

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ADELSON COLLADO :
D/B/A CALIDAD RESTAURANT : DETERMINATION
: DTA NO. 823893
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2007 through August 31, 2009. :
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Petitioner, Adelson Collado d/b/a Calidad Restaurant, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2007 through August 31, 2009.

On July 20, 2011, the Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of Mr. Matthews, dated July 20, 2011, and attached exhibits in support of the motion. Petitioner, appearing by David Rivas, EA, did not respond to the motion. Therefore, the 90-day period for issuance of this determination commenced on August 20, 2011, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affirmation and annexed exhibits, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition filed in this matter.

FINDINGS OF FACT

1. Petitioner, Adeldo Collado d/b/a Calidad Restaurant, filed a petition with the Division of Tax Appeals on October 1, 2010, protesting 20 notices of determination (including one that was repeated in error) and 5 warrants. Even though instructed to attach copies of the notices and the conciliation order, petitioner attached only a list of 20 notices and 5 warrants. In the petition's allegation of errors and assertion of facts, petitioner claimed that he was not an owner of the business, made no decisions on its behalf, signed no checks and had nothing to do with withholding taxes or sales tax. Petitioner alleged the business was a partnership and that he was neither an "official nor an investor."

2. On November 9, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The notice of intent explained this action as follows:

Pursuant to § 2006.4 of the Tax Law, a petition must be filed within ninety days from the date a statutory notice is issued.

The Notices of Determination appear to have been issued on April 19, 2010, but the petition was not filed until October 1, 2010 or one hundred sixty five days later.

3. An Order was issued on April 7, 2011, which dismissed the petition of Adeldo Collado d/b/a Calidad Restaurant with respect to all five warrants and the following ten notices:

L-033074766-6, L-033074767-5, L-033074768-4, L-033074769-3, L-033074770-3,
L-033074771-2, L-033074772-1, L-033074773-9, L-033553816 and L-029164728.

4. However, with respect to the remaining nine notices, notice numbers L-030000903, L-029157302-7, L-032388855-8, L-031833622-8, L-030606464-6, L-030000903-3, L-029693853-8, L-030096852-6 and L-030096850-8, the Notice of Intent to Dismiss Petition, dated November 9, 2010, was rescinded, and the Division of Taxation was directed to file an Answer to the petition within 75 days from the date of the order.

The nine remaining notices were not attached to the petition and neither party submitted copies of the notices in response to the Notice of Intent to Dismiss Petition. Therefore, this forum was not aware that the notices were issued to other taxpayers.

5. Following the filing of an answer, the Division filed this motion to dismiss, or, in the alternative, for summary determination. The affidavit noted that two of the notices petitioned by Adeldo Collado, notice numbers L-030000903 and L-030000903-3, were actually identical, since the hyphen and last digit allegedly are not part of the notice number. Therefore, the Division of Taxation asserts that only eight notices are left in issue.

6. The remaining eight notices were issued to Leonidas Gil Corona and Gilberto Collado, neither of whom is the petitioner herein. One of the notices, notice number L-029157302-7, was petitioned and taken to a conciliation conference, where, by order dated August 8, 2008, the notice was sustained by the conciliation conferee. Subsequently, the petitioners therein, Leonidas Gil Corona and Gilberto Collado, executed a withdrawal of petition and discontinued the proceeding on February 12, 2009.

7. Notice number L-029693853-8 was a Notice of Determination (Estimated) issued to Leonidas Gil Corona and Gilberto Collado, dated February 11, 2008, and was the only notice conferring a right to a hearing.

8. The remaining notices (L-030000903 [L-030000903-3], L-032388855-8, L-031833622-8, L-030606464-6, L-030096852-6 and L-030096850-8) were notices and demands for tax due issued to Leonidas Gil Corona and Gilberto Collado, none of which conferred a right to a hearing.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [1991]).

Accordingly, a party to a proceeding cannot confer jurisdiction on the Division of Tax Appeals to decide matters outside the scope of its authority (*see Strina v. Troiano*, 119 AD2d 566, 500 NYS2d 736 [1986] [subject matter jurisdiction cannot be conferred by consent or stipulation of the parties, and a defect in subject matter jurisdiction cannot be waived]).

B. Tax Law § 2008(1) provides:

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, a determination of tax due, a denial of a refund or credit application . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

C. In this instance, petitioner has protested notices and demands for payment of tax due that were not issued to him and that asserted additional sales and use tax due from other, distinctly separate, taxpayers. The notices and demands for payment of tax due issued to Leonidas Gil Corona and Gilberto Collado (L-030000903 [L-030000903-3], L-032388855-8, L-031833622-8, L-030606464-6, L-030096852-6 and L-030096850-8), along with the Notice of

Determination (Estimated) (L-029693853-8) and the Notice of Determination number (L-029157302-7) made it clear that they were separate and distinct from any notice issued to Adelso Collado. Simply stated, none of the notices issued to Leonidas Gil Corona and Gilberto Collado (L-030000903 [L-030000903-3], L-032388855-8, L-031833622-8, L-030606464-6, L-030096852-6 and L-030096850-8, L-029693853-8 and L-029157302-7) confer a right to a hearing on petitioner. (Tax Law § 2008[1]; 20 NYCRR 3000.1[k].)

D. The Division argues that there is no jurisdiction to entertain the petition with regard to the notices and demands and notice number L-029157302-7 because they do not confer hearing rights. This issue is not reached herein. The Division only offers this argument after adding Leonidas Gil Corona and Gilberto Collado to the Division of Tax Appeals caption in this matter, ignoring the fact that the caption is dictated by the party who filed the petition with the Division of Tax Appeals in this matter in response to a notice issued to that party by the Division of Taxation. The Division of Taxation has no authority to add parties on a whim to confer jurisdiction over unrelated parties.¹

E. The petition of Adelso Collado d/b/a Calidad Restaurant is dismissed with respect to notice numbers L-030000903, L-029157302-7, L-032388855-8, L-031833622-8, L-030606464-6, L-030000903-3, L-029693853-8, L-030096852-6 and L-030096850-8.

DATED: Troy, New York
September 22, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

¹L-029693853-8, the Notice of Determination (Estimated), issued to Leonidas Gil Corona and Gil Collado, may have rights to a hearing after a refund application, as the Division argues, but it is of no moment in this matter since petitioner, Adelso Collado, was not issued that notice.