STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRUCE AND BEVERLY GRIFFITH	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1988 through 1990.	:	DETERMINATION DTA NO. 816986

Petitioners, Bruce and Beverly Griffith, 16 Crystal Lake Drive, Weston, Connecticut 06883, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1988 through 1990.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Hauppauge, New York, on September 28, 1999 at 10:30 A.M., with all briefs to be submitted by January 25, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by Jerry Schneider, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Jr. , Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to review petitioners' claims for refund of taxes, which were paid pursuant to restitution imposed on petitioners by a court in a criminal action, and if so, whether petitioners have proven their entitlement to a refund of taxes.

II. Whether the Division of Taxation may properly assert greater tax deficiencies and civil fraud penalties against petitioners at hearing, and if so, whether greater tax deficiencies and civil fraud penalties may be imposed against petitioners.

FINDINGS OF FACT

1. The record is extremely bare concerning the activities of petitioner[1] Bruce Griffith during the years at issue which were related to the source of his personal income. Neither Mr. Griffith nor his wife, petitioner Beverley Griffith, testified at the hearing in this matter.[2] Rather, petitioner presented the testimony of Jerry Schneider, an accountant who was hired by petitioner *after* the years at issue, who prepared amended tax returns on petitioner's behalf by reconstructing, years after the fact, his income for each of the years at issue. Mr. Schneider, however, knew "nothing" about Republic Elevator Company and could not even state with any certainty that Republic Elevator Company was petitioner's "primary source of income" (tr., p. 84).

2. Petitioner's only other witness was Lee Hymowitz, an attorney who represented petitioner in certain criminal proceedings related to his activities and associations concerning Republic Elevator Corporation. Notably, on September 8, 1994, petitioner Bruce Griffith was indicted on three counts of offering a false instrument for filing in the first degree, in violation of Penal Law § 175.35, by the Supreme Court Grand Jury of the County of Albany in that for each of the years at issue, petitioner allegedly filed a New York State income tax return containing

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[1] Petitioner Beverly Griffith is a party to this matter solely on the basis that she filed joint tax returns with her husband, petitioner Bruce Griffith, for each of the years at issue. Consequently, references in this determination to "petitioner" are to Mr. Griffith.

[2] Furthermore, the Division of Taxation did not offer the testimony of any witness.

false information.[3] On November 21, 1995, Mr. Griffith entered into a plea agreement with the New York State Attorney General's office which detailed petitioner's unreported income for each of the years at issue and additional tax liability as follows:

> Evidence present before the Grand Jury and otherwise indicates that for the tax year 1988 [Mr. Griffith] had net unreported income in the amount of $1,004,636.00 (derived as follows: $180,000.00 BAF partnership income, $112,600.00 Republic[4] pension distribution, $235,052.00 from Republic EAB account, and $480,000.00 from sale of Republic stock minus $3,016.00 allocated cost); for the tax year 1989, in the amount of $430,051.00 (derived as follows: $284,805.00 BAF partnership income, $26,000.00 Republic pension distribution, $120,000.00 from sale of Republic stock minus $754.00 allocated cost); for the tax year 1990, in the amount of $227,622.00 (derived as follows: $48,225.00 BAF partnership income, $100,000.00 from cancellation of employment, $80,000.00 from sale of Republic stock minus $603.00 allocated coast.) Based on this evidence of undisclosed income it has been calculated that [Mr. Griffith] has a tax liability for this additional income for the tax year 1988 in the amount of $88,099.39, for the tax year 1989 in the amount of $60,406.61, and for the tax year 1990 in the amount of $36,843.79, for a total $185,349.79.

The plea agreement further provided that petitioner's plea of guilty to the indictment was in exchange and subject to the following conditions and promises, in relevant part:

> 2. At the time of sentencing the Attorney General . . . will recommend that [Mr. Griffith] be sentenced to probation for a period of five years.
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> 3. Any sentence imposed by the Court will include restitution to the Department of Taxation and Finance . . . in the amount of $185,349.79, which represents, for purposes of the settlement of this criminal action, the amount by which the parties stipulate he underpaid his taxes. [Mr. Griffith] expressly consents to restitution in this amount and waives any objection he might assert by virtue of Penal Law §§ 60.27 and/or 65.10. . . . In the event that, prior to sentencing, the Department of Taxation and Finance should inform the Attorney General that, in its opinion, the amount of additional income tax owed for the period embraced by the indictment and relating to the undeclared income detailed above is less than the amount of restitution stated above and ought to be

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[3] Petitioner Bruce Griffith was also charged in a felony complaint in the Criminal Court of the City of New York, Queens County, with one count of grand larceny in the first degree, grand larceny in the second degree, and four counts of offering a false instrument for filing in the first degree.

[4] Petitioner was an officer and shareholder of Republic Elevator Corp.

> accordingly reduced, the Attorney General shall so inform the Court for purposes of the Court reducing the restitution amount. . . . [Mr. Griffith] shall execute a confession of judgment in favor of Dept. of Taxation and Finance for balance of restitution amount not paid at sentencing or before.
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> * * *
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> 5. It shall be a further condition of any sentence of probation . . .that [Mr. Griffith] file amended tax returns for all the tax years that were the subject of the investigation described above. It is expressly understood that neither the Department of Taxation and Finance of the State of New York nor the Department of Finance of the City of New York is a party to this action, proceeding and agreement and that any restitution is paid without prejudice to the taxing authorities' assessing, according to law, any person or entity for any tax and any penalties or interest authorized by law to be imposed.
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> 6. Bruce Griffith understands and acknowledges that he may not appeal, pursuant to Criminal Procedure Law § 450.10, from any sentence of the Court except to the extent that sentence imposed might constitute error as a matter of law. He further waives any motions he might have made and explicitly withdraws any motions he has made in this action.
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> 8. This agreement is subject to the approval of the court.

3. On November 21, 1995, the State Attorney General, appearing by Joseph J. Hester (Assistant Attorney General), petitioner Bruce Griffith and his attorney, Lee D. Hymowitz, appeared in Albany Count Court with the Honorable Thomas A. Breslin, presiding. Mr. Hester outlined the plea agreement as detailed in Finding of Fact "2". In particular, he noted that Mr. Griffith "expressly agrees" to restitution in the amount of $185,349.79. Mr. Hester also indicated that:

> In the event that prior to sentencing the Department of Taxation and Finance should inform the Attorney General that in its opinion the amount of additional income tax owed for the period embraced by the indictment and relating to undeclared income detailed above is less than the amount of restitution stated above and ought to be accordingly reduced, the Attorney General shall so inform the Court for purposes of the court reducing the restitution amount.

* * *

> Now, it shall be a further condition of any probation, in addition to the condition of restitution, that the defendant file amended tax returns for all tax years that were the subject of the indictment pending in this court. It is expressly understood that neither the Department of Taxation and Finance of the State of New York nor the City of New York is a party to this action, proceeding and agreement and that any restitution is paid without prejudice to the taxing authorities assessing, according to law, any person or entity for any tax and any penalties authorized by law.

4. Petitioner was examined under oath by Judge Breslin during the plea proceedings on November 21, 1995, and he admitted his guilt as follows:

> The Court: The first count charges that on or about the 17th of October 1989, . . . you did with intent to defraud the state and knowing that . . . a New York State income tax return for the tax year 1988 contained a false statement and false information, you did offer or present said instrument to . . . the New York State Department of Taxation . . . . Now, did you cause a false income tax return for the year 1988 to be filed.
> Mr. Griffith: Yes.
> The Court: And did you provide the incorrect information that was placed upon that tax return?
> Mr. Griffith: Yes, I did.
> The Court: Did you have an accountant or file it yourself?
> Mr. Griffith: I had an accountant.
> The Court: But you gave him the bad information?
> Mr. Griffith: Yes.
> The Court: And you knew it was bad when you gave it to him?
> Mr. Griffith: Yes.
> The Court: You signed it with the idea that it was going to be filed?
> Mr. Griffith: Yes.
> The Court: And you knew it was going to be filed; right?
> Mr. Griffith: Yes.
> The Court: And you caused this to happen knowing that you in essence were going to defraud the state out of tax liability that was due and owing: correct?
> Mr. Griffith: Yes.

Judge Breslin questioned Mr. Griffith in a similar fashion with regard to petitioner's income tax returns filed for 1989 and 1990, and Mr. Griffith's responses were similar to those he gave with regard to his 1988 tax return as detailed above. The judge also ensured that petitioner

understood that his "plea of guilty is just the same as if you have gone to trial and were found guilty of each of these three crimes to which you plea." Further, petitioner responded in the negative to the judge's question whether anyone had threatened or forced him into pleading guilty, and responded in the positive to the judge's question whether his guilty plea was petitioner's "free and voluntary choice." Moreover, Judge Breslin specifically asked petitioner whether he was "pleading guilty to these three counts because indeed you are guilty of these three counts?" To which petitioner responded, "Yes."

5. As noted in petitioner's plea agreement detailed in Finding of Fact "3", if *prior* to petitioner's actual sentencing, the Department of Taxation and Finance informed the Attorney General's office that the amount of restitution ought to be reduced, in turn, the Attorney General would so inform the Albany County Court so that the court would reduce accordingly the amount of restitution. Petitioner was sentenced by Albany County Court Judge Breslin on September 6, 1996, approximately ten months after the plea agreement. By the time of such sentencing, the Department of Taxation and Finance had not informed the Attorney General that the restitution amount ought to be reduced. Consequently, the Court imposed sentence and ordered restitution in the amount of $185,349.79 as provided by the plea agreement.

6. On his sentencing date of September 6, 1996, petitioner executed an affidavit[5] for judgment by confession, which in relevant part, provided as follows:

> 4. I, the defendant in [the action of the Department of Taxation and Finance of the State of New York against Bruce Griffith] confess judgment in favor of the

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[5] The record provides no explanation why petitioner's affidavit confessing judgment shows the incorrect case caption of Department of Taxation and Finance of the State of New York, as plaintiff, against Bruce Griffith, as defendant. The plaintiff in the underlying criminal action was, in fact, the People of the State of New York. It is observed that only petitioner executed this document, which presumably was prepared by his attorney. In other words, petitioner's confession of judgment was in the form of an affidavit by petitioner, unlike the plea agreement to which both petitioner by his attorney and the State by Assistant Attorney General Hester were signatories.

plaintiff, the Department of Taxation and Finance of the State of New York, for the sum of $185,349.79, exclusive of interest as may be provided for by law and of penalties thereon and hereby authorize said plaintiff *to finally and irrevocably fix and assess and enter a judgment for said sum* against me.

5. I am fully aware of the fact that the plea of guilty entered by me to the crime of Offering a False Insturment [sic] for Filing in the [F]irst Degree (P.L.§ 175.35) (3 counts) under Indictment No. 2-4291, Albany County, State of New York, does not prevent or preclude the Department of Taxation and Finance of the State of New York from initiating further civil proceedings against me for additional amounts of taxes, penalties and interest as provided by law. These taxes may include periods of time covered by the indictment and periods of time prior to and subsequent to the indictment period.

* * *

7. This confession of judgment is for a debt justly due to the plaintiff arising out of the following facts:

i. During the period embraced by said Indictment No. 2-4291 I was an officer of and part equity owner of a corporation named Republic Elevator Corporation.

ii. For the tax year 1988 I underreported my income by $1,004,636.00--and my personal income tax liability by $88,099.93, and for the tax year 1989 I underreported my income by $430,051.00 and my liability by $60,406.61, and for the tax year 1990, I underreported my income by $227,622.00 and my liability by $36,843.79.

iii. As a result of the actions and omissions recited above, I owed the Department of Taxation and Finance of the State of New York income tax monies in the amount of $185,349.79 exclusive of any penalties and interest, and this debt is justly due the Department of Taxation and Finance of the State of New York.

8. This confession of judgment is not for the purpose of securing the plaintiff against *a contingent liability*.

9. This confession of judgment waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit of [sic] refund within the time limit set forth in the statute.

[Emphasis added.]

7. In the period between petitioner's plea agreement on November 21, 1995 and his sentencing on September 6, 1996, petitioner sought to convince the Department of Taxation and Finance to reduce the amount designated as restitution in the plea agreement. He failed to do so.

Assistant Attorney General Joseph J. Hester in a letter dated July 30, 1996 to petitioner's criminal defense attorneys, Lee Hymowitz and Michael Freeman (with a copy to Albany County Court Judge Thomas Breslin and a copy to Lucille Hamilton, a Division of Taxation auditor to whom petitioner submitted his amended tax returns), advised that he would maintain at the sentencing "that the proper restitution amount is the amount stipulated to by the parties before the Court on November 21, 1995." He also emphasized in his letter that petitioner's proof of entitlement to a reduction of the amount of restitution was "unconvincing" and "appears to be grounded on no more than [petitioner's] assertion or on very fragile evidence, at best . . . ."

8. Approximately three months after petitioner's sentencing, the Division of Taxation issued a Notice and Demand dated November 29, 1996 against petitioner which asserted a "current balance due" of $212,191.62 with interest continuing to accrue, which was in accord with the amount of restitution imposed at the sentencing.

9. Although the Department of Taxation and Finance did not agree to reduce the amount designated as restitution in the plea agreement prior to petitioner's sentencing on September 6, 1996, petitioner, by his accountant, Jerry Schneider, continued to press petitioner's claim that his tax liability for the years at issue should be reduced from the amount of restitution. Mr. Schneider had been hired on the recommendation of Lee Hymowitz, petitioner's attorney in the criminal proceedings, in the winter of 1995-1996, and had prepared amended New York personal income tax returns for petitioners for 1988, 1989, and 1990 prior to petitioner's sentencing. Mr. Schneider had submitted these amended returns to the Division of Taxation's auditor, Lucille

Hamilton.[6] These amended tax returns showed the following amounts for New York taxable income and New York State tax as compared to petitioner's original filings:

	1988	1989	1990[7]
New York adjusted gross income on *original* return	$ 221,610.00	$330,755.00	$ 111,048.00
New York taxable income on *original* return	169,125.00	283,009.00	Not in record
New York State income tax reported on *original* return	13,486.00	21,510.00	Not in record
New York adjusted gross income on *amended* return	1,124,110.00	329,255.00	207,913.00
New York taxable income on *amended* return	1,079,897.00	271,173.00	108,403.00
New York State income tax on *amended* return	89,763.00	20,578.00	7,819.00

[6] The specific date on which the amended returns were submitted to auditor Hamilton was not established in the record. However, these returns were submitted prior to petitioner's sentencing on September 6, 1996.

[7] Petitioner's amended return for 1990 was not filed on the proper form and, as a result, does not disclose amounts as reported on his original return for 1990. Included in the Division's Exhibit "M" are tables apparently prepared by petitioner's accountant, Jerry Schneider, from which petitioner's New York adjusted gross income on his original return for 1990 was listed so that such information was included in this table. For 1988 and 1989, petitioner used the proper tax forms, and amounts reported on his original returns for 1988 and 1989 are shown on the respective amended returns. However, at the hearing in this matter, petitioner's representative requested additional time to submit petitioner's amended returns for the following reason:

"They're in such a state of disarray, to be frank, I want to make sure I put them together proper because a proper amended return should have a copy of the federal behind it and all the supporting schedules (tr., pp. 111-112)."

Petitioner's amended returns, which were eventually submitted on April 19, 2000, did not have such promised federal returns and supporting schedules. Furthermore, the original returns for 1989 and 1990 were not introduced into evidence. The Division of Taxation introduced into evidence only the original 1988 return.

According to Assistant Attorney General Joseph J. Hester, the requirement in the plea agreement for petitioner to file amended tax returns with the Division of Taxation represented an obligation on petitioner and was not intended to impose on the Division of Taxation the obligation to accept as true whatever petitioner should subsequently report.

10. As noted in Finding of Fact "2", the amount of restitution ordered by the Albany County Court of $185,349.79 consisted of the following:

Additional 1988 tax liability		$ 88,099.39
Additional 1989 tax liability		60,406.61
Additional 1990 tax liability		36,843.79
Total	$185,349.79	

Based on his amended tax returns noted in Finding of Fact "9", petitioner claims that instead of $185,349.79, his additional tax liability as a result of his inaccurate original tax returns totals $72,266.00, and he should be refunded the excess[8] of any amount he has paid as restitution to the Department of Taxation and Finance pursuant to his plea agreement and sentencing.

11. Petitioner's accountant, Jerry Schneider, sometime in 1997, attempted to persuade Victor Tundis, an auditor employed by the Division of Taxation in its Nassau County district office, that petitioner's amended tax returns were accurate. According to Mr. Schneider, he succeeded in so persuading Mr. Tundis.[9] However, the record includes the following comments in the report dated January 20, 1998 by Victor Tundis:

> Auditor reviewed the amended returns as filed. It was determined that the income from all business activity should be allocated to NYS and NYC. There was an allowance of expenses associated with additional income. There was a disallowance of unsubstantiated expenses. However, the material issue is that the taxpayer did not include all the income determined by the Revenue Crimes

[8] The record suggests that petitioner has not yet paid the total amount of restitution.

[9] Mr. Schneider also testified that the Internal Revenue Service accepted petitioner's amended federal tax returns although no document was introduced into evidence in support of such testimony.

> Bureau. I included all income as per the RCB report. In addition, I added [f]raud penalty based on the income per the RCB report. The taxpayer's agreement with the Attorney General's office clearly indicates that this income was intentionally omitted from the taxpayer's original returns. It appears that it is the taxpayer's position that he had provided court cases that indicated that the undeclared income is not taxable to him as an individual. However, based on the RCB report and the Attorney General's agreement with the taxpayer there is no evidence at the audit level that indicates this income should be excluded from the amended returns.

Furthermore, a transmittal dated October 15, 1997 from Victor Tundis to Mr. Schneider has attached 6 sheets of computations[10] with each sheet having been boldly stamped with the following capitalized words:

WORK COPY
FOR DISCUSSION ONLY
SUBJECT TO POSSIBLE
REVIEW & REVISION

In addition, included in the audit file are photocopies of three statements of personal income tax audit changes dated November 4, 1997 for 1988, January 15, 1998 for 1989, and January 15, 1998 for 1990, with each asserting fraud penalties against petitioner. Moreover, even after crediting petitioner with payment of $100,000.00 at the time of his sentencing in the criminal matter on September 6, 1996, these three statements show total liabilities as of the date of the respective statements of $272,701.05 for 1988, $137,055.41 for 1989, and $48,574.41 for 1990. An affidavit dated September 23, 1999 of Jon Obert, the supervisor of Victor Tundis, noted that the "review of the Petitioners' amended returns [by the Division of Taxation] resulted in an increased tax liability for the years in issue, rather than any decrease."

12. Petitioner's only other witness, as noted in Finding of Fact "2", was Lee Hymowitz, an attorney who defended him in the criminal proceedings described in this determination.

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[10] Petitioner introduced into evidence as his Exhibit "4" only five of the six sheets of computations. Attached to his petition is apparently another copy of such computations, which consists of six sheets.

According to attorney Hymowitz, petitioner had set up "one or two accounts" in order to take monies "out of Republic Elevator for the purposes of making . . . kickbacks [to inspectors to get approvals for elevators]" (tr., p. 61). Mr. Hymowitz contends that these monies taken out of Republic Elevator were treated incorrectly by the Division of Taxation as petitioner's personal income although "a good portion of them" were used to pay kickbacks on behalf of the company (tr., p. 61).

Procedural Permutation

13. By a motion dated September 10, 1998, petitioner sought to be resentenced by Judge Thomas A Breslin of Albany County Court on the basis that "the State had miscalculated the tax originally owed by the defendant and that the correct amount owed was $171,338.62 instead of the $185,349.79." By an order dated October 19, 1998, Judge Breslin denied petitioner's motion on the basis that "[t]here has been no showing that the sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law." Judge Breslin noted, in relevant part, as follows:

> The amount of restitution ordered [of $185,349.79] was determined by the figures supplied by the Department of Taxation and Finance and was based on the amount of tax owed when the unreported income was considered. Defendant agreed on the record to pay that amount. The only discussion concerning paying a lesser amount was the agreement that if the amount due was determined to be less than the stated amount *as of the sentence date*, the Court would be so informed so the Court could consider the revised figure in fixing the restitution amount at sentencing. No such revised figure was provided to the Court. The Court directed the amount of restitution to be paid and the terms of payment at sentencing. [Emphasis added.]

14. In his petition dated February 19, 1999, petitioner asserted that "On October 19, 1998, [Judge Breslin] indicated that Mr. Griffith should have an opportunity to prove that the original agreement overstated the tax." However, this assertion is not supported by the record, which

includes the order dated October 19, 1998 of Judge Breslin as detailed in Finding of Fact "13". With his petition, petitioner did not attach any type of statutory notice issued by the Division of Taxation, such as a notice of deficiency, a notice and demand or a refund denial.[11] Rather, attached to his petition is a copy of his plea agreement dated November 21, 1995 to the criminal proceeding in Albany County Court, which is detailed in Finding of Fact "2", and six sheets of computations which petitioner alleged represented "the preliminary audit report", and which are, in fact, the six sheets of computations transmitted by the auditor, Victor Tundis, to Mr. Schneider, as noted in Finding of Fact "11". Based on these documents, petitioner in his petition requested "a hearing to review all the facts in this case so that the proper amount of liability can be confirmed."

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner maintains that he did not agree with the amount of restitution under the plea agreement of $185,349.79 but rather the plea agreement "provided for a vehicle in which this could be addressed" (Petitioner's brief, pp. 11-12). According to petitioner, he is being "penalized" and "forced to pay the amount stipulated to in the plea agreement" because the Division of Taxation failed to "act in a diligent fashion" in reviewing his amended tax returns (Petitioner's brief, p. 12). Petitioner argues that the Division of Tax Appeals:

> should make a determination as to whether Mr. Griffith owes less that [sic] the $185,349.79 and if in fact he does, he should be entitled to reimbursement directly from the State for his overpayment or in the alternative application would be made to the Supreme [sic] Court for re-sentencing based on the newly found determination of the State Department of Taxation (Petitioner's brief, p. 14).

[11] He did reference certain amended tax returns which might be viewed as refund claims in certain circumstances.

Petitioner rejects the Division of Taxation's argument that the legal principle of collateral estoppel should bar him from contesting his tax liability for the years at issue in this administrative proceeding:

> At no time could it be said that Mr. Griffith had a fair opportunity to have the issue of the amount of taxes he owed fairly determined. After all of this time there has never been a determination made by the Department of Taxation and Finance on the amended returns other than the determination of the field auditor Mr. Tundis which corroborates that fact that Mr. Griffith should only pay $72,266 in taxes instead of $185,349.79 (Petitioner's brief, pp. 14-15).

In conclusion, petitioner contends that the Division of Taxation may not assert a greater tax deficiency against petitioner in this proceeding because notices of deficiency must be issued to taxpayers within three years of the filing of a tax return.

16. The Division of Taxation maintains that the Division of Tax Appeals does not have the power to review and revise a state court order, and therefore is without jurisdiction over the subject matter of petitioner's tax liability for the years at issue as fixed by the restitution order issued by a state court. According to the Division, "[t]he proper remedy for the Petitioner was to seek relief in the state courts" (Division's brief, p. 6). In the alternative , the Division argues that petitioner's claim for reduction of his income tax liability for the years at issue is barred by the doctrine of collateral estoppel. Citing ***Kuriansky v. Professional Care, Inc.*** (158 AD2d 897, 551 NYS2d 695), the Division contends that a plea of guilty can have collateral estoppel effect. The Division emphasizes that:

> [T]he Petitioner acceded to the restitution portion of the sentence consistent with the terms of the Plea Agreement, even *after* all amended returns had been prepared and filed (emphasis in original). (Division's brief, p. 8.)

The Division adds that petitioner admitted his tax liability for the years at issue by accepting the restitution sentence, and such admission "constitutes extremely potent evidence in the case at bar" (Division's brief, p. 9).

The Division also contends that it properly asserted greater tax deficiencies and fraud penalties against petitioner at the hearing pursuant to Tax Law § 689 (d)(1). Citing ***Matter of DeFeo*** (Tax Appeals Tribunal, April 22, 1999), the Division maintains that it is not restricted from asserting a greater deficiency than the amount agreed to as restitution in a criminal case based on the same facts for the same time period. Finally, the Division maintains that petitioner's admissions in the criminal proceeding that he "knowingly, willfully and intentionally filed false income tax returns for the years at issue with intent to defraud the State of New York" is sufficient to meet the requirements for imposing fraud penalties against petitioner (Division's brief, p. 14).

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689, in income tax matters, the Division of Tax Appeals ("Tax Appeals") has jurisdiction to hear and determine a petition which contests a notice of deficiency or which challenges a denial of a refund claim or the failure of the Division of Taxation to timely act with regard to the review of a refund claim. In addition, in its reversal of the Tax Appeals Tribunal, the Appellate Division decided that the Division of Tax Appeals also has jurisdiction pursuant to Tax Law § 2006(4) to hear and determine a petition which contests a notice and demand (***Meyers v. Tax Appeals Tribunal***, 201 AD2d 185, 615 NYS2d 90, ***lv denied*** 84 NY2d 810, 621 NYS2d 519).

B. As noted in Finding of Fact "14", petitioner failed to attach to his petition any type of statutory notice issued by the Division of Taxation, such as a notice of deficiency, a notice and

demand or a refund denial. However, in the course of the hearing, a notice and demand, as detailed in Finding of Fact "8", was included in the administrative record for review. In effect, the relief sought by petitioner in his petition equates to a challenge of this Notice and Demand dated November 29, 1996, by which the Division of Taxation sought to collect a balance due based upon the amount of restitution ordered by Albany County Court Judge Breslin on September 6, 1996 at petitioner's criminal sentencing. In the alternative, pursuant to Tax Law § 689(c), it is reasonable to view petitioner's amended returns as refund claims over which the Division of Tax Appeals would have jurisdiction since six months have expired since they were filed. Consequently, in the first instance, it is concluded that the Division of Tax Appeals has jurisdiction to review and determine the validity of the Notice and Demand dated November 29, 1996. By doing so, a determination would also, by necessity, be made concerning petitioner's refund claims as represented by his amended returns.

C. However, although it is concluded that the Division of Tax Appeals has jurisdiction over petitioner's petition dated February 19, 1999, petitioner is collaterally estopped from contesting the amount of his tax liability for the years at issue as reflected by the amount of restitution ordered by Judge Breslin at petitioner's sentencing in the criminal proceeding, which in turn is reflected in the Notice and Demand dated November 29, 1996. For the doctrine of collateral estoppel to apply, petitioner must have had a fair opportunity to litigate the issue of his liability for the income tax at issue for the years 1988 through 1990 at the criminal proceeding before Judge Breslin (***see, Kuriansky v. Professional Care***, 158 AD2d 897, 551 NYS2d 695). This means that:

> First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior

> determination. (***Kaufman v. Eli Lilly and Co.,*** 65 NY2d 449, 492 NYS2d 584, 588 [citations omitted].)

Furthermore, the Court of Appeals in ***Kaufman v. Eli Lilly and Co. (supra***, 492 NYS2d at 588) noted:

> The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action [citations omitted].

D. The essential issue in the criminal proceeding is the same one raised by petitioner here, i.e., the amount by which petitioner underpaid his taxes for the years 1988 through 1990. Furthermore, the criminal proceeding required such central issue to be decided, and this issue was resolved by petitioner's plea of guilty as detailed in the findings of fact and his agreeing to pay an amount of restitution of income taxes for the years 1988 through 1990. Such amount of restitution corresponds to the amount of taxes due asserted in the Notice and Demand dated November 29, 1996.

E. Consequently, it is petitioner's burden to show that he did not have a "full and fair opportunity to litigate" (***Kaufman v. Eli Lilly and Co., supra***) his income tax liability and the accuracy of his income tax returns for the years 1988 through 1990 during the criminal proceeding. Petitioner has failed to make such showing. During the plea proceedings in the criminal case, an attorney appeared on behalf of petitioner. Further, petitioner was questioned carefully by the judge as detailed in Finding of Fact "4" to ensure that his plea was entered into voluntarily and that petitioner was aware he was waiving his right to a trial on the issues. Moreover, it was petitioner's decision to go forward with the sentencing based upon his plea agreement despite the Division of Taxation's refusal to inform the Attorney General that the

amount of additional income tax owed for the years 1988 through 1990 was less than the amount of restitution specified in the plea agreement. Most important, actual litigation is not a requirement for collateral estoppel (***Lanzano v. City of New York***, 202 AD2d 378, 609 NYS2d 891, 892, ***lv denied*** 83 NY2d 760, 616 NYS2d 14). As a result, petitioner cannot now avoid liability for the amount of restitution agreed to, which was fixed on his sentencing in the criminal proceeding. Furthermore, even petitioner's affidavit, by which he confessed judgment in the Albany County criminal matter as noted in Finding of Fact "6", explicitly noted that the Division had the authority "to finally and irrevocably fix and assess and enter a judgment for said sum [of $185,349.79] against me." Petitioner also stated in his affidavit that the additional tax liability confessed for the years at issue was not a *contingent* liability. In other words, petitioner's additional tax liability for the years at issue of $185,349.79 was not "dependent on or conditioned by something else" (Webster's Ninth New Collegiate Dictionary 284 [1983]). This final and irrevocable fixing of tax due of $185,349.79 may not be altered by the provision in petitioner's affidavit which provided that "[t]his confession of judgment . . . does not waive the taxpayer's right to apply for a credit of [sic] refund within the time limit set forth in the statute." There is no comparable provision in the plea agreement, which instead specifically provided that the amount of restitution could be reduced only "prior to sentencing" if the Department of Taxation and Finance so informed the Attorney General and, in turn, the Attorney General so informed the court. In addition, the plea agreement specified that "any restitution is paid *without prejudice* to the *taxing authorities' assessing*, according to law, any person or entity for any tax and any penalties or interest authorized by law to be imposed (emphasis added)." Petitioner, in contrast, was prejudiced by his very act of executing the plea agreement, by which he pleaded guilty to the criminal charges and agreed to restitution of additional tax for the years at issue in the specific

amount of $185,349.79. Therefore, it is concluded that he is collaterally estopped from now seeking to have this amount decreased. To the extent that petitioner's affidavit confessing judgment, a document executed *only* by him, might be viewed as in conflict with the plea agreement, a document executed by petitioner *and* the State, it cannot be given any weight. In other words, petitioner's affidavit, to the extent that it might suggest that he may seek a refund of the taxes paid, is without force and effect for purposes of this determination.

F. The issue of whether petitioner has introduced sufficient evidence to establish a lesser tax liability for the years at issue than the amount of restitution, which he agreed to in the criminal proceeding, is rendered moot.

G. Tax Law § 689(d)(1) provides that a greater deficiency than asserted in a notice of deficiency as well as additions to tax and civil penalties, including fraud penalties, may be determined at hearing if claim for such greater deficiency or additions to tax and civil penalties are asserted at or before the hearing. Furthermore, pursuant to Tax Law § 683(c), an assessment my be made at any time based upon a false or fraudulent return.[12] However, in the matter at hand, as noted in Conclusion of Law "A", petitioner did not file a "petition for redetermination of a *deficiency*," which under Tax Law § 689(d)(1) would permit the Division to assert a greater deficiency and fraud penalties[13] at or before hearing. Consequently, the Division of Taxation did not properly assert greater tax deficiencies and civil fraud penalties against petitioner at the hearing, and the issue of whether greater tax deficiencies and civil fraud penalties may be imposed against petitioner is moot.

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[12] However, as noted in Finding of Fact "11", the Division has not yet *assessed* petitioner for fraud penalties but has merely issued *statements* of personal income tax audit changes asserting such penalties. Such statements are not the same as deficiency notices.

[13] Pursuant to Tax Law § 683(c), fraud penalties may be assessed at any time. Nonetheless, the Division may not seek to impose fraud penalties without the issuance of the appropriate statutory notice.

H. The petition of Bruce and Beverly Griffith is denied, and the Notice and Demand dated November 29, 1996 is sustained, and petitioner's refund claims, as represented by his amended returns, are disallowed.

DATED: Troy, New York
June 29, 2000

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE