

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GROTTO D'ORO BAY CORP.	:	DECISION
	:	DTA NO. 816776
for Redetermination of a Deficiency, Revision of a	:	
Determination or for Refund of Corporation Franchise	:	
Tax, Personal Income Tax, and Sales and Use Taxes	:	
under Articles 9-A, 22, 28 and 29 of the Tax Law for the	:	
Period December 1, 1993 through December 15, 1997.	:	

Petitioner Grotto D'Oro Bay Corp., c/o Joseph Faga, 1718 East 36th Street, Brooklyn, New York 11234, filed an exception to the order of the Administrative Law Judge issued on November 12, 1999. Petitioner appeared by Marvin E. Kramer & Associates, P. C. (Marvin E. Kramer, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether a petition filed in this matter, which was signed by an individual who could not legally represent the corporate petitioner, conferred jurisdiction on the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in her order dated September 16, 1999 and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

A petition was filed on October 23, 1998 and received by the Division of Tax Appeals on October 27, 1998. The petition was signed by Ben Faga and dated October 21, 1998. Petitioner's representative, Marvin E. Kramer, Esq., submitted a cover letter with the petition, dated October 22, 1998, which provided in relevant part:

We are the attorneys for Messrs. Ben Faga, Tom Faga and Joseph Faga, former owners of the capital stock of Grotto D'Oro Bay Corp., who sold said corporate stock on August 21, 1995. In view of the fact that the corporation is defunct and in anticipation of a possible effort by you to impute responsible party liability upon my clients, we are submitting a petition on behalf of the corporation disputing and seeking review of these tax obligations.

Attached to the petition was a copy of a document, issued by the Division of Taxation ("Division"), entitled "Supporting Documentation to Proof of Claim" ("Proof of Claim") and bearing the caption "United States Bankruptcy Court, ern [sic] District of New York, In the Matter of Grotto D'Oro Bay Corp." This document states that as of June 30, 1997, the date of the filing of petitioner's bankruptcy petition, the Division had substantiated claims against petitioner in the amount of \$588,289.70, including penalty and interest. These claims numbered nineteen and consisted of one Article 9-A corporation tax notice, eight Article 22 withholding tax notices and ten Article 28 and 29 sales and use tax notices.¹

¹The sales and use tax notices listed were notice numbers L-0011617008-5, L-0011868543-4, L-012343519-3, L-013169474-4, L-012786249-7, L-013381059-2, L-013911854-9, L-014203340-4,

An amended petition² was filed on December 9, 1998 and received by the Division of Tax Appeals on December 15, 1998. The petition was signed Ben Faga and dated December 3, 1998.

The petition, in relevant part, states:

This Petition is being submitted by the former President of the Corporation. On August 21, 1995, the capital stock of the Corporation was sold to Messrs. Astuto and Aurilia. Included in the transaction was an adjustment in favor of the withdrawing shareholders Tom Faga and Ben Faga pursuant to which the individual successors and the corporation assumed substantial payment of all the past due taxes. Although this Petition is in behalf of the corporation, the issues are raised as to pre-sale tax obligations and post sale tax obligations. The former shareholders are concerned that if they do not provide a defense to this matter, they will be improperly bound by the decision as regards the corporation and then be subject to a possible responsible party determination.

Joe Faga was a shareholder to both the predecessor and successor operation. He, however, was not a responsible party to the successor operation being systematically excluded from management. We can demonstrate by judicial proceeding, proof that he was not only excluded from management, but from working for the corporation or present at their premises for a substantial portion of the period involved.

Attached to the amended petition was a copy of a two-page Consolidated Statement of Tax Liabilities (“Statement”), issued to petitioner by the Division on November 23, 1998. This document shows a current balance due of \$616,642.52. There are 14 notices listed. These include the Article 9-A corporation tax notice listed on the Proof of Claim document, four of the

¹(...continued)
L-0146124525-8 and L-015104218-7.

²Pursuant to 20 NYCRR 3000.4(d)(1) petitioner was allowed to amend its petition once without leave prior to the expiration of the time period the Division of Taxation had to file its answer.

eight Article 22 withholding tax notices listed on the Proof of Claim document, and nine of the ten Article 28 and 29 sales and use tax notices listed on the Proof of Claim document.³

An answer, dated February 4, 1999, was received by the Division of Tax Appeals.⁴ The answer was signed by Dennis A. Fordham, Esq., the representative of the Division of Taxation at that time. The answer, in relevant part, states:

16. DENIES KNOWLEDGE AND INFORMATION sufficient to form an opinion as to the allegation in the first sentence of the first un-numbered paragraph of the Petition that the Petition is submitted by [Ben Faga] the former President of the Corporation. AFFIRMATIVELY STATES, moreover, that insofar as Ben Faga is no longer an officer of the Petitioner that Ben Faga is not an agent authorized to act on behalf of the Petitioner. AFFIRMATIVELY STATES, therefore, that the Petition is a nullity and should be dismissed by the Division of Tax Appeals.

* * *

20. DENIES the allegation in the last sentence of the first un-numbered paragraph of the Petition that the former shareholders are required to defend the corporation in order to defend themselves against possible responsible officer liabilities. AFFIRMATIVELY STATES, that the former shareholders's [sic] personal liability as responsible persons for any part of the Petitioner's Sales Tax assessments (under sections 1131(1) and 1133(a) of the Tax Law) is properly the subject of a separate petition in the names of such officers disputing any notices of determination issued against them personally.

A Motion for Summary Determination was filed by the Division of Taxation on April 1, 1999 and received by the Division of Tax Appeals on April 2, 1999. The Notice of Motion was dated April 1, 1999 and signed by Robert Maslyn, Esq., the current representative of the Division

³The sales and use tax notices listed on the statement were notice numbers L-0011617008-5, L-0011868543-4, L-012343519-3, L-013169474-4, L-012786249-7, L-013911854-9, L-014203340-4, L-0146124525-8 and L-015104218-7. Notice number L-013381059-2 was not listed on this statement, but was listed on the Proof of Claim.

⁴It is not possible to determine from the answer when it was filed, since there is no envelope attached, or when it was received by the Division of Tax Appeals, since there is no date stamp or other indication of receipt on the face of the document.

of Taxation.⁵ The sole ground stated for the motion is that petitioner did not timely file either a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals.⁶ Other than the copy of the answer submitted in support of the motion (in particular paragraphs 16 and 20), there is no mention in any of the documents of a motion to dismiss on the grounds that the person signing the petition was not authorized to sign on behalf of petitioner.

The only notice submitted by the Division in support of its motion for summary determination — Notice of Determination number L-015104218-7 — relates exclusively to sales and use taxes for the period December 1, 1993 through December 15, 1997. This notice was listed both in the Proof of Claim submitted with the petition, and the Statement submitted with the amended petition.

Petitioner did not file a timely response to the Division's motion.⁷

On June 17, 1999, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition which explained that a review of the record indicated that the petition was not valid in that it was not signed by a person authorized to sign on behalf of Grotto D'Oro Bay Corp. The

⁵The caption of the Notice of Motion lists the type of tax as Article 9-A (corporation franchise tax), but does not state what time period is at issue. The remainder of the motion papers of the Division of Taxation relate exclusively to sales and use taxes for the period December 1, 1993 through December 15, 1997.

⁶The motion papers assert that petitioner filed a late request for conciliation conference and indicate that in support of that assertion a copy of such request, together with the envelope it was delivered in and a copy of the Conciliation Order Dismissing Request, were attached as exhibits. An original envelope addressed to the Bureau of Conciliation and Mediation Services was attached to the motion papers as Exhibit 4. However, the record does not contain either a copy of the request or a copy of the Conciliation Order Dismissing Request. Furthermore, none of the pleadings filed make any mention of a request for a conciliation conference having been filed, and no conciliation order was attached to the petition.

⁷Petitioner's response was due by May 3, 1999. On June 18, 1999 a request from petitioner to be allowed to file a late response was received. By letter dated June 18, 1999, petitioner was informed that such request would be held in abeyance pending the outcome of the proceedings regarding the Notice of Intent to Dismiss Petition.

notice further explained that on its own motion the Division of Tax Appeals, intended to issue an order dismissing the petition unless the parties advised the Division of Tax Appeals why such an order should not be issued.

Petitioner submitted a response to the Notice of Intent to Dismiss, received by the Division of Tax Appeals on July 12, 1999, which consisted of an affirmation of petitioner's attorney, an affidavit of Joseph Faga and five powers of attorney signed by Joseph Faga naming Marvin E. Kramer, Esq. as the authorized representative.

Only one of the powers of attorney submitted lists petitioner as the taxpayer. The other four powers of attorney are individual powers of attorney listing Joseph Faga as the taxpayer and authorizing representation on his behalf for proceedings involving sales and use taxes for the following notice numbers: L-016101436-1, L-016101437-9, L-016101438-8 and L-016101439-7. These notice numbers do not appear anywhere else in the record. In particular, they do not appear on the Proof of Claim submitted with the petition, or the Statement submitted with the amended petition. Furthermore, Joseph Faga is not listed as a petitioner in either the petition or the amended petition. Being unable to relate these powers of attorney to the record, such powers are considered irrelevant and will not be considered part of the record.

The corporate power of attorney that lists petitioner as the taxpayer is for proceedings involving Notice of Determination number L-015104218-7. This notice is listed in the petition and the amended petition and a copy of the notice was submitted as part of the Division's documents in support of its motion for summary determination. The power is signed by Joseph Faga as corporate officer. Next to Joseph Faga's signature the spaces for corporate title, date and corporate seal are blank. Two witnesses signed the power and dated it July 2, 1999 under the

sentence: “The corporate officer signing [sic] this Power of Attorney appeared before us and certified that he/she had the authority to execute this Power of Attorney on behalf of the taxpayer.”

The affirmation of petitioner’s representative submitted in response to the Notice of Intent to Dismiss Petition asserts that Ben Faga was an appropriate person to sign the petition. First, petitioner’s representative asserts that while Ben Faga was not an officer of petitioner at the time the petition was filed, he was subject to “claims” being made against him as a responsible officer of petitioner.⁸ Second, petitioner’s representative asserts that because Ben Faga held “stock certificates” and “stock powers” as collateral for an indebtedness of petitioner, upon the default of petitioner Ben Faga had automatically become a shareholder.⁹ Third, petitioner’s representative argues that there are issues concerning the corporate liability that would affect the liability of persons determined to be responsible officers and therefore, the law providing for the filing of a petition must be interpreted to include any possible responsible person as a person authorized to file a petition on behalf of a corporate taxpayer. Petitioner’s representative argues that equity requires that a person determined by the Division to be a responsible person of a

⁸If the “claims” referred to are meant to include a responsible person notice issued by the Division for the taxes at issue in this matter, this is contrary to the assertions made in the petition and amended petition that the proceedings were being brought on behalf of the corporation in case of “possible” responsible person liabilities being asserted against Ben Faga, Tom Faga and Joseph Faga. Furthermore, there is no affidavit of Ben Faga, or any documentary evidence in the record to support the assertions that Ben Faga was subject to any “claims” as a responsible person for petitioner.

⁹There is no affidavit of Ben Faga, or any documentary evidence in the record to support the assertions that petitioner was indebted to Ben Faga, or that any collateral was given as a result of such indebtedness.

corporate taxpayer be allowed to challenge the findings of the Division regarding the corporation.¹⁰

In the alternative, petitioner's representative argues that contrary to the assertions in the petition that Ben Faga, Tom Faga and Joseph Faga sold their stock in the corporation in August of 1995, Joseph Faga never sold his stock in the corporation and remained an officer. Submitted in support of this proposition was the affidavit of Joseph Faga. The affidavit states that the affiant is an officer of petitioner, that he was familiar with the documents filed on behalf of petitioner, that he authorized Ben Faga to sign such documents, and that if it was determined that Ben Faga did not have authority to sign the documents, he adopted as his own the signatures of Ben Faga. The affidavit does not specify the office held by Joseph Faga for petitioner.

The Division submitted a letter in response to petitioner's submission requesting that the petition be dismissed on the grounds that it was not signed by a person authorized to sign on behalf of petitioner. The letter asserts that nothing in petitioner's submission addressed the issue of the lack of authority of Ben Faga to sign the petition. The Division also asserts that petitioner's argument that it is necessary to allow Ben Faga to file a petition on behalf of petitioner because of possible responsible person assessments is invalid because a responsible person issued a notice by the Division would have his own right to contest the Division's determination.¹¹

We find the following additional facts:

¹⁰Petitioner's representative did not cite any legal authority for the proposition that the basis for the corporate liability could not be challenged during a proceeding before the Division of Tax Appeals on a responsible person notice issued by the Division.

¹¹The Division did not cite any legal authority for this proposition.

On September 16, 1999, the Administrative Law Judge issued an order holding that Ben Faga was not a person authorized to sign a petition on behalf of petitioner. However, the Administrative Law Judge did conclude that Joseph Faga, as an officer of petitioner, was a person authorized to sign a petition on behalf of petitioner. Pursuant to that order, the Administrative Law Judge allowed petitioner 30 days from that date to file a corrected petition signed by Joseph Faga as officer.

Petitioner failed to comply with the aforesaid order of September 16, 1999 in that petitioner failed to file a corrected petition signed by Joseph Faga, as officer, on or before October 18, 1999.

On November 12, 1999, the Administrative Law Judge issued an order pursuant to 20 NYCRR 3000.3(d) dismissing the petition.

On November 22, 1999, petitioner filed a motion for relief from the September 16, 1999 and November 12, 1999 orders and, at the same time, filed a petition executed by Joseph Faga as officer of petitioner.

On December 6, 1999, petitioner filed an exception to the November 12, 1999 order with the Tax Appeals Tribunal (hereinafter "Tribunal"), noting therein that a petition signed by Joseph Faga had been filed with the Division of Tax Appeals.

On January 6, 2000, the Administrative Law Judge denied petitioner's motion for relief from the September 16, 1999 and November 12, 1999 orders.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the petition and amended petition filed in this matter explicitly stated that Ben Faga was a former officer of the corporation who had sold his corporate stock on August 21, 1995, a date several years prior to filing the petition herein at issue. The record in this proceeding did not contain any evidence to show that Ben Faga was a corporate employee at the time the petition was filed. Since Ben Faga was neither an officer nor

an employee of petitioner at the commencement of these proceedings, the Administrative Law Judge concluded that he was not a person authorized to appear for petitioner.

The Administrative Law Judge rejected each of petitioner's arguments that Ben Faga was an appropriate person to sign the petition. The Administrative Law Judge found that aside from an authorized representative such as a licensed attorney, certified public accountant, Internal Revenue Service enrolled agent or licensed public accountant, the Tribunal's Rules of Practice and Procedure prohibited a personal appearance on behalf of a corporation by anyone other than an officer or employee of the corporation. The Administrative Law Judge found no provision in the Tribunal's Rules which allowed a shareholder or a person who arguably had claims against him as one responsible for corporate actions to appear on behalf of a corporation. Since Ben Faga could not legally appear on behalf of petitioner, the Administrative Law Judge concluded that any attempt by a corporate officer to subsequently authorize him to do so was void.

The Administrative Law Judge did, however, conclude that Joseph Faga was authorized to file a petition on behalf of petitioner. Based on a power of attorney in which Joseph Faga certified before two witnesses that he had the authority to execute the power of attorney on behalf of petitioner and an affidavit executed by Joseph Faga stating that he was an officer of petitioner, the Administrative Law Judge found that Joseph Faga had demonstrated that he was an officer of petitioner at the time that the petition was filed.

The Administrative Law Judge stated that pursuant to the Tribunals' Rules of Practice, a petition must have a signature in order to be valid and, in the case of a personal appearance by a corporate petitioner, that signature must be provided by an officer or employee of the petitioner. If a petition is not filed in the proper form, the Administrative Law Judge noted that 20 NYCRR

3000.3(d) provides a procedure whereby corrections may be accomplished. Pursuant to that section, the petition is to be returned to petitioner together with a statement indicating the requirements with which the petition does not comply, and the petitioner receives an additional 30 days within which to file a corrected petition. The corrected petition is deemed to have been filed at the time the original petition was filed. If petitioner fails to serve a corrected petition within the time prescribed, the petition is to be dismissed.

The Administrative Law Judge concluded that this procedure should have been followed in the present case and the failure to do so was not the fault of petitioner. The Administrative Law Judge found that the procedure that was available at the time the petition was filed should be available to petitioner now. By order issued on September 16, 1999, the Administrative Law Judge allowed petitioner 30 days within which to file a corrected petition under the signature of Joseph Faga as officer, said signature being the only change allowed in the corrected petition. The Administrative Law Judge further allowed petitioner to file a response to the pending motion by the Division for summary determination within that same 30-day period.

On November 12, 1999, the Administrative Law Judge issued an additional order in which she determined that petitioner did not file a corrected petition in accordance with her September 16, 1999 order. As a result, she dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that a petition filed by Ben Faga was valid for the corporation since under a default by the successors (to Ben Faga), he had the right to retake the stock and resume the office of President. Petitioner argues that although the corporation was never reinstated to operations, and Mr. Faga had no personal liability for the time period

involved, he had the theoretical rights of the President to execute documents for the corporation since a small period of time involved in this proceeding related to a period during which Ben Faga was an operational owner before the transfer to the successors.

The Division, in opposition, argues that petitioner has offered no documents or other evidence to support its assertions on exception nor has it cited any law supporting its novel proposition of the rights of a theoretical corporate President. Rather, the Division claims that the failure to file a valid petition requires a finding of lack of jurisdiction. The Division agrees with the Administrative Law Judge's conclusion that Ben Faga, at the time of the filing of the petition, was neither an officer, employee or other person authorized to appear and act on behalf of petitioner corporation. As he was not in the category of persons who could legally act or appear on behalf of petitioner or be entitled to so act or appear, he could not be authorized to do so. Thus, the Division asserts that the petition signed by Ben Faga was invalid and the Division of Tax Appeals has no jurisdiction to consider such petition.

Petitioner, in reply, argues that the shares of Ben and Tom Faga had been sold to third parties while Joe Faga remained a shareholder and officer of the corporation. As a result of the default on indebtedness to Ben and Tom Faga, they foreclosed on the collateral which they held in escrow, including stock certificates. Thus, argues petitioner, prior to the filing of any petition, Ben, Tom and Joe were shareholders of the corporation. Although the corporation did not resume operations, petitioner believes that the three shareholders assumed all of their positions as officers of the corporation. Accordingly, petitioner asserts that Ben Faga was President of the corporation at the time he executed the petition. Further, petitioner argues that there may be personal liability of the shareholders for certain of the claims asserted against the corporation.

Thus, it is appropriate that the corporation be able to defend itself. Petitioner believes that it is a denial of due process to deny the corporation the right to be heard on its petition.

OPINION

We affirm the order of the Administrative Law Judge dismissing this matter. Tax Law § 2014(1) limits a taxpayer's choice of representatives in a proceeding in the Division of Tax Appeals as follows:

Appearances in proceedings conducted by an administrative law judge or before the tax appeals tribunal may be by the petitioner or the petitioner's spouse, by an attorney admitted to practice in the courts of record of this state, by a certified public accountant licensed in this state, by an enrolled agent enrolled to practice before the internal revenue service or by a public accountant licensed in this state. The tribunal may allow any attorney, certified public accountant, or licensed public accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a petitioner in proceedings before the tribunal for a particular matter. *In addition, the tax appeals tribunal may promulgate rules and regulations to permit a corporation to be represented by one of its officers or employees* (emphasis added).

The Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.2[a][1]) provide as follows:

Representation of petitioner in proceedings before the tribunal and administrative law judges. (1) Personal appearance. Appearances in proceedings conducted before the tribunal or administrative law judges may be by the petitioner or the petitioner's spouse. A partnership may act through one of its general partners without filing any power of attorney provided that the partner is authorized to act for the partnership and certifies that he or she has such authority. Where a corporation files a petition, it may act through one of its officers or employees. Where the corporation acts through an employee, a power of attorney executed by an officer of the corporation must be filed pursuant to subdivision (c) of this section.

At the time the petition was filed, Ben Faga was neither an officer nor an employee of petitioner nor a person otherwise authorized to appear and act on behalf of petitioner. Petitioner argues that Ben Faga was a “theoretical” president and a de facto president as a result of the default by petitioner’s shareholders. Petitioner points to no authority for this proposition nor is there evidence in the record before us that would allow us to conclude that Ben Faga was president of petitioner at the time he executed the petition or amended petition herein. The Administrative Law Judge correctly concluded that Ben Faga was not in the category of persons who could execute a petition on behalf of petitioner in any event, despite the subsequent attempt by Joseph Faga to ratify his actions (*Matter of Levin*, Tax Appeals Tribunal, April 16, 1998, ***dismissed for lack of personal jurisdiction*** App Div 3, Oct. 20, 1998, case No. 82927, *lv denied* 92 NY2d 819, 685 NYS2d 421). Thus, the petition signed by Ben Faga was invalid and the Division of Tax Appeals never acquired subject matter jurisdiction to consider the merits of the petition.

Petitioner might have cured the defect in its petition by filing a corrected petition signed by Joseph Faga on or before October 18, 1999 as allowed by the Administrative Law Judge in her September 16, 1999 order. Petitioner did not avail itself of this remedy and, as required by the Tribunal’s Rules of Practice, the Administrative Law Judge properly dismissed the petition.

Subsequent to the November 12, 1999 order of the Administrative Law Judge dismissing this matter, however, a petition was executed by Joseph Faga on behalf of petitioner and filed with the Division of Tax Appeals on November 22, 1999. In her September 16, 1999 order, the Administrative Law Judge concluded that Joseph Faga was an officer of petitioner and a person with authority to file such a petition. While the original petition signed by Ben Faga was

appropriately dismissed on jurisdictional grounds, there has been no action taken with respect to the petition filed on November 22, 1999. As a result, the petition signed by Joseph Faga is accepted as filed on November 22, 1999 with the Division of Tax Appeals.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Grotto D'Oro Bay Corp. is denied;
2. The order of the Administrative Law Judge is sustained;
3. The petition of Grotto D'Oro Bay Corp., dated December 3, 1998 and signed by Ben Faga, is dismissed; and
4. The petition of Grotto D'Oro Bay Corp., signed by Joseph Faga and filed on November 22, 1999, is referred back to the Division of Tax Appeals for appropriate action.

DATED: Troy, New York
June 29, 2000

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner