

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABDULWAHAB ZIAD	:	ORDER
for Redetermination of a Deficiency or for Refund	:	DTA NO. 822035
of Cigarette Tax under Article 20 of the Tax Law.	:	

Petitioner, Abdulwahab Ziad, filed a petition for redetermination of a deficiency or for refund of cigarette tax under Article 20 of the Tax Law.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Michele Milavec, Esq., of counsel), brought a motion filed August 7, 2008, seeking dismissal of the petition pursuant to Tax Law § 2006(5)(ii) and 20 NYCRR 3000.9(a)(1)(ii) on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition or, alternatively, for summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b).

Petitioner had 30 days from the filing of the motion, or until September 8, 2008, to respond to the motion but failed to do so, and thus that date commenced the 90-day period for issuance of this order. After due consideration of the motion, the supporting affirmation of Michele W. Milavec, Esq., the three exhibits attached thereto, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether the petition should be dismissed for lack of subject matter jurisdiction in the Division of Tax Appeals or, alternatively, whether summary determination should be granted in

favor of the Division of Taxation because there are no disputed facts and, as a matter of law, such facts mandate a determination in its favor.

FINDINGS OF FACT

1. On March 12, 2007, investigators from the Office of Tax Enforcement of the Division of Taxation (Division) visited the place of business of petitioner, Abdulwahab Ziad, as part of a routine tax compliance inspection. This inspection revealed that Mr. Ziad did not possess a valid certificate of registration allowing the sale of cigarettes or tobacco products, as required per Tax Law § 480-a(1)(a), and was, at the time of the inspection, illegally selling cigarettes without such a certificate of registration. On May 10, 2007, as a consequence of this alleged violation, the Division issued to Mr. Ziad a Notice of Deficiency (L-028516884) asserting a penalty in the amount of \$2,000.00 pursuant to Tax Law § 480-a(3).

2. The notice was challenged by a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was scheduled for September 17, 2007, with notice of the scheduled conference provided to Mr. Ziad by mail on August 13, 2007. Mr. Ziad did not appear at the scheduled conference, either in person or by representative, and as a result, a Conciliation Default Order (CMS No. 219424) dated October 5, 2007 was issued to Mr. Ziad at 3292 Main Street, Buffalo, New York 14214-1314.

3. A petition was filed in the name of Abdulwahab Ziad. This petition is dated January 2, 2008 and was signed by one Farier A. Ziad under the title "power of attorney for Mr. Abdulwahab Ziad." The envelope in which the petition was filed carries a Pitney Bowes postage stamp dated January 2, 2008, and the envelope as well as the petition and all attached pages bear the January 4, 2008 receipt stamp of the Division of Tax Appeals. The first page of the petition

lists “petitioner” as Abdulwahab Ziad, a telephone number, and the address 3292 Main Street, Buffalo, New York 14214. The petition lists “petitioner’s representative” as Jeffrey A. Lazroe, a telephone number, and the address 410 Main Street, Buffalo, New York 14202. There was no power of attorney form attached to or filed with the petition appointing either Farier A. Ziad or Jeffrey A. Lazroe as Mr. Ziad’s representative. The petition states, as to the alleged errors and asserted facts, that “[p]etitioner’s place of business was closed on February 2, 2007 and the store has not reopened.” The petition also states, with respect to the conciliation conference, that “petitioner was out of the country at the time of the original hearing [conciliation conference].”

4. After an attempt to contact Jeffrey Lazroe by telephone was unsuccessful, the Division of Tax Appeals issued a letter, dated January 17, 2008 and addressed to Jeffrey A. Lazroe at 410 Main Street, Buffalo, New York 14202, requesting that additional information be supplied to complete and correct the petition as filed. The information sought included the tax article, taxpayer’s social security number, and assessment number, as well as a power of attorney authorizing Mr. Lazroe to represent Mr. Ziad. A copy of this letter, which included a return address mailing label for the Division of Tax Appeals, was mailed to Mr. Ziad, at the 3292 Main Street, Buffalo, New York 14214, address listed above, and advised that a period of 30 days would be allowed in order for Mr. Lazroe or Mr. Ziad to provide the requested information and the completed power of attorney in favor of Mr. Lazroe. There was no response to this letter.

5. The Division of Tax Appeals issued a second letter, dated March 28, 2008 and addressed to Mr. Ziad as above, again requesting information to complete and correct the petition. This letter again advised that if Mr. Lazroe would be representing Mr. Ziad, a properly executed power of attorney would be required. This letter, which included a return address mailing label for the Division of Tax Appeals, advised that failure to provide the necessary items

by April 15, 2008 would result in dismissal proceedings. The letter was copied to Mr. Lazroe, at the address listed above. There was no response to this letter.

6. By a letter dated May 20, 2008, the Division of Tax Appeals advised Mr. Ziad that the petition had been forwarded to the Office of Counsel of the Division of Taxation for the preparation and filing of an answer by August 4, 2008. This letter, sent by certified mail and addressed to Mr. Ziad as above, and copied to Mr. Lazroe addressed as above, again advised that a properly completed power of attorney was required in order for Mr. Lazroe to represent Mr. Ziad. The letter addressed to Mr. Ziad was returned to the Division of Tax Appeals by the United States Postal Service (USPS) as “unclaimed—unable to forward.” The envelope in which the letter was mailed bears the receipt stamp of the Division of Tax Appeals dated June 18, 2008. Mr. Ziad’s address as listed on the envelope is crossed out, and the address “764 Highland Ave., Ton NY 14223” is handwritten thereon. There was no response to this letter as mailed to Mr. Lazroe.

7. On June 20, 2008, the foregoing letter was remailed to Mr. Ziad. The Division of Tax Appeals returned-mail worksheet indicates that this mailing was made by regular (i.e., first class) mail to Mr. Ziad at “764 Highland Avenue, Buffalo, N.Y. 14223-1742,” and describes this address as the “address listed on ret. mail by p.o.”

8. The Division filed its answer to the petition on July 16, 2008, requesting that the petition be dismissed and the notice be sustained on the basis that the Division of Tax Appeals lacks subject matter jurisdiction. In this regard, the Division states that petitioner failed to validly commence a proceeding in the Division of Tax Appeals since the petition was not signed by petitioner or by petitioner’s authorized representative as required.

9. On August 7, 2008, the Division brought the subject motion, seeking dismissal of the petition on the ground set forth above. The Division's motion also requests, in the alternative, summary determination. The Division claims the petition does not challenge the assertion that petitioner was selling cigarettes without the required certificate of registration, thus leaves no material facts in dispute, and consequently fails to state a cause for relief such that summary determination against petitioner should be granted.

10. The Division's motion papers were mailed by certified mail to Mr. Ziad, at 3292 Main Street, Buffalo, New York 14214. This mailing was returned to the Division by the USPS on August 26, 2008 stamped as "unclaimed." The envelope in which the moving papers were mailed indicates delivery attempts were made on August 11, 2008 and on August 16, 2008. The envelope, as above, reflects that the address listed thereon has been covered over, and the address "764 Highland Ton NY 14223" is handwritten thereon.

11. The Division of Tax Appeals received a power of attorney form, together with a copy of the May 20, 2008 letter as remailed to Mr. Ziad on June 20, 2008 (*see* Finding of Fact 8). The power of attorney form lists the taxpayer as Abdulwahab Ziad, includes an 11-digit taxpayer ID number (as opposed to a 9-digit social security number), but includes no address for Mr. Ziad. The power of attorney form appoints Jeffrey Lazroe as Mr. Ziad's representative, lists "cigarette [sic] tax 2007" as the proceeding, and lists "DTA 822035" as the notice/assessment number. The form includes a signature which appears to be "Abdulwahab Ziad," is dated August 8, 2008, indicates Jeffrey Lazroe to be an attorney-at-law, and is acknowledged before and bears the stamp of a notary public. The envelope in which these two documents were mailed bears the August 13, 2008 receipt stamp of the Division of Tax Appeals.

12. On September 3, 2008, the Division of Taxation's representative mailed a copy of the Division's motion papers to Jeffrey Lazroe, with a copy of the covering letter for such mailing mailed to Mr. Ziad at 764 Highland Avenue, Buffalo, New York 14223.

13. Neither Mr. Ziad, nor Mr. Lazroe responded to the Division's motion.

CONCLUSIONS OF LAW

A. Tax Law § 2008 provides that all proceedings in the Division of Tax Appeals shall be commenced by the filing of a petition with the Division of Tax Appeals protesting any written notice of the Division of Taxation which has advised the petitioner of a tax deficiency or other notice which gives a person the right to a hearing in the Division of Tax Appeals.

B. Tax Law § 2014(1) states, with respect to representation of petitioners, 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 to practice 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.

C. Consistent with the foregoing statutory provision the Tax Appeals Tribunal's Rules of Practice and Procedure specify the circumstances by and under which a taxpayer may appear (20 NYCRR 3000.2[a][1]) and be represented (20 NYCRR 3000.2[a][2],[3],[4];[c]) in proceedings before the Division of Tax Appeals. As is particularly relevant to this matter, 20 NYCRR 3000.2(d) provides as follows:

Other representation forbidden. No person other than those described in the foregoing subdivisions of this section may represent a taxpayer *in the*

filing of a petition or at a hearing or argument upon such petition. (Bold emphasis as in original; italicized emphasis added.)

D. 20 NYCRR 3000.3(b)(7), which relates to the form of a petition in the Division of Tax Appeals, provides that the petition shall contain “the signature of the petitioner or the petitioner’s representative . . .”

E. 20 NYCRR 3003.(d) provides as follows:

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.

F. Notwithstanding the several notifications to Mr. Ziad and to Mr. Lazroe that the petition was defective (*see* Findings of Fact 4 through 7), and that failure to correct would result in dismissal proceedings (20 NYCRR 3000.3[d]), it remains that Mr. Ziad has failed to file a petition which complies with the provisions of 20 NYCRR 3000.2(a) and 3000.3(b)(7). In fact, the petition was not signed by Mr. Ziad, or by Mr. Lazroe. Furthermore, there has been no response furnished providing any information (including any power of attorney) as to Farier A. Ziad, the person whose name appears on the signature line of the petition, so as to support a conclusion that Farier A. Ziad was a person authorized to represent Mr. Ziad in the filing of a petition (20 NYCRR 3000.2[a], [c], [d]). In fact, the only response to any of the notifications has been the filing of a power of attorney in favor of Mr. Lazroe. This power of attorney form itself,

whether intentionally or as the result of oversight, does not provide an address for Mr. Ziad and reflects a social security number which contains two extra digits (*see* Finding of Fact 11). The Division of Taxation's answer to the petition, as well as the subject motion, have been consistent in requesting dismissal of the petition for lack of jurisdiction on the basis that Mr. Ziad failed to commence a proceeding in the Division of Tax Appeals because the petition did not contain the signature of the taxpayer or the taxpayer's authorized representative as required. In light of all of these facts, the petition as filed is defective. Despite having been afforded the opportunity to correct the petition, as required by 20 NYCRR 3000.3(d)(1), Mr. Ziad has failed to serve a corrected petition. Furthermore, there has been no response to the subject motion seeking dismissal of the petition. Under all of these circumstances, the petition must be dismissed for lack of jurisdiction (20 NYCRR 3000.3[b][7]; [d][2]; 3000.9[a][1],[4]).

G. The Division of Taxation's motion to dismiss is hereby granted and the petition of Abdulwahab Ziad is dismissed.¹

DATED: Troy, New York
December 4, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

¹ In light of this conclusion the Division's alternative motion for summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) is rendered academic.