

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GROTTO D'ORO BAY CORP.	:	ORDER
	:	DTA# 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. ¹	:	

Petitioner, Grotto D'Oro Bay Corp., 3206 Emmons Avenue, Brooklyn, New York 11235, filed a petition for redetermination of a deficiency, revision of a determination or for refund of corporation franchise, personal income, 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.

On June 17, 1999 the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4). The parties had 30 days to respond to the notice. Both petitioner, appearing by Marvin E. Kramer, Esq., and the Division of Taxation, appearing by Terrence M. Boyle, Esq. (Robert Maslyn, Esq., of counsel), submitted responses to the notice. The response of the Division of Taxation was received on July 14, 1999, which date began the 90-day period for the issuance of this order.

Upon review of the pleadings, the documents submitted in support of the Division of Taxation's motion for summary determination, the Notice of Intent to Dismiss Petition, and the responses to such notice, Roberta Moseley Nero, Administrative Law Judge, renders the following order.

¹The documents attached to the petition and amended petition filed in this matter list various corporation franchise, personal income tax (withholding tax) and sales and use tax liabilities for the years 1995, 1996 and 1997 (*see*, Findings of Fact "2", "4"). However, the only notice submitted by the Division of Taxation 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.

ISSUE

Whether a valid petition conferring jurisdiction on the Division of Tax Appeals was filed in this matter.

FINDINGS OF FACT

1. 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.

2. 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.²

3. An amended petition³ 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:

²The 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, L-0146124525-8 and L-015104218-7.

³Pursuant 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.

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.

4. 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 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.⁴

5. An answer, dated February 4, 1999, was received by the Division of Tax Appeals.⁵ 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

⁴The 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.

⁵It 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.

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.

6. 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 of Taxation.⁶ 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.⁷ 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.

7. 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

⁶The 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.

⁷The 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.

was listed both in the Proof of Claim submitted with the petition, and the Statement submitted with the amended petition.

8. Petitioner did not file a timely response to the Division's motion.⁸

9. 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 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.

10. 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.

11. 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.

12. 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

⁸Petitioner'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.

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."

13. 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.⁹ 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.¹⁰ 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

⁹If 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.

¹⁰There 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.¹¹

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.

14. 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.¹²

CONCLUSIONS OF LAW

A. The Division of Tax Appeals acquires jurisdiction over a given matter by the filing of a petition (Tax Law § 2008; 20 NYCRR 3000.3; ***Matter of Levin***, Tax Appeals Tribunal, April 16, 1998, ***dismissed for lack of personal jurisdiction*** App. Div. 3, October 20, 1998, Case #82927, ***lv denied*** 92 NY2d 819, 685 NYS2d 421). The petition in the present matter was filed by a

¹¹Petitioner'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.

¹²The Division did not cite any legal authority for this proposition.

corporation. A corporation may appear before the Division of Tax Appeals by an officer or an employee of the corporation.¹³ (20 NYCRR 3000.2[a][1]; *see also*, Tax Law § 2014[1].) No other personal appearance by a corporation is allowed (*see*, 20 NYCRR 3000.2[d]).¹⁴

B. The petition and amended petition in this matter were signed by Ben Faga. These documents explicitly state that Ben Faga is a former officer of the corporation and that he sold his stock in the corporation on August 21, 1995, more than three years prior to the filing of the petition in this matter. There is no evidence in the record that Ben Faga was an employee of the corporation at the time the petition was filed.¹⁵ Since Ben Faga was neither an officer nor an employee of petitioner at the time of the commencement of these proceedings, he was not a person authorized to appear for petitioner.

C. Petitioner argues that Ben Faga was an appropriate person to sign the petition because: (1) at the time the petition was filed there existed claims against him as a responsible person for the corporation; (2) petitioner was indebted to Ben Faga as evidenced by his “stock certificates” and “stock powers” and when petitioner defaulted on its obligations to Ben Faga he then became a de facto shareholder of petitioner; and (3) Ben Faga was authorized by Joseph Faga, an officer of petitioner, to sign the documents submitted in these proceedings.

With regard to petitioner’s first two arguments, there is no provision in the Rules of Practice and Procedure governing proceedings before the Division of Tax Appeals allowing a shareholder or a person having claims against him as a person responsible for corporate actions to appear on behalf of a corporation. In fact, the rules prohibit a personal appearance on behalf

¹³An employee appearing on behalf of a corporation must file a power of attorney pursuant to 20 NYCRR 3000.2(c).

¹⁴While not relevant to the present matter, a corporation may also be represented “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” or by an attorney or accountant from another jurisdiction granted permission to appear in a particular matter by the Tax Appeals Tribunal (Tax Law § 2014[1]; 20 NYCRR 3000.2[a].)

¹⁵Even if such evidence existed, as an employee Ben Faga would have been required to submit a power of attorney from the corporation, which he did not (20 NYCRR 3000.2[c]; *see also*, *Matter of Levin, supra*).

of a corporation being made by anyone other than an officer or employee of the corporation (20 NYCRR 3000.2[a][1]; [d]).

Petitioner's third argument that Ben Faga was authorized by an officer of petitioner to appear on its behalf also fails. Having held that Ben Faga could not legally appear on behalf of petitioner since he was neither an officer nor employee of petitioner, any attempt to authorize him to do so is simply void. (*Id.*)

D. Petitioner argues that Joseph Faga was a person authorized to sign the petition on its behalf since he was an officer and shareholder of petitioner.¹⁶ The argument that Joseph Faga was authorized to sign the petition as a shareholder also fails because a shareholder, not being an officer or employee, is not authorized to appear on behalf of a corporate petitioner. (*Id.*)

In support of its argument that Joseph Faga was authorized to sign the petition in this matter because he was an officer of petitioner, petitioner submitted a power of attorney signed by Joseph Faga as corporate officer and an affidavit executed by Joseph Faga stating that he was an officer of petitioner. In the power of attorney which he submitted, Joseph Faga certified before two witnesses that he had the authority to execute the power of attorney on behalf of petitioner. Joseph Faga had authority to sign the petition in this matter. Unfortunately, it was Ben Faga, who did not have the authority, who signed the petition. I can find no reason at this stage of the administrative proceedings not to allow petitioner to file a corrected petition with the signature of Joseph Faga.

The Rules of Practice and Procedure governing proceedings before the Division of Tax Appeals require that a petition have a signature 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

¹⁶The covering letter submitted with the original petition indicated that Joseph Faga had also sold his stock in 1995. However, the amended petition clearly states that Joseph Faga remained a shareholder of petitioner after the sale of the stock by Ben and Tom Faga, and specifically states that Joseph Faga was a shareholder during the audit period at issue.

(20 NYCRR 3000.3[b]; 3000.2[a],[d]). If a petition is not filed in the proper form, corrections may be accomplished utilizing the procedure contained in 20 NYCRR 3000.3(d) which provides:

(d) Failure to correct. (1) Where the petition filed by a petitioner is not in the form required by this section, the supervising administrative law judge shall promptly return it to the petitioner together with a statement indicating the requirements with which the petition does not comply, and extend to the petitioner an additional 30 days within which to file a corrected petition with the supervising administrative law judge. The supervising administrative law judge shall then forward the corrected petition to the office of counsel pursuant to subdivision (c) of this section. For purposes of the time limitations, a corrected petition is deemed to have been filed at the time the original petition was filed.

(2) Where the petitioner fails to serve a corrected petition within the time prescribed in paragraph (1) of this subdivision, the supervising administrative law judge will issue a determination dismissing the petition.

When the petition in this matter was filed, the Division of Tax Appeals should have returned it with the instructions that a proper signature be obtained and the petition be refiled within 30 days. Petitioner could have then filed the petition with Joseph Faga's signature as an officer of the corporation. That procedure was not followed in this case through no fault of petitioner. There was no attempt by petitioner to conceal either the identity of the signatory to the petition or his relationship with the corporate petitioner. Quite the opposite, the documents filed by petitioner all clearly indicate that Ben Faga was not an officer or employee of petitioner. It was simply not noticed by the Division of Tax Appeals. Under these circumstances the procedure that was available at the time the petition was filed should be available to petitioner now. Petitioner will be allowed to file a corrected petition with the signature of Joseph Faga as officer.¹⁷

E. The only change to be allowed in the corrected petition is the change of the signature to Joseph Faga. The issue of his authority to sign the petition having been decided in petitioner's favor, it will not be necessary for the Division to file an amended answer. Therefore, we will proceed with the Division's motion for summary determination. Petitioner will be allowed to file

¹⁷Having determined that a corrected petition may be filed, it is not necessary to address petitioner's remaining argument that the former officers of the corporation should be allowed to file a petition for the corporation in anticipation of possible individual liabilities being asserted against them.

a response to the motion of the Division for summary determination¹⁸ within the same time period that it has to file a corrected petition.

F. Accordingly, it is ordered that the petitioner has 30 days from the date of issuance of this order to file a corrected petition in accordance with Conclusions of Law “D” and “E” and a response to the motion for summary determination filed by the Division of Taxation.

DATED: Troy, New York
September 16, 1999

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE

¹⁸*See*, footnote 8.