

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

Of

RAYMOND AND ALICE MARQUEZ

DETERMINATION

TAT(H) 97-107(UB)

Murphy, A.L.J.:

Petitioners, Raymond and Alice Marquez, filed a Petition for Hearing with the New York City ("City") Tax Appeals Tribunal ("Tribunal") requesting a redetermination of a deficiency of City Unincorporated Business Tax ("UBT") for the tax years ended December 31, 1990, December 31, 1991, December 31, 1992 and December 31, 1993 ("Tax Years").

Petitioners were represented by R. David Marquez, Esq. Respondent Commissioner of Finance ("Respondent") was represented by Francis J. Henn, Esq., Senior Counsel of the City Law Department.

A formal hearing was held on May 5, 6 and 7, 2003 and continued on June 24 and 26, 2003, at which times evidence was admitted and testimony taken. The record was left open for the submission of certain documents referenced during the course of the proceeding.¹

¹ Correspondence dated June 16, 1997 was admitted into evidence as Petitioners' Ex. 29, and two pages of pen-register documents were admitted as Petitioners' Ex. 30. On July 13, 2004, the entire file on Petitioners' Motion for Summary Judgment (which was denied due to the existence of material and triable issues of fact) was marked as Tribunal Exhibit I. The record was closed on October 5, 2004.

Petitioners submitted a Hearing Brief on December 10, 2004 and Respondent submitted a Post Hearing Brief on March 21, 2005. Petitioners submitted a Reply Brief on April 28, 2005 and Respondent submitted a Post Hearing Reply Brief on June 9, 2005.

ISSUES

I. Whether Raymond Marquez was engaged in the unincorporated gambling business of the Raymond Marquez Organization during the Tax years and, therefore, is liable for UBT computed on its unincorporated business taxable income.

II. Whether Alice Marquez was engaged in the unincorporated gambling business of the Raymond Marquez Organization during the Tax Years and, therefore, is liable for UBT computed against its unincorporated business taxable income.

III. What is the proper amount of unincorporated business taxable income for the Raymond Marquez Organization for the Tax Years.

FINDINGS OF FACT

1. During the Tax Years, Raymond Marquez was engaged in the operation of a gambling business, primarily involving "policy" or "numbers" betting, in several locations in the City. Petitioner's family has been involved in this business for several generations. During the 1940s, Lionel Marquez, Sr. was in charge of the operation. Subsequently the business was divided among Lionel Marquez's three sons: Raymond Marquez, Robert Marquez, Sr. and Lionel Marquez, Jr. Following the death of Robert Marquez, Sr. and the incarceration of Lionel Marquez, Jr., the business was

reorganized into two operations: one headed by Petitioner (the "Raymond Marquez Organization") and the other by Robert Marquez, Jr., Peter Marquez, Hilton Roundtree and Angel Colon (the "Robert Marquez Organization"). After April 1994, the Raymond Marquez Organization was combined with the Robert Marquez Organization.

2. "Numbers" or "policy" wagering is a gambling activity which is not, in and of itself, illegal.² However, it is a violation of New York Penal Law to conduct a numbers operation.

3. Numbers wagering occurs either on the street or at a "spot" or "numbers hold" which is a fixed location where numbers are "bought." Numbers wagering also can be conducted by telephone bookmakers. Generally bets of \$.50 to \$1 are made in numbers gambling, although bets may be placed for as much as \$500.

4. In City numbers gambling, the winning "number" is determined by the total moneys bet, or payoffs made, at specific New York racetracks, or by the winning horses of specific races. The "Brooklyn" number is comprised of the last three digits to the left of the decimal of a particular track's total parimutuel receipts or "handle" for the day. The "New York" number requires more complicated calculations as it combines the payoff odds for win, place and show horses in the first seven races at a specific race track. The first digit of the number is calculated after the third race, the second digit after the fifth race and the last digit after the seventh race. The "Bronx" number is a four digit number which includes the ninth race. The "Bolita" is a bet on either the first or last two digits of the final winning number.

² See, generally, Police Department City of New York *Organized Crime Control Bureau Gambling Investigators Manual* (January 1984). See, also, Affidavit of Detective Luis Ramirez, April 10, 1994.

5. A "single-action" bet is a separate bet on each digit as it is calculated. A "straight" bet is a bet on three digits in a specific order. A "combination" bet is a bet on three digits without regard to order. The odds for a "straight" bet winning are approximately 600:1; for a "single action" it is 8:1; and for the Bolita it is 64:1.

6. Spots often group together to pool receipts through a "bank." One or more "banks" may service the spots. The bank functions to spread out the risk of large pay-outs on winning bets. The number of banks depends upon a gambling organization's size. Banks employ individuals to pick up and transport moneys from the spots to the banks. A bank may record the cash on adding machine tapes known as "bankers ribbons." Banks often maintain "count rooms" where cash is kept. Frequently, at the end of the working day, the cash at a bank is transferred to another location where there are also "count rooms," helping to guard the operation against police confiscation.

7. The principal personnel of a numbers gambling operation include: day and night "writers," "runners," and "collectors" who take the bets and deal with the customers; and "look-outs" who advertise the spots by standing outside and encouraging individuals to enter. The spot personnel (known as "employees") report to "controllers" who are the agents or associates of the top management of the organization and often work for the bank. Controllers collect bets and money from the runners and in many cases run the day-to-day operations of the business. "Bankers" are the heads of the organizations or the top managers. The 1984 City Police Department Organized Crime Control Handbook notes that bankers "accept the financial risks, covering short-term losses and keep all the profits."

8. The paperwork for numbers betting involves forms prepared in triplicate: one copy is retained by the bettor, one by the betting spot, and one is for the central bank. These documents are often referred to as the "work" of the operation and generally bear a number or a codename which refers to a particular spot. The banks also keep other records, such as "volume sheets," which record the take from the individual spots and other specific financial information.

9. Telephones are essential to a large-scale numbers gambling operation. The telephone is used by the spots to report to the central bank as well as to communicate between themselves and personnel at the central bank. Many organizations also use facsimile transmission machines and beepers. Telephones were listed to the various locations of the Raymond Marquez Organization throughout the City, including several at 3650 Broadway and 730 Riverside Drive.³

10. In 1993, the two Marquez operations maintained sixty-six gambling spots, banks and offices in the City. The Raymond Marquez Organization was comprised of approximately forty spots, with the remainder attributable to the Robert Marquez Organization. The organizations maintained several banks as well as central business offices.⁴ A central bank was located at 3650 Broadway on the second floor. Other bank locations included 3641 Broadway, 3653 Broadway, and apartments at 3657 Broadway. Other locations included spots and offices at various addresses on St. Nicholas Avenue, as well as specialty spots, such as night offices, at locations on upper Broadway.

³ Unless otherwise stated, all addresses are located in the City.

⁴ See, e.g., Ex. X, p.38, which lists some of the Raymond Marquez Organization's banks.

11. Business records of the Raymond Marquez Organization were maintained at 730 Riverside Drive by Claudia Hernandez who was the organization's bookkeeper and "office manager" or "supervisor."⁵ In 1994, Ms. Hernandez was arrested and pled guilty to felony gambling charges and subsequently provided the District Attorney with information about the Raymond Marquez Organization.

12. The Raymond Marquez Organization employed over one hundred individuals, with the majority working at the spots or banks. The organization employed an individual carpenter/handy person, Edwin Wynne (a/k/a "Eddie Carp"), who was engaged to maintain and repair spots which had been subjected to police raids. It did not employ controllers.⁶

13. In 1993, the Organized Crime Unit of the City District Attorney's Office and the City Police Department, Organized Crime Control Bureau, Manhattan North Public Morals Division, conducted an investigation of both Marquez gambling operations which was known as "Operation Checkmate."⁷ Assistant District Attorney Howard Perzan led the investigation, assisted by Assistant District Attorney Ann Rudman, Chief of the Asset Forfeiture Unit.

14. During the course of the investigation, the Police Department obtained orders for trap-and-trace devices and/or pen

⁵ See, e.g., Ex. X., p. 16. In his affidavit, Detective Ramirez identifies Ms. Hernandez as the Raymond Marquez Organization's supervisor, listing, and in some instances transcribing, several business calls between Ms. Hernandez and Raymond Marquez.

⁶ Detective Huthansel's affidavit indicates that the Robert Marquez Organization may have employed Hilton Roundtree in such capacity.

⁷ While Ex. V indicates that Operation Checkmate officially began in 1993, documents in the record establish that the preliminary investigation of the Marquez gambling organizations began in 1992.

registers⁸ for telephones listed to several locations under investigation, as well as orders permitting eavesdropping. The targeted locations included 3650 Broadway (the location of the Raymond Marquez Organization's bank) and 730 Riverside Drive (the location of the Raymond Marquez Organization's headquarters offices).⁹ Telephone calls and facsimile transmissions were monitored and recorded, including calls between Mr. Marquez and Claudia Hernandez, and facsimile transactions between New York and Florida locations.

15. Handwritten records of the monitored telephone calls (known as "Consecutive Conversation Sheets") were prepared by investigating officers. Printout summaries were transcribed of approximately 9,163 calls monitored during the period January 17, 1994 through February 18, 1994. These documents indicated whether a call was incoming or outgoing and, if outgoing, the name of the party called and the address of that party where available. In the case of the Consecutive Conversation Sheets, the monitoring officer also transcribed a brief description of the caller (for example, whether it was a male or a female voice) and the general content of the call (for example, whether or not there were "hits" at a particular location). Summaries of the calls were also provided according to the number called or being called. These documents indicate telephone contact between several of the Raymond Marquez Organization's locations and, specifically, among Raymond Marquez, Claudia Hernandez and Edwin Wynne.

⁸ These devices, which are attached to individual telephone lines, enable an investigator to identify and record calls on that line. A trap-and-trace device identifies the telephone numbers of incoming calls, while a pen register identifies and records outgoing numbers as they are dialed. T. 331.

⁹ See, e.g., Ex. X, Affidavit of Luis A. Ramirez in support of an application for search warrants, which recites the content of several intercepted conversations and transmissions.

16. During Operation Checkmate, several of the Raymond Marquez Organization spots were subjected to "bet-and-bust" operations. In these operations, an undercover officer entered a spot and placed a bet. The officer then left the location and informed back-up officers that an illegal wager had been accepted. The back-up team entered, arrested the operator, and sometimes recovered records and currency. The Police Department's Public Morals Division then analyzed these operations, in concert with other activities, to develop an understanding of the Raymond Marquez Organization.

17. During the Tax Years, Alice Marquez was engaged in several enterprises. She owned two hotels directly: the Grantmoor Motor Lodge located in Newington, Connecticut, and the Oakland East Motor Inn, in Fort Lauderdale, Florida.¹⁰ She also owned the stock of NCDI Inc., which owned the Commack Motor Inn located in Commack, New York. There also was testimony that Ms. Marquez owned a house located on the Commack Inn property. The nature of Alice Marquez's business interests and investments has been described by the parties as the "hospitality business" and the hotels which she owned primarily catered to adults during the Tax Years. Each of Ms. Marquez's businesses employed its own bookkeepers.

18. Alice Marquez was the principal shareholder of the following corporations: Grantmoor Inn, Inc.; Oakland Park Inn, Inc.; Showcase Inns, Inc.; NCDI Realty Corp.; and Alicia M Inc.¹¹ U.S. Corporation Income Tax Returns and State General Business

¹⁰ This hotel was subsequently known as the Oakland East Motor Lodge. See, T. 755.

¹¹ See, Ex. T, "Personal Financial Statement." Note, two other entities, Seafarers 1986 Ltd. and Oasis Enterprises Ltd., are referred to in the testimony and documents. A suggestion by Respondent's witness that Ms. Marquez owned these entities was never substantiated. See, e.g., Ex. T. 642, 705-6.

Corporation Franchise Tax Returns were filed for several of these entities for the Tax Years.¹² The primary source of income reported for the Showcase Inns, Inc. was from "chartering." However, other documents and testimony suggest that Showcase Inns, Inc. is a holding company which holds the stock of the three corporations, two of which leased a hotel to Ms. Marquez and one of which owned a hotel. Showcase Inc.'s telephone is listed as located at the Marquez residence in Great Neck, New York. NCDI Inc., which owns the Commack Motor Inn, reported its primary business activity as motel operator.

19. During the Tax Years, Raymond Marquez reported wage/salary income from "Showcase Inns" on his Federal and State personal income tax returns.

20. Showcase Marine Charters, Inc., a corporation which was involved in the provision of excursions, rents the Alicia M, a 62 foot charter boat, from Alicia M. Inc. The telephone listing for the Alicia M. is at the Marquez residence in Great Neck, New York.

21. Bridal Moments of Boca d/b/a Enchanted Moments of Boca Inc. is a Florida corporation owned by Ms. Marquez, engaged in the sale and rental of bridal and formal apparel. In 1992, Ms. Marquez sold a one-third interest in that corporation to an unrelated party for \$80,000, which amount was to be paid over a five-year period.

22. Tutto Bene Inc. is a corporation which owns a restaurant located at the Oakland Park Inn. During 1993, Alice Marquez

¹² The record includes copies of Forms 1120 U.S. Corporation Income Tax Returns and Forms CT-3 New York Corporation Franchise Tax Returns for Showcase Inns Inc. for 1990-1993, and Forms 1120S U.S. Income Tax Return for an S Corporation and Forms CT-3-S New York S Corporation Franchise Tax Returns for NCDI Realty Corp for 1990-1993. There were no returns submitted for other corporations in which Alice Marquez held an interest, including Alicia M. Inc.

advanced \$285,394 to this corporation, which funds were used primarily to pay an unrelated design firm for renovations.

23. Petitioners' personal residence was located in Great Neck, New York during the Tax Years. On occasion, Petitioners also stayed at the Oakland East Motor Lodge (f/k/a the Oakland Park Inn) in Ft. Lauderdale, Florida.

24. On April 19, 1994, Raymond Marquez, Alice Marquez and Julia Rojo were arrested for illegal gambling.

25. At or about the time of the arrests, several search warrants were executed at fifty-six locations in the City, Long Island, New York and Ft. Lauderdale, Florida, which were related to the Raymond Marquez Organization and to Petitioners personally. The premises searched included offices, apartments, bars/restaurants and motels. As a result of the searches, numerous documents and tangible personal property were confiscated.

26. Included in the records obtained pursuant to the execution of the warrants were 33 boxes of gambling business records; a disbursement journal from 1993; postal money orders; correspondence with respect to certain of Alice Marquez's business and financial transactions; and other correspondence and facsimile transmittal cover sheets addressed to Petitioners.

27. The gambling records seized were primarily spreadsheet records prepared by the Raymond Marquez Organization. They included daily and weekly records pertaining to the income and expenses of several gambling spots; specific records reflecting 1993 income from slot machines from various spots; a record of four months' expenses for Con Ed for the spots; a record of spot rents

for five months; and a record of four months' payments for telephone services.

28. One of the principal types of records seized was the Raymond Marquez Organization's "volume sheets."¹³ These sheets were prepared on a weekly basis reflecting the activity of the Raymond Marquez Organization's spots. The information on these sheets include the total amount of bets or the "volume" of a particular spot and certain expenses, including the costs to the spot of supplies, and payments to employees according to category; e.g., day-writers, night-writers, day look-outs, night look-outs. Other columns referred to items which could have been other income or expenses, such as "rent" and "telephone."

29. The records seized during the investigation which pertained to the Tax Years were reviewed by personnel in the District Attorney's office. Based on these records and other information obtained during the investigation, it was determined that the Raymond Marquez Organization engaged in two principal types of bets, "single action" and "straight action." The Raymond Marquez Organization also operated slot machines at some of the spots, rented space to some spots and sold telephone services.¹⁴

30. The District Attorney concluded that in 1993 the Raymond Marquez Organization received the following net income from gambling and related activities: \$588,757 from "straight action;"

¹³ Petitioner initially argues that as these records do not bear Mr. Marquez's name, there is no proof that they relate to his business. However, testimonial evidence, in the form of affidavits, identify the records and documents seized during the investigation as being from the Raymond Marquez Organization's places of business.

¹⁴ See, Ex. X, which indicates that telephones located at various spots were registered to and paid for by the Organization.

\$439,910 from "single action;" \$319,770 from slot machines; \$107,285 from the rental of premises; and \$4,929 for the use of telephones. The amounts were based entirely on the books and records seized. The single action total was as reflected on the records. The straight action amount represented receipts less prizes of \$2,181,322, adjusted for expenses (\$461,565), payroll (\$1,060,000), and a miscellaneous amount (\$371,000). The District Attorney calculated the Raymond Marquez Organization's 1993 net profits to be \$1,460,651. The District Attorney further determined that the expenses of forty spot locations were paid for from the receipts from single action, while the expenses of seven offices were paid for from the receipts from straight action.

31. The District Attorney was assisted in his review of the seized documents by Virginia Urzi, a tax auditor with the New York State ("State") Department of Taxation and Finance's Office of Tax Enforcement. Ms. Urzi did a computation of the 1993 State Personal Income Tax consequences to Raymond Marquez from the information contained in the documents seized. She was able to confirm that the 1993 State Personal Income Tax Return filed by Raymond Marquez did not include the income from the gambling operation identified by the District Attorney. The related State Income Tax violations were made part of the subsequent indictment as a separate count of filing a false instrument.

32. On April 25, 1994, the District Attorney informed the Commissioner of Finance, in writing, of the Petitioners' arrest, and the attaching of Petitioners' real and personal property. The District Attorney indicated that hotel receipts may have been

understated.¹⁵ Information about the investigations and the arrests was also contained in an April 20, 1994 press release that was issued by the District Attorney's office.

33. Walter Huthansel is a Detective with the City Police Department and is presently serving with the Counter-terrorism Division. From April 1992 until January or February 1995, he was assigned to the Department's Public Patrol or Vice Division where he participated in the investigation of both Marquez gambling operations. His investigation initially focused on the Robert Marquez Organization and on activity which took place in and around 65 St. Nicholas Avenue. It included observations, telephone eavesdropping and buy-and-bust events. In the course of the investigation it became apparent that there were at least two Marquez gambling organizations, one involving Robert Marquez Jr. and one involving Raymond Marquez.¹⁶ In April 1994, search warrants were executed for the main offices or banks and for several related gambling locations, of which six or seven pertained to the Raymond Marquez Organization, and records were seized. After the arrest of the Petitioners, the focus of the investigation returned to the business of Robert Marquez Jr. and continued until some time in 1995.

34. Detective Huthansel testified at the hearing. His affidavit which was prepared for a State Division of Tax Appeals proceeding, and which chronicled his involvement from 1992 forward in the investigation of the Marquez gambling organizations, was admitted into evidence. In both his testimony and affidavit,

¹⁵ In his April 25, 1994 letter, District Attorney Morgenthau attributes the hotel income to Raymond Marquez, stating "[W]e have reason to believe that Marquez understated the motels' cash receipts." Ex. E, p. 10.

¹⁶ Detective Huthansel testified that he was not involved in any money laundering investigation of Raymond and Alice Marquez. T. 246.

Detective Huthansel indicated that based on the investigation, the Raymond Marquez Organization took in approximately \$202,449 per week from October 1992 through April 1994, and \$404,897 per week from April 1994 forward. His affidavit suggests that for the period October 1992 through January 1995, the approximate gross income of the Raymond Marquez Organization was \$31,000,000.

35. Luis Ramirez was a Detective with the City Police Department's Organized Crime Control Bureau, Manhattan North Public Morals division in 1994. He had extensive training and experience in investigating illegal gambling and was involved in the investigation of the Raymond Marquez Organization beginning in 1992 and including the period of time of Operation Checkmate. The affidavit of Detective Ramirez, which supported the search warrants issued in April 1994 for the fifty-six Raymond Marquez Organization locations, was admitted into evidence. The affidavit recited several incidents of surveillance and interception of telephone and facsimile transmissions at various locations associated with the Raymond Marquez Organization and between various individuals affiliated with that organization. Included in the affidavit were transcripts of several conversations between Raymond Marquez and Claudia Hernandez regarding the Raymond Marquez Organization's business matters.

36. During the course of the investigation, in an intercepted April 10, 1994 telephone conversation with Raymond Marquez, Ms. Hernandez indicated that the income or "take" from the Raymond Marquez Organization for one week in April of 1994 was \$450,788.

37. For the Tax Years, Alice Marquez filed individual Federal Income Tax Returns (Federal Forms 1040) and individual State and City Resident Income Tax Returns (State Forms IT-201). She

reported income and loss from interests in the State (a house in Commack, New York), Connecticut (a motel) and Florida (a motel); other income, including interest income, from Federal Subchapter S corporations (Alicia M Inc.; NCDI Realty Corp.; Oakland Park Inn, Inc.; and Showcase Marine Inc.); and wage income from Showcase Inns, Inc. For each of the Tax Years, Ms. Marquez reported no federal taxable income and reported State taxable income only for 1990. Ms. Marquez's businesses were not located in the City.

38. For the Tax Years, Raymond Marquez filed individual Federal Income Tax Returns (Federal Forms 1040) and individual State and City Resident Income Tax Returns (State Forms IT-201). For each of the Tax Years, Mr. Marquez reported wage/salary income from Showcase Inns, Inc. and other interest income, and listed his occupation as "Executive." He reported the following amounts of federal taxable income: \$60,585 in 1990; \$60,006 in 1991; \$63,093 in 1992; and \$57,467 in 1993.

39. Petitioners did not file City UBT returns for the Tax Years for the Raymond Marquez Organization and did not pay any City UBT on the income of that business.

40. Former Assistant District Attorney Anne Rudman affirmed that the seized gambling business records of the Raymond Marquez Organization pertained to the Tax Years. Her affirmation was based upon several factors, including date labels, labels on folders and specific records identification information provided by the organization's bookkeeper Claudia Hernandez.

41. The records seized included documents which establish that Petitioners maintained several accounts with banks located outside the United States. For example, in 1993, deposits of

\$489,483.21 were made to an account that Ms. Marquez held in Nassau, Bahamas; and from December 1993 to February 1994, approximately \$195,000 was transferred from this account to a London account. The seized records also included copies of money orders in the total amount of \$26,300 made out to Seafarers 1986 Ltd. which in some instances were endorsed by Canadian Imperial Bank of Commerce, Nassau, Bahamas. It was subsequently determined that the money orders were purchased from locations in Long Island.

42. Certain of the records which were seized in Florida were examined by Evelyn Serrano, a Staff Analyst in the Forfeiture Unit of the District Attorney's Office. Ms. Serrano's affidavit and referenced exhibits, dated June 7, 1994, which were prepared for another proceeding,¹⁷ were admitted into evidence. Ms. Serrano lists certain documents which were seized as a result of the warrants executed for Alice Marquez's Florida business/personal residence, copies of which were admitted in this proceeding. These documents included financial information from a Bahamian company and copies of receipts for \$500 and \$700 money orders made out to Seafarers, Ltd.

43. Records which pertained to Alice Marquez (including seized documents and tax returns) were analyzed by three forensic accountants, Richard A. Nossen, Joan A. Norvelles and Wendy L. Spaulding (the "Forensic Accountants"). In December 1994, the Forensic Accountants prepared a report for Assistant District Attorney Rudman, wherein they attempted to trace funds which Ms. Marquez received into several of her domestic and foreign accounts, which she apparently used in the maintenance and construction of

¹⁷ According to the caption, the affidavit was prepared for a proceeding involving a 1994 Cross-Motion by Petitioners and other individuals and entities to vacate certain "provisional remedies."

some of her properties. The Forensic Accountants concluded that Ms. Marquez had expenditures in excess of the reported sources of income for two of the three years examined, including 1993. The expenditures reflected deposits made to off-shore or foreign accounts, sums already on deposit in these accounts, and withdrawals from U.S. Accounts. The sources of income included amounts which were reported on returns filed as salary, interest, dividends, net rent receipts from the three hotels, and refunds from Federal, State and local taxing authorities. According to the Forensic Accountants, for 1992, Ms. Marquez's income sources were greater than her expenditures; but for 1993 she had expenditures of \$469,946.42 that were in excess of identified/reported income. The Forensic Accountants hypothesized that the source of the excess funds was gambling proceeds from the Raymond Marquez Organization.

44. On October 4, 1994, the U.S. Department of Justice, Federal Bureau of Investigation, wrote the United States Attorney for the Southern District of New York with regard to Raymond Marquez. In that correspondence the Supervisory Special Agent asserted that money from the Raymond Marquez Organization was sent to Alice Marquez at her Florida business location. There is no other information in the record which would confirm either an active Federal investigation or specific identifiable money transfers.

45. Based on its review of the seized records and the U.S. Income Tax Returns filed, the District Attorney concluded that Petitioner Alice Marquez: (a) received substantial sums of money from the illegal gambling activities of the Raymond Marquez Organization; (b) acted as a conduit of such funds; and (c) used such funds to operate her own discrete business enterprises.

46. On December 12, 1994, a New York County Grand Jury filed indictment No. 11856/94 against Raymond Marquez, Alice Marquez and Julia Rojo. Count One of the indictment charged these individuals with the Class C Felony of Enterprise Corruption,¹⁸ stating:

The defendants, in the County of New York, from on or about January 1993 to on or about April 1994, having knowledge of the existence of a criminal enterprise, called herein the "Raymond Marquez Organization," and of the nature of its activities, and being associated with and employed by the Raymond Marquez Organization, intentionally conducted and participated in the affairs [sic] the Raymond Marquez Organization by participating in a pattern of criminal activity.

The Raymond Marquez Organization was a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure, distinct from the aforesaid pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents.

¹⁸ Article 460 of State Penal Law, Title X, the "Organized Crime Control Act," contains the provisions covering the crime of Enterprise Corruption. Penal Law §460.10(3) defines a "criminal enterprise" to be "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." A "pattern of criminal activity" is defined to include "conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts" which were related and were committed within a ten-year period. Penal Law §460.10(4). A person is guilty of enterprise corruption when "having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or (b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or (c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise." Penal Law §460.20(1). Penal Law §460.20(2) defines participation in the pattern of criminal activity to require engaging in or being criminally liable for three criminal acts of the pattern. Among the statutory requirements, two of the criminal pattern acts must be felonies. Penal Law §460.20(2)(a).

. . .

The business of the Raymond Marquez organization was to operate illegal gambling businesses through a number of retail betting spots that received wagers and money from bettors, and a number of offices that processed the gambling work and money, paid the employees, paid rents and utility bills for the betting spots and offices, and arranged for the disposition of the illegal gambling proceeds . . . The defendants controlled and worked for the Raymond Marquez Organization and held the following positions:

Raymond Marquez was the boss . . .

Alice Marquez . . . worked for Raymond Marquez, and among other things, handled certain financial transactions for the organization.

47. The indictment recited two hundred and twenty pattern acts, primarily pursuant to Penal Law Section 225, involving the crimes of promoting gambling and possessing gambling records on specific dates between January 2, 1993 and April 19, 1994; and one additional pattern act, the filing of a false instrument (Raymond Marquez's 1993 State Resident Income Tax Return) in violation of State Penal Law §175. The indictment also charged Petitioners with two hundred and fifteen separate counts of promoting gambling and possessing gambling records, six counts of possession of a weapon in the third degree (Penal Law §265.02), and one count of offering a false instrument. None of the pattern acts or separate counts involve City tax filings.

48. Subsequent to the 1994 indictment, Raymond Marquez returned to the gambling business, working with the Robert Marquez Organization. On January 15, 1995, under indictment No. 386/95, Mr. Marquez was charged with the crimes of promoting gambling and

possessing gambling records pursuant to State Penal Law §§225.20(2)(a), 225.10(2)(b) and 225.20(2).

49. In July 1996, Petitioners entered into a plea agreement with respect to the two indictments.¹⁹ Raymond Marquez agreed to enter a plea of guilty to one count of Attempted Enterprise Corruption under Penal Law §110/460.20, a Class C felony.²⁰ He further agreed to the imposition of a ninety day period of incarceration and four years and nine months of probation. Alice Marquez agreed to enter a plea of guilty to one count of Possession of Gambling records in the Second Degree, under Penal Law §225.15, a Class A misdemeanor, in full satisfaction of the indictment. The agreement also encompassed the terms of a forfeiture agreement, and Alice Marquez was to receive an unconditional discharge upon the payment of a \$1,000,000 forfeiture amount.

50. In August 1996, Petitioners entered into a Forfeiture Stipulation with Assistant District Attorney Rudman. Petitioners agreed to enter certain guilty pleas and waived any claims and interest in the property and money seized as a result of the execution of the search warrants. Pursuant to the Forfeiture Agreement, certain property and bank accounts were forfeited and Raymond Marquez agreed to payment of the \$1,000,000 in three installments.²¹ The deed to the land and buildings comprising the

¹⁹ The plea agreement also pertained to Julia Rojo.

²⁰ The portions of the plea agreement in the record, which are contained in Exhibit B to Petitioner's Reply Affirmation in Further Support of Motion for Summary Determination, do not contain any information with respect to the 1995 indictment, although that indictment is referenced in the caption.

²¹ Raymond Marquez had paid \$180,000 on July 3, 1996, and agreed to pay \$70,000 on or before September 15, 1996 and \$750,000 by March 4, 1997. Under the terms of the plea agreement, it was agreed that the District Attorney would release certain personal property (e.g., the boat Alicia M.) so that it could be sold to meet the forfeiture amounts.

Grantmoor Motor Lodge secured the balance due. The agreement further provided that if Petitioners failed to pay the forfeited amount, Raymond Marquez would be sentenced to from five to fifteen years and the Grantmoor Motor Lodge would be sold. Raymond and Alice Marquez agreed that they were jointly and severally liable for payment of the forfeited amount.

51. On August 28, 1996, Alice Marquez pled guilty to the April 19, 1994 misdemeanor possession of gambling records under Penal Law §225.15(2). The act pled to, a Class A Misdemeanor,²² is a lesser included offense of Count 214 of the Indictment. In her plea allocution, Alice Marquez stated that on April 19, 1994, she was "in constructive possession of a sheet of paper, which sheet of paper had entries on it which related to gambling, and I knew it was unlawful to be in constructive possession of such sheet of paper." Pursuant to paragraph 6 of the Forfeiture Stipulation, Ms. Marquez agreed that she was jointly and severally liable for payment of the forfeiture amount. Ms. Marquez was unconditionally discharged subject to the terms of the Forfeiture Stipulation. She was sentenced on March 5, 1997.

52. On August 28, 1996, Raymond Marquez pled guilty to attempted Enterprise Corruption under Count One of the 1994 Indictment and promoting gambling under Count One of the 1995 indictment. He allocuted on the record that from January 1993 to April 1994, in the borough of Manhattan, he "intentionally attempted to conduct, participate, and engage in the affairs of the [criminal enterprise called the] Raymond Marquez Organization by participating in a pattern of criminal activity . . . [which

²² See, Ex. C to Reply Affirmation in Further Support of Motion for Summary Determination. On May 6, 1997, on the motion of Alice Marquez's attorney, the record was corrected to reflect that the plea was to a Class A misdemeanor and not a Class E felony.

enterprise consisted of] a series of gambling spots which were directed by a structure distinct from those . . . spots." He further stated that on January 11, 1995, he profited from unlawful gambling activity and received money and/or written records of gambling activities. Mr. Marquez was sentenced to three months' imprisonment, four and three-quarters years of probation and restitution of \$1,000,000. Raymond Marquez was sentenced on March 5, 1997.

53. Max Muhlberg is Special Tax Auditor with the Department of Finance, Enforcement Division. Mr. Muhlberg was often called upon to assist the District Attorney in criminal investigations which involved City taxes and, in 1994, Assistant District Attorney Howard Prezan requested in an Application for a Disclosure Order that Mr. Muhlberg be permitted to "examine and utilize" Grand Jury evidence obtained in connection with an investigation of Raymond Marquez. Mr. Muhlberg was never called to appear before the grand Jury or otherwise participate in the District Attorney's investigation.

54. In 1996, Mr. Muhlberg performed an audit of the business of the Raymond Marquez Organization to determine Petitioners' UBT liability.²³ He reviewed certain business records, newspaper articles and documents which were maintained by the District Attorney as part of the criminal investigation, including the Forfeiture Stipulation and the indictments. Mr. Muhlberg reconstructed and/or estimated the unincorporated business gross income and some expenses of the Raymond Marquez Organization for each of the Tax Years.

²³ Ex. 20 is Mr. Muhlberg's audit narrative, whereas Ex. E is a group of documents identified as the field audit report which does not include the narrative.

55. The original records of the Raymond Marquez Organization seized as a result of the warrants, which were kept in the possession of the District Attorney, were made available for Mr. Muhlberg's review. He made copies of volume sheets, weekly sales journals and expense documents. Among the records reviewed, Mr. Muhlberg examined the weekly sales journals for 1990, 1991 and 1993. Sales records were not available for 1992. He computed sales for 1990 to be \$23,621,490; and for 1993 to be \$23,885,779. He estimated that total sales for 1991 and 1992 were \$23,000,000 per year. When he was able to verify the amounts, he generally accepted the expenses reflected on the records reviewed for payroll, rent and certain miscellaneous expenses. In several instances, Mr. Muhlberg accepted a figure reflected on a specific weekly sheet and extrapolated that amount for each of the other weeks. For example, for 1993, the December rent expense of \$47,939 was verified in the records and then multiplied by 12 to arrive at an annual rental expense for that year of \$575,268. Mr. Muhlberg used the 1990 sales journal sheets to compute weekly miscellaneous expenses, estimating this amount to be \$62,535 and multiplying it by 52 to arrive at the annual miscellaneous expense of \$3,251,820. No records of "payouts" or payments on winning bets were provided to Mr. Muhlberg during the course of his audit.

56. Mr. Muhlberg adjusted income by expenses to arrive at net income subject to UBT for each of the Tax Years as follows: \$18,762,758 for 1990; 18,141,268 for 1991; \$18,141,268 for 1992; and \$19,027,047 for 1993.

57. On February 11, 1997, Respondent issued the Notice of Determination to Petitioners asserting \$2,962,893.64 UBT due for the Tax Years, in the following base tax amounts: \$750,510.32 for 1990; \$725,650.72 for 1991; \$725,650.72 for 1992; and \$761,081.88

for 1993. Penalties for fraud (50% or \$1,481,446.82), a penalty for substantial understatement of tax liability (10% or \$296,289.36), an interest penalty (50% of the interest or \$225,877.78) and a "Commissioner's" penalty²⁴ (\$1,000 per year, or \$4,000) were added. Interest was computed to November 22, 1996 in the amount of \$1,225,476.62. The total liability asserted in the Notice was \$6,582,844.76.

58. In May 1997, following the indictment of Petitioners and after the Notice was issued, the matter was referred to the State Income Tax Audit Unit by the State Revenue Crimes Bureau in order to compute for and collect additional income tax from Raymond Marquez for the 1993 period. In 1997, State Deputy Commissioner Robert Shepherd directed State Income Tax auditor Hedda Braun to assess and collect State Personal Income Tax from Raymond Marquez based on the information developed by Ms. Urzi and the District Attorney (the "State Audit"). The State auditor prepared a State Personal Income Tax Notice of Deficiency asserting \$228,921.41 of State and City income tax as a result of Raymond Marquez's 1993 unreported income.

59. The State auditor accepted Ms. Urzi's findings of additional net income, including the computations of income from slot machines, rent and the use of telephone. Ms. Braun adjusted income for "payouts" (i.e., the moneys paid to customers on winning bets) and certain other expenses. She concluded that the Raymond Marquez Organization had a 1993 net profit of \$1,460,531, derived as follows: net income from single action (income less payouts) of

²⁴ While the penalty is identified on the Notice as a "Commissioner's" penalty, there is no penalty specifically denoted as such in the Code. The reference to a "Commissioner's penalty" appears to be that penalty imposed at the discretion of the Commissioner pursuant to Code §11-525(g) for the failure to pay tax and/or file a tax return with intent to defraud.

\$439,910; net income from straight action (income less payouts) of \$588,737; net income from slot machines of \$319,770; and income from rental of premises and for the use of telephones of \$112,114. This amount was attributed to Petitioner Raymond Marquez as 1993 unreported income.

60. Vito LaMonica is an accountant who for eighteen years has been affiliated with Michael J. Berger & Co. Mr. LaMonica, a former Internal Revenue Service employee, has experience in examining an individual's gambling losses for federal income tax purposes, and has received training in forensic accounting. Mr. LaMonica performed accounting services for Petitioners, including preparing personal income tax returns for both Petitioners, and corporate income tax returns for Ms. Marquez's business interests. No UBT returns were filed by either Petitioner. Mr. LaMonica testified at the State proceeding concerning Raymond Marquez for the Tax Year 1993, as well as the proceedings in this case.

Mr. LaMonica reviewed several boxes of records seized by the District Attorney, as well as the computations of the City auditor. He testified that he reviewed the "entire" records provided in the course of both the State and City proceedings, including volume sheets (T. 368) and expense records (e.g., T. 376). He prepared schedules and worksheets based on these records. In many instances, Mr. LaMonica's computations closely approximated Mr. Muhlberg's findings. For example, his computations indicated slightly greater expense amounts than those identified by the City auditor; e.g., a rent expense of \$588,480 compared to \$575,268 calculated by the City auditor. (T. 383.)

Based only on his review of the seized documents, Mr. LaMonica concluded that the City auditor did not deduct the appropriate

amount of expenses in computing net income from the Raymond Marquez Organization. Mr. LaMonica concluded that the business was operating at a loss for three of the four Tax Years (T. 403, 407-8) and prepared schedules which purport to demonstrate this conclusion. While he stated that he was unable to "cross foot" the records he reviewed (T. 413), he did not offer any other documentary or third-party evidence supporting his identified expenses.²⁵ Finally, it was his opinion that Alice Marquez's approximate net worth for the Tax Years was "in excess of five million dollars." (T. 422.)

61. Wallace Musoff is a former Special Agent with the U.S. Treasury Department Intelligence Division (subsequently the Criminal Investigation Division), and a liaison to the City Police Department. He has received training in examining gambling activities and taught courses which concentrate on numbers gambling. He has qualified as an expert witness on gambling in Federal District Court proceedings. Mr. Musoff testified at the State proceeding which concerned Raymond Marquez's 1993 Personal Income Tax. He testified as an expert in these proceedings. Mr. Musoff was engaged by Petitioners to review the methodology of the State and City audits and to assist Mr. LaMonica in his examination.

Mr. Musoff testified that a numbers gambling operation may not be analyzed according to the same parameters used to examine a legitimate business, because the earning of profits in the gambling

²⁵ For example, while Mr. LaMonica asserted that income should be adjusted for so-called car rental expense, he testified that he had not reviewed any source documentation, such as receipts, of such expenses. (T. 471, 479-80). Similarly, while it was his position that the amounts denominated on the records as "rent" represented rents paid to unrelated third parties for the various spots (T. 503), as opposed to income to the Raymond Marquez Organization, Mr. LaMonica was unable to provide any verification of this assertion.

operation is highly contingent. For example, he stated that the higher the number of bets a gambling operator engages in, the greater the risk of loss in payout. (T. 523.) Mr. Musoff therefore rejects the use of traditional legitimate business ratios and other similar estimates in reviewing an illegal gambling operation.

Based on his experience, Mr. Musoff testified that a numbers gambling operation could expect to retain approximately twenty per cent of the amount it took in in bets. In his opinion, as the City auditor was unfamiliar with numbers gambling operations, Mr. Muhlberg's analysis was deficient and his conclusions with respect to income and expenses were incorrect.

Mr. Musoff supported the methodology used and schedules prepared by Mr. LaMonica, which calculate net losses for the Raymond Marquez Organization for 1990, 1991 and 1993. Mr. Musoff also did not offer any documentation in substantiation of the expenses he deducted from income, nor explain why a 20% net income factor would not accurately reflect the Raymond Marquez Organization's income.

62. Robert Stahl is the manager of the City Department of Finance's Criminal Audit Group, Enforcement Division. Mr. Stahl testified with respect to certain documents submitted pertaining to bank accounts of Alice Marquez, it was his opinion that the documents he examined suggest inconsistencies in the flow of funds between Ms. Marquez's domestic and foreign bank accounts.

63. In written argument submitted, Respondent agreed to reduce the asserted UBT liability. Respondent accepts \$1,460,651, the State's computation of the 1993 net income of the Raymond Marquez Organization, as being the amount of unincorporated

business taxable income that is subject to UBT for each of the Tax Years (instead of the approximately \$18,000,000 annual amount that had been computed by the City auditor). Respondent further asserts that this revised net income must be adjusted upward by adding ten per cent (10%) of that income as a disallowance of payments to proprietors or partners for services or the use of capital pursuant to Code §11-507(3). The theory of this adjustment is that since Petitioner's witnesses argued that payments to controllers of 10% of the profits were accepted gambling business expenses, and since the Raymond Marquez Organization did not employ controllers, Raymond Marquez himself must be both controller and banker and any deduction taken for payment to Mr. Marquez as controller should be disallowed as a payment to Mr. Marquez as partner/proprietor. There is, however, no evidence that the \$1,460,651 figure, that was computed by the State as the 1993 net income of the Raymond Marquez Organization, included any deduction for payments to Mr. Marquez.

64. On March 14, 2000, Acting Supreme Court Justice Laura E. Drager ordered that any grand jury testimonial evidence which had been released for "investigative purposes" could not be offered as evidence in this matter. Such evidence was accordingly excluded.

STATEMENT OF POSITIONS

Petitioners assert that neither Raymond Marquez nor Alice Marquez were engaged in the unincorporated business of the Raymond Marquez Organization during the Tax Years. Raymond Marquez further alleges that if it is determined that he was engaged in the business of that organization, the business was operating at a loss during the Tax Years.

Respondent asserts that Petitioners were involved in the business of the Raymond Marquez Organization during the Tax Years and that the unincorporated business earned, but did not report, unincorporated business taxable income for that period. Respondent asserts that Raymond Marquez ran the Raymond Marquez Organization and that Alice Marquez materially participated in that business in the capacity of financial manager. Finally, Respondent asserts that Petitioners failed to report income from the unincorporated business with intent to defraud the City of UBT for the Tax Years and are therefore liable for penalties computed thereon.

CONCLUSIONS OF LAW

An unincorporated business for UBT purposes is "any trade, business, profession or occupation conducted, engaged in . . . by an individual or unincorporated entity . . ." Code §11-502(a). Code §11-506 defines "unincorporated business gross income" to be "the sum of the items of income and gain [of the unincorporated business] includible in gross income for federal income tax purposes." For the Tax Years, the Code defines unincorporated business taxable income to be "the excess of [the business'] unincorporated business gross income over its unincorporated business deductions, allocated to the city" adjusted for certain statutory deductions and exemptions. The evidence clearly establishes that, during the Tax Years, Raymond Marquez was engaged in a City unincorporated gambling business known as the Raymond Marquez Organization. He did not file UBT returns for the Tax Years for that business, and did not otherwise report the income therefrom.

Where a taxpayer fails to file a UBT return, the Code specifically permits the Commissioner of Finance to "estimate the

taxpayer's city unincorporated business taxable income and tax thereon, from any information in the commissioner's possession" The Code also provides that assessment of UBT due may be made at any time where no return is filed. Code §11-523(c)(1)(A). There is no restriction on the audit methodology used by the taxing authority to determine UBT liability which would proscribe the use of estimates. *Matter of Hennekens v. State Tax Commissioner*, 114 A.D.2d 599 (3rd Dept. 1985).

Based on a review of the available business records, the City auditor determined that the Raymond Marquez Organization realized approximately \$23,000,000 annual gross income during the Tax Years and, therefore, as Petitioners participated in that business, they were liable for UBT. The auditor used the Raymond Marquez Organization's own records to compute liability and did not resort to external indices. *Matter of Atlantic & Hudson Ltd. Partnership*, DTA No. 806710 (State Tax Appeals Tribunal, January 30, 1992). Therefore, the auditor did not "estimate" Petitioner's UBT taxable income *per se*. Instead, he obtained gross income figures directly from the Raymond Marquez Organization's volume sheets and extrapolated from these base amounts only where records were incomplete or not available.

Respondent's auditor similarly made certain adjustments to gross income for expenses, using in the first instance the records from the Raymond Marquez Organization and extrapolating annual amounts in those instances where quarterly or monthly figures were available. Mr. Muhlberg was not provided with any records representing payouts on the various types of bets and therefore could not make that expense adjustment. Since the expense amounts which the City auditor used as adjustments to reduce income are based on the accounting records seized from the Raymond Marquez

Organization and Petitioners have offered no proof that the application of these expenses was invalid, they are accepted. *Matter of Giuliano v. Chu*, 135 A.D.2d 893 (3d Dept. 1987).

Subsequent to the audit, the State taxing authorities reviewed the business of the Raymond Marquez Organization. The State auditor also reviewed records which were seized during the District Attorney's investigation and which were initially analyzed by an auditor from the State Office of Tax Enforcement, Virginia Urzi. The State auditor, as had the City auditor, concluded that Raymond Marquez earned unreported income from the Raymond Marquez Organization in 1993. However, the State auditor determined that the gross income of the Raymond Marquez Organization should be adjusted by amounts representing payouts on winning bets. Accordingly, the State findings asserted an annual 1993 net income of \$1,460,651, which is substantially less than the amount asserted by Mr. Muhlberg.

In response to Petitioners' assertions with respect to the computation of UBT liability, Respondent has conceded that the City deficiency should be reduced so that the lower net income base computed by the State auditors for 1993 will be the unincorporated business taxable income base against which UBT will be asserted for each of the Tax Years. See, Finding of Fact 63, *supra*. Respondent wishes to increase that revised base amount by 10% to reflect payments by the Raymond Marquez Organization to Raymond Marquez personally. However, there is nothing in the record which even suggests that the more reasonable 1993 State computation included a specific deduction for payments made to Mr. Marquez by his own organization. Accordingly, \$1,460,651 is found to be the amount of the Raymond Marquez Organization unincorporated business taxable income for each of the Tax Years.

Petitioners assert that even this substantial reduction overstates the amount of the unincorporated business taxable income of the Raymond Marquez Organization for the Tax Years. Petitioner further opposes any computation which relies on the State findings as those findings were not sustained by a State Administrative Law Judge.²⁶

Petitioners have not met their burden of establishing that the income attributed to the Raymond Marquez Organization, as herein adjusted, is inaccurate or that the audit methodology was otherwise incorrect. *Matter of Grace v. New York State Tax Commission*, 37 N.Y.2d 193 (1975). *Matter of Drebin v. Tax Appeals Tribunal*, 249 A.D.2d 716 (3d Dept. 1998). Petitioners did not provide any substantiation of the unincorporated gambling business's activities or income for the Tax Years. Neither did Petitioners successfully refute the amount and source of expenses which the auditors attributed to this business. For example, while Petitioners argue that the gambling business operated at a loss for three of the four Tax Years, they did not document the expenses allegedly incurred by

²⁶ Raymond Marquez challenged the initial assertion of his 1993 State Personal Income Tax liability. See, *Matter of Raymond Marquez*, DTA No. 818561, (State Division of Tax Appeals, June 5, 2003) an Administrative Law Judge determination. Neither the Respondent, nor the undersigned, however, are bound by the findings of a State Administrative Law Judge. City Charter §170(d) states that the City Tribunal "shall follow as precedent the *precedential* decisions of the [State] tax Appeals Tribunal . . . insofar as those decisions pertain to any substantive legal issues currently before the Tribunal." City Charter §170(d). [Emphasis supplied.] See, also, *Matter of U.S. Trust Corporation and Subsidiaries*, TAT(E) 93-204(BT); TAT(E) 93-205(BT); TAT(E) 93-804(BT) (City Tribunal, November 25, 1997). State Tax Law §2010 states:

Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state. T.L. §2010.5.

Therefore the State Administrative Law Judge determination (which was not appealed) has no force or effect on the determination in this proceeding.

the various spots, or by the Raymond Marquez Organization, in the provision of services to the betting locations.²⁷ Petitioners did not provide substantiation of their position with respect to expense amounts denominated on the volume sheets; e.g., whether the amount denominated as "rent" was a business expense paid by the Raymond Marquez Organization or was, as the State findings suggest, rental income paid to the Raymond Marquez Organization.

Moreover, the only reasonable inference from the facts is that Raymond Marquez realized income from the unincorporated gambling business of the Raymond Marquez Organization. See, *Matter of Jacobson v. State Tax Commission*, 129 A.D.2d 880 (3d Dept. 1987). In his plea allocution, Mr. Marquez specifically stated that he attempted to conduct the affairs of the Raymond Marquez Organization and that he received moneys from unlawful gambling activities. The information obtained in the course of the investigation, including police observations, intercepted telephone and facsimile transmittals, and voluminous records evidencing the gambling enterprise, establish his day-to-day participation in and responsibility for the gambling business. As the Appellate Division noted in *Drebin, supra* at 718-719:

In the absence of any evidence from petitioner demonstrating any inaccuracy in the net profit figures or, more importantly, the distribution of these funds, it was not an unreasonable inference that he, as an owner . . . personally received the net profits as income or constructive dividends.

²⁷ For example, Petitioner's witnesses testified at length about a car rental expense. T. 471-2; 480. However, no supporting documentation was ever submitted.

With respect to Alice Marquez, Respondent's position (as articulated by Mr. Muhlberg) is that she was involved in the unincorporated business of the Raymond Marquez Organization and is liable for UBT because she pled guilty to the possession of a gambling record (T. 57) and was liable under the terms of the Forfeiture Agreement (Ex. E). These facts alone, however, do not establish that Alice Marquez materially participated in, or otherwise earned income from, the Raymond Marquez Organization. Ms. Marquez pled guilty to one count of the misdemeanor possession of a gambling record on April 19, 1994, a date on which the search was conducted of the Florida motel (among other Marquez Organization sites and related premises). See, Finding of Fact 25, *supra*. The plea itself was to a lesser included offense in one of the over two hundred separate counts which constituted pattern acts of the indictment. Further, her liability pursuant to the Forfeiture Agreement flowed from her ownership of certain real property which was attached and personal property which was seized in order to ensure payment of the forfeiture fine.

It is true that Alice Marquez was named in Count One of the indictment as an individual who worked for the Raymond Marquez Organization and it was specifically alleged that she "handled certain financial transactions for the organization." See, Tribunal Ex. I, Ex. A to Affirmation in Opposition to Motion for Summary Determination. Nevertheless, the District Attorney's investigation did not establish with any degree of certainty that Ms. Marquez was active in the organization. For example, based in part upon the Forensic Accountants' report, Respondent alleges that Ms. Marquez was the organization's "money manager." While the report suggests that Ms. Marquez may have processed proceeds of the Raymond Marquez Organization through her off-shore accounts, it also indicates that it cannot be conclusively established that her

excess income was in fact gambling business income. Similarly, although it was proposed that receipts existed for several hundred thousand dollars worth of money orders allegedly transferred from the Raymond Marquez Organization to Alice Marquez, the actual records of the referenced transactions, which were reviewed by the Forensic Accountants for the District Attorney, were in substantially smaller amounts and it was only hypothetically suggested that they represented a funds transfer from the Raymond Marquez Organization.²⁸ In addition, Detective Huthansel testified that during the course of his investigation there were few references to Ms. Marquez. (T. 305-6, 308, 359-60.) Moreover, the intercepted facsimile transfers between City offices of the Raymond Marquez Organization and Alice Marquez's Florida motel only establish that certain documents (which obliquely referenced gambling operation income) were transmitted to Raymond Marquez at the Florida hotel, where he was in residence at the time. Based on the record, it is equally plausible that the financial responsibility for the business rested on Evelyn Gonzalez, the alleged bookkeeper for the Raymond Marquez Organization.

While the facts suggest that Alice Marquez realized income during the Tax Years in excess of her reported expenses,²⁹ there is no clear evidence that the source of this excess unreported income was the Raymond Marquez Organization. It is possible that any additional unreported income was attributable to Ms. Marquez's own "adult entertainment" enterprises, which were not located in the

²⁸ See, e.g., Tribunal Ex. I, Ex. G to Affirmation in Opposition to Motion for Summary Determination, p. 2, which refers to "presently available money order documentary evidence of \$122,100."

²⁹ See, generally, Tribunal Ex. I, Exs. E, F, and G to Affirmation in Opposition to Motion for Summary Judgment (reports prepared by Evelyn Serrano and the Forensic Accountants), contrasted with Ex. F and Tribunal Ex. I, Ex. C to Notice of Motion for Summary Judgment, Federal and State income tax returns for Alice Marquez and affiliated businesses.

City. In sum, Respondent has not established that Alice Marquez participated in the business of the Raymond Marquez Organization or that she received income therefrom. Her plea to a lesser included Count One offense falls short of an admission that she was a participant in that organization. Her contacts with Mr. Marquez and with others associated with the organization may not necessarily have been benign, as Petitioner suggests, but the record does not support a finding that she was a principal in the Raymond Marquez Organization who is liable for UBT computed on the income of that unincorporated business.

Respondent has asserted several penalties in the Notice. On the facts, and pursuant to the Code, Raymond Marquez is liable for penalties asserted for his failure to file UBT returns (Code §11-525(a)(1)(A)), for his failure to pay UBT required to be shown on such returns (Code §11-525((a)(1)(C)(3))), and for the substantial understatement of UBT liability (Code §11-525(j)). Respondent also asserts that the UBT deficiency is due to Mr. Marquez's failure to pay the tax due with intent to defraud the City and, therefore, that Mr. Marquez is liable for a penalty of fifty percent of the deficiency, pursuant to Code §11-525(f)(1), as well as a discretionary "additional" penalty of \$1,000 for each of the Tax Years, referred to as the "Commissioner's penalty," pursuant to Code §11-525(g).

The burden to prove that a deficiency is due to fraud rests upon Respondent. Code §11-529(e). Respondent has proved by clear and convincing evidence that Raymond Marquez willfully, with knowledge and intent to defraud the City of UBT, intentionally

failed to report and failed to pay UBT due and owing.³⁰ Raymond Marquez's conduct of the unincorporated illegal gambling business resulted in a deliberate nonpayment of UBT. *Matter of T. Management*, DTA No. 816662 (State Tax Appeals Tribunal, April 12, 2001); *Matter of Sener*, DTA No. 800498, (State Tax Appeals Tribunal, May 5, 1998), citing *Matter of Shutt* (State Tax Commission, July 13, 1982). Finally, Petitioners do not affirmatively oppose the imposition of these penalties. The penalties asserted in the Notice are therefore sustained.

ACCORDINGLY, IT IS CONCLUDED THAT:

A. Raymond Marquez was a principal in the unincorporated gambling business known as the Raymond Marquez Organization. He received income from that business which he did not report for City UBT purposes, nor did he pay UBT thereon.

B. The evidence presented is insufficient to conclude that Alice Marquez was engaged in the illegal gambling business of the Raymond Marquez Organization. Therefore, Alice Marquez is not liable for UBT assessed on the income from that organization.

C. The revised amount of unincorporated business taxable income of the Raymond Marquez Organization for each of the Tax

³⁰ Raymond Marquez pled guilty to the crime of attempted enterprise corruption. The charged tax offense (filing a false instrument) was not included in the plea agreement. Therefore, Raymond Marquez is not collaterally estopped from arguing that he did not fail to file UBT returns with intent to defraud the City. *Plunkett v. Commissioner*, 465 F.2d 299 (7th Cir. 1972); *Matter of T. Management*, *supra*. Nevertheless, the record in this matter overwhelmingly establishes that Mr. Marquez was engaged in a pattern of criminal conduct over an extended period of time which includes the Tax Years. By his plea, Mr. Marquez admitted that he received moneys from the illegal operation of a gambling business, the Raymond Marquez Organization, and the information reviewed on audit establishes that he earned substantial moneys from his criminal conduct which was neither reported nor was UBT paid thereon.

Years is \$1,460,651. That amount may not be increased by an add-back of ten percent representing payments to Raymond Marquez for services to the Raymond Marquez Organization as it is neither evident nor likely that the \$1,460,651 amount computed by the State for 1993 included a reduction for payments made to Mr. Marquez.

D. Respondent appropriately asserted penalties for failure to file UBT returns and pay UBT due for the Tax Years with intent to defraud the City.

The Notice of Determination, dated February 11, 1997, is revised to exclude Alice Marquez and to reflect a recomputed UBT liability based on unincorporated business taxable income of \$1,460,651 for each of the Tax Years, plus penalties and interest computed thereon.

DATED: March 8, 2006
New York, New York

ANNE W. MURPHY
Administrative Law Judge