officers or directors of the three corporations at his request or direction, Mr. Scaring again objected on the basis that he thought the question "has to do with the civil aspect that's coming." (Division's Exhibit R, p. 29.) Also, while discussing the amount of tax due and the issue of whether certain payments had been properly credited, Mr. Scaring stated "if the civil division comes to us, we definitely have a dispute on that issue." (Division's Exhibit R, p. 32.)

14. In contrast to the record of the criminal proceedings, at the hearing in the present matter, petitioner testified that he did not agree with the criminal charges brought against him, but did not have the financial ability to contest such charges. He testified that he would not have pleaded guilty to the charges if he had known that there was a possibility of future assessments being issued by the Division, over and above the amount agreed to as restitution in the criminal matter. Furthermore, he stated he received limited information from his lawyer. After expressing his disagreement with the criminal charges, petitioner admitted that he had pleaded guilty to the charges. When asked by the Division's representative if he knew if the other three defendants had also pleaded guilty, petitioner responded:

> I believe so. I have nothing to do with them anymore because I was pretty much like the fall guy that got in trouble for something he didn't do. (Tr., p. 72.)

Petitioner also testified that he had dyslexia and therefore did not fill out the MV-50s, required for purchasers to register their vehicle, and that his father filled these out. He added that he did not have anything to do with the paperwork for Buy-Rite, "all they did was use my signature. I really didn't know what was going on. I just would sign the papers." (Tr., p. 80.)

15. More consistent with the record of the criminal proceedings was petitioner's testimony at the hearing that he had the authority to sign checks for Buy-Rite, was listed on the signature cards on file with the bank for Buy-Rite and did actually sign checks for Buy-Rite. When asked on cross-examination if he signed sales tax returns and checks for payment of sales taxes during the audit period, petitioner answered in the affirmative.

After the conclusion of the hearing the Division introduced copies of sales tax returns for the quarters ending May 31, 1988, August 31, 1988, November 30, 1988, February 28, 1989,

May 31, 1989, and November 30, 1989.[3] When shown these documents during the course of the hearing petitioner emphatically denied that the signature on the documents was his. Furthermore, he could not remember if he signed the sales tax return for the period in question and only specifically admitted signing the sales tax returns for the period from March 1, 1992 until the conclusion of audit period, August 31, 1994. The sales tax return for the period in question was not introduced by either party.

The Division also introduced a copy of the Vendor Registration Information Card for Buy-Rite listing April of 1984 as the date Buy-Rite began doing business in New York State and identifying petitioner as president of the corporation. This card does not contain or require a signature, but petitioner testified that the hand-printing on the card was not his.

Petitioner stated that he was not aware of any forgeries of his signature on sales tax returns until the hearing, but was aware his name might have been signed by someone else on several checks. He added, "I was a truck driver, and they were just using my signature to have their - - I guess it was their way out, which got me in a lot of trouble." (Tr., p.89.)

16. When asked on cross examination if he had any documentary evidence in support of his testimony, petitioner responded that he did not have the time to go through the records that had been returned to him by TED, and that TED had organized the records for their use in the criminal prosecution and he was not able to locate specific documents.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner argues that the Division should not be able to issue a notice of determination for an amount greater than that which he agreed to as part of the plea bargain in the criminal

[3]These documents, together with another sales tax return that was not submitted, were shown to petitioner at the hearing, but not introduced into evidence at that time.

matter. With regard to the amount in question petitioner argues that credit should be given for two motorcycles the Division assumed were sold and were actually stolen. Petitioner points out that the auditor knew about the stolen motorcycles at the time of the audit. Petitioner argues that he was just a truck driver for the business and that his business associates (the other three defendants in the criminal trial) had used him and his signature to shield themselves from liability. It therefore appears that petitioner is arguing both that he was not a person responsible for the collection and payment of sales taxes and that the fraud penalty assessed should be abated. Petitioner argues that interest and penalty should not be assessed because the Division removed his records from his business premises in February of 1992 and despite numerous requests for copies of his records, the records were not returned until March of 1997, making it impossible for petitioner to determine his tax liability. Finally, petitioner argues that the payments he made pursuant to the court-ordered restitution should have been applied to the quarter at issue.

18. The Division argues that: petitioner's testimony, without further proof, is not sufficient to show that the Division is limited to the amount of the criminal restitution when assessing civil liabilities; that petitioner is estopped from contesting the civil fraud penalty at issue, having pleaded guilty to grand larceny in the second degree and conspiracy in the fourth degree for collecting and not paying over sales taxes (and in the alternative, the proof of fraud exits); petitioner is estopped from contesting the amount of $10,846.76 of the tax set forth in the notice as this was the amount of tax due for the quarter at issue included in the restitution order, and, in any event, petitioner failed to present any evidence of any errors made by the Division; and, petitioner has not proven his requests for documents or that receiving the documents in March of 1997 prejudiced him in any way, and, in any event, interest cannot be abated.

CONCLUSIONS OF LAW

A. Petitioner's primary argument is that the Division is limited in its assertion of tax liability by the amount of the restitution agreed to as part of petitioner's plea agreement in the criminal case. Petitioner asserts in support of this argument that he would not have pleaded guilty to the criminal charges filed against him if he had been aware that the restitution figure included in such agreement did not represent the total amount of sales and use taxes due for the period December 1, 1987 through February 29, 1992. Petitioner adds that he was not fully informed by his attorney in the criminal matter. Other than these assertions, the only evidence in the record regarding the plea agreement is the record of the proceedings wherein petitioner and the other three defendants pleaded guilty.

As part of his plea agreement petitioner agreed to be jointly and severally responsible for restitution in the total amount of $188,000.00. Of this total, $50,000.00 was paid at sentencing, and petitioner paid over time the amount of the restitution order entered against him, $34,612.19. The period at issue, December 1, 1991 through February 29, 1992, was covered by this order. The Division is not restricted as a matter of law from issuing a notice of determination for the total amount of taxes it determined was due, where that amount is greater than an amount agreed to as restitution in a criminal case based on the same facts for the same time period (***see***, Penal Law § 60.27[6]; ***Farber v. Stockton***, 131 Misc 2d 470, 502 NYS2d 901; ***Matter of N.T.J. Liquors***, Tax Appeals Tribunal, May 7, 1992). Since the notice was properly issued by the Division, it is petitioner's burden of proof to show that based on the plea agreement, the amounts set forth in the notice are erroneous because of some promise made by the prosecutor that petitioner relied upon to his detriment (***see***, ***Matter of N.T.J. Liquors***, ***supra***; ***Matter of Miras***,

Tax Appeals Tribunal, October 22, 1992). While the Division might not legally be bound to the terms of a plea agreement arrived at between a defendant and a prosecutor,

> 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.***, 44 NY2d 57, 404 NYS2d 76.)

Petitioner has not proven that any promises were made to him as part of his plea agreement that no further civil liabilities would be assessed. Indeed, the record of the plea proceedings indicates that the amount of the restitution would most likely not be the final liability of petitioner.

Petitioner was questioned by the judge as to his age, educational background and whether he understood the charges against him. Petitioner stated on the record that he understood the charges against him and that he understood the rights he was giving up by pleading guilty. While petitioner asserted during these proceedings that he was not kept well informed by his counsel in the criminal proceedings, he told the judge during the pleading proceedings that he was satisfied with his lawyer's representation. Petitioner further indicated that he was not threatened or forced in any way to change his plea to guilty. This record indicates that petitioner was questioned thoroughly by the judge to make sure that he was making an informed change in plea.

There is nothing in the record of the plea proceedings indicating that the Division would be limited to seeking recovery only of those amounts agreed to as restitution. On the contrary, the attorney representing Salvatore DeFeo, petitioner's father, made several objections to questions posed to the defendants by Assistant Attorney General Genecin on the ground that he thought the Assistant Attorney General was attempting to establish proof for the Division's possible future

civil collection activities. There could be no doubt in the mind of anyone attending the proceedings on that day that there was at a least a possibility of additional civil tax liabilities.

Petitioner makes no specific allegations that there were promises other than those on the record, and indeed offered no evidence to prove any type of agreement. Based on the record provided, petitioner made an informed plea with clear knowledge that civil action was a possibility. Therefore, it cannot be held that the Division was limited to the amount of restitution set forth in the plea proceedings. (***See***, ***Matter of Dallacqua***, Tax Appeals Tribunal, March 2, 1989; ***Matter of N.T.J. Liquors***, ***supra***; ***Matter of Miras***, ***supra***.) Furthermore, petitioner's mere contention that he would not have pleaded guilty if he knew that further civil liabilities were to be assessed, also does meet petitioner's burden of proof in this matter (***see***, ***Matter of Drebin***, Tax Appeals Tribunal, March 27, 1997, ***confirmed*** __AD2d__, 671 NYS2d 565).

B. The next issue to be addressed is whether petitioner is estopped from challenging the notice on the theory that he was not a responsible person within the meaning of Tax Law § 1131 and Tax Law § 1133. For the doctrine of estoppel to apply, petitioner must have had a fair opportunity to litigate the same issues during the prior proceeding. (***See***, ***Kuriansky v. Professional Care***, 158 AD2d 897, 551 NYS2d 695.) This means that:

> the party seeking the benefit of collateral estoppel (here, the State) has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use (here, petitioner [Sokol]) has the responsive burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. (***State of New York v. Sokol***, 113 F3d 303, 306 [2d Cir 1997][citations omitted].)

Petitioner argues that he was in reality nothing more than a figurehead and that the other defendants in the criminal proceedings used his name and signature to insulate themselves from

liability. He asserts that he was a truck driver with no knowledge of the books. Petitioner is estopped from making this argument in this forum.

Assistant Attorney General Genecin stated clearly on the record that:

> I want the record to be clear here that each of these defendants had the role of a responsible individual within those corporations and that each of those, that each of the defendants personally was responsible for collecting and also for remitting the taxes and that the defendants plead to conspiring, that is to say, working together to make sure that those taxes were, one, collected from customers, and, two, not remitted to the State of New York. (Division's Exhibit R, p.24, 25.)

Therefore, petitioner was on notice that his responsibility for the failure to remit the taxes collected was an issue in the plea proceedings. Under these circumstances, petitioner admitted that he knew sales taxes were collected, that he knew the sales taxes were to be paid to the State, that he did not pay the sales taxes over to the State and that it was against the law not to do so. He admitted he participated with the others in these activities. Petitioner agreed that $188,000.00 represented the amount of sales taxes collected and not turned over to the State, and stated that he was the president of Buy-Rite and was willing to be jointly and severally responsible for these taxes along with the other three defendants.

The Division has shown that the issue of whether petitioner was a responsible officer of Buy-Rite was answered in the affirmative during the plea proceedings and that the issue was necessarily addressed during those proceedings (i.e., failure to pay over taxes requires a duty to pay over taxes). Therefore, petitioner is estopped from arguing in these proceedings that he was not a responsible officer of Buy-Rite for the period December 1, 1991 through February 29, 1992. (***Cf.***, ***Matter of Seruya***, Tax Appeals Tribunal, December 2, 1993 [guilty plea to filing a false instrument does not necessarily require that taxpayer be a responsible officer or person for the corporation].)

C. The next issue to be addressed is whether petitioner is estopped from challenging the amount of tax due. Petitioner's only challenge to the amount of tax due is that he should receive credit for two motorcycles which were stolen and not sold. Petitioner is not estopped from arguing this point in this forum. Petitioner pleaded guilty to grand larceny in the second degree and conspiracy in the fourth degree based on facts that he collected and did not remit sales taxes owed to the State. There was no opportunity in the plea proceedings for discussion of an issue involving whether some of the sales asserted by the Division were, in fact, not sales. (***See***, ***Kuriansky v. Professional Care***, ***supra***; ***State of New York v. Sokol***, ***supra***.)

In fact, having determined that the amount of tax asserted by the Division for these motorcycles was assessed for the period June 1, 1994 through August 31, 1994, these transactions were not even considered in the criminal proceedings which involved the period December 1, 1987 through February 29, 1992. That having been said, petitioner during the conciliation process agreed to, and in fact paid, the tax due for the period June 1, 1994 through August 31, 1994. Therefore, the Division of Tax Appeals is without jurisdiction to review this issue.

D. Petitioner is estopped from contesting the fraud penalty for the period at issue. Tax Law § 1145(a)(2) provides for civil penalties in a case where failure to pay tax is the result of fraud. The burden of showing that such failure occurred as a result of fraud rests with the Division (***Matter of Ilter Sener d/b/a Jimmy's Gas Station***, Tax Appeals Tribunal, May 5, 1988). While fraud is not defined in the statute, a finding of fraud requires the Division to show:

> clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing. (***Matter of Ilter Sener***, ***supra***, citing, ***Matter of Walter and Gertrude Shutt***, State Tax Commn., July 13, 1982.)

Petitioner pleaded guilty to grand larceny in the second degree and conspiracy in the fourth degree. The basis of these charges, admitted by petitioner in plea proceedings, is that petitioner collected sales tax from customers, and while knowing that such taxes were legally due and owing the State of New York, failed to pay them to the State. Furthermore, petitioner admitted that he conspired with three others to accomplish this. There is simply no doubt that petitioner's actions were fraudulent and that petitioner's admissions alone meet the ***Ilter Sener*** requirements. Petitioner is estopped from arguing that the fraud penalty in this matter was improperly asserted (***see***, ***Plunkett v. Commr.***, 465 F2d 299 [7th Cir 1972]); ***Matter of N.T.J. Liquors***, ***supra***; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989).

E. The next issue to be addressed is whether interest should be abated because petitioner's records were kept by the Division from 1992 until 1997, making it impossible for petitioner to determine and pay his tax liability. Interest may not be abated under the circumstances of this case.

There are only two statutory provisions allowing for abatement of interest. Tax Law § 1145(a)(1)(iii) provides that interest in excess of the underpayment rate[4] may be abated if the Commissioner of Taxation and Finance finds that a failure to pay over tax was due to "reasonable cause and not due to willful neglect." Petitioner has not proven that in this case. The original assessment of interest was made in the notice dated May 28, 1996. The tax due and therefore the interest assessed were based on petitioner's failure to pay over sales tax. Petitioner stated on the record during the plea proceedings that sales taxes were collected in the operation of Buy-Rite, that he knew such taxes must be paid to the State of New York and despite this

[4]The underpayment rate is set by the Commissioner of Taxation and Finance pursuant to Tax Law § 1142.

knowledge failed to pay such taxes. It therefore, cannot be held that failure to pay over the taxes in this matter was due to reasonable cause.

Tax Law former § 3008[5] provided for abatement of interest in certain specific cases involving errors or delays by Division employees in performing ministerial acts. The time period petitioner is speaking to involves a criminal prosecution, which concluded with sentencing in November 1995, and the following audit, which began with the Audit Division's receiving the case back from TED on December 5, 1995 and concluded with the issuance of the notice on May 28, 1996.

Petitioner has neither alleged nor proven that Division employees through delays in ministerial acts caused any increase in interest assessed. The first time period covered a criminal investigation and a criminal prosecution involving the Attorney General's office. A criminal investigation and prosecution cannot be considered ministerial acts. The civil audit was completed and a notice issued to petitioner in approximately six months from the time the case was forwarded from TED to the Audit Division. First, an audit is also not a ministerial act. Second, six months is not an unreasonable amount of time in which to conduct an audit. Therefore, there is no basis on which to base an abatement of interest in this matter under Tax Law § 3008(a) (***see***, ***Matter of Framapac Delicatessen***, Tax Appeals Tribunal, July 15, 1993; ***Matter of Rashbaum***, Tax Appeals Tribunal, December 15, 1994, ***affd on other grounds*** 229 AD2d 723, 645 NYS2d 175).

[5]Amendments made to this statue in 1997 are not applicable to the present case since in 1997 the matter was before the Division of Tax Appeals, and interest may not be abated for time periods during the protest process (***see***, ***Matter of Welco Ad Corp.***, Tax Appeals Tribunal, November 23, 1994***; Matter of Rizzo***, Tax Appeals Tribunal, May 13, 1993.)

Finally, on this issue, petitioner testified that he continuously requested that his records or copies of his records be returned to him. He offered no documentary evidence such as letters requesting the documents and concedes in his reply brief that such evidence does not exist, all requests were made over the telephone. Petitioner has not pointed to any authority that would require the return of the records during the course of a criminal investigation and prosecution and prior to the issuance of the notice of determination. It appears petitioner did not make a Freedom of Information Law request for the records after the conclusion of the criminal case. Also, petitioner did not utilize the records returned to him during the course of the hearing. He asserted that there were too many records and they had been reorganized by the Division, and, therefore, he did not have the time required to look through the records. Under all these circumstances it cannot be held that petitioner even requested the records, much less that the Division was in any manner dilatory in returning them to petitioner or that petitioner was prejudiced in any way by not having receipt of the records.

F. The last remaining issue raised by petitioner involves a question of the application by the Division of the payments made by petitioner pursuant to the restitution order. Petitioner asserts that such payments should have been applied to the period at issue. The Division produced an affidavit showing that all of petitioner's restitution payments were applied to notice number L-012204220. This is confirmed by the Statement of Consolidated Tax Liabilities submitted by petitioner. This notice was issued for the period March 1, 1984 through August 31, 1994. The period covered by the plea agreement in the criminal case — December 1, 1987 through February 29, 1992 — is within this time period.

No petition has been filed protesting notice number L-012204220. Therefore, while there may be an issue as to whether the payments were applied properly only to those periods covered

by the criminal case, the Division of Tax Appeals has no jurisdiction over the application of the payments to this notice. If petitioner believes that the Division's application of the restitution payment violated the plea agreement, he must now apply to the Nassau County Court for a remedy.

D. The petition of Christopher P. DeFeo is denied. The Notice of Determination, as modified by Finding of Fact "4", is sustained.

DATED: Troy, New York
September 24, 1998

/s/ Robert Moseley Nero
ADMINISTRATIVE LAW JUDGE