STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSE M. SUAREZ D/B/A THORNWOOD SERVICE CENTER	:	DECISION DTA No. 800787
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1980 through August 31, 1983	:	

Petitioner Jose M. Suarez d/b/a Thornwood Service Center, c/o Richard P. Manero, Esq., 537 Steamboat Road, Greenwich, Connecticut 06830 filed an exception to the order of the Administrative Law Judge issued on December 12, 1991 with respect to his petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through August 31, 1983. Petitioner appeared by Manero & Potash, Esqs. (Richard P. Manero, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner submitted a letter in support of his exception. The Division of Taxation submitted a letter in opposition. Oral argument, requested by petitioner, was denied.

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

ISSUE

Whether adequate grounds were presented by petitioner to vacate a default order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On May 9, 1990, after several unsuccessful scheduling attempts, a consolidated hearing was held before Jean Corigliano, Administrative Law Judge, in the matters of Thornwood Auto

Service Center, Inc. ("Thornwood") and Peter Burford and Jose M. Suarez ("petitioner") d/b/a Thornwood Service Center. Thornwood was the seller in a bulk sales transaction and petitioner and Mr. Burford were the purchasers. Thornwood appeared at the hearing, but petitioner and Mr. Burford did not.

Prior to the hearing, by letter dated April 16, 1990, the Division of Taxation's representative, Peter J. Martinelli, Esq., forwarded copies of the field audit report and related workpapers to petitioner's representative, Richard P. Manero, Esq. advising him that these documents would be placed in evidence at the upcoming hearing on May 9, 1990.

By letter dated April 30, 1990, Mr. Manero advised Judge Corigliano that petitioner had instructed him "to take no further action of any kind whatsoever on his behalf in this matter because the cost of [Mr. Manero's] representation was becoming prohibitive...." Mr. Manero further advised that he would not attend the hearing and that he had informed petitioner on three different occasions that the hearing would take place on May 9, 1990.

On July 12, 1990, Judge Corigliano issued her determination in the Matter of Thornwood Auto Service Center, Inc. sustaining the assessment against Thornwood in full.

Since petitioner and Peter Burford failed to appear at the hearing, their case was severed from Thornwood's and a default determination was issued on August 2, 1990.

At no time following Mr. Manero's letter of April 16, 1990 did petitioner make any attempts to contact Judge Corigliano or any other employee of the Division of Tax Appeals until September 26, 1991 when the instant application was received by the Division of Tax Appeals.

The application to vacate was filed by Mr. Manero and it alleges that petitioner's tax liability of $60,000.00 has been paid and that he now wishes to contest the imposition of penalty and interest.

OPINION

In the order issued below, the Chief Administrative Law Judge decided that petitioner's application to vacate the default determination issued against him should be denied. The basis for this decision was that petitioner did not show an excuse for the default nor a meritorious case.

On exception, petitioner alleges that he has paid the sales tax assessed and alleges he did not appear at said hearing because of the continuing cost of legal representation and, more importantly, because neither he nor an attorney on his behalf could have made any worthwhile contribution to such hearing and the issues to be determined. Petitioner argues: 1) he had no access to records of any kind whatsoever on the basis of which to advance a defense to any of the allegations made against Thornwood, the principal obligor of the sales taxes allegedly due; 2) his derivative liability for payment of Thornwood's sales tax matured only on July 12, 1990, the date on which this Tribunal rendered its decision against Thornwood; 3) the purported obligation of petitioner to pay any such tax, interest and/or penalties between the fall of 1983 and the date of such adjudication is a violation of the due process clause of the New York State Constitution; and 4) to impose upon him now an enormous sum in the nature of interest and penalties relating back to an administrative assessment made in 1983 is simply inequitable. Finally, petitioner's representative attempts, in his letter brief of March 10, 1992, to submit for consideration by this Tribunal new evidence not submitted below.

In response, the Division of Taxation (hereinafter the "Division") argues that a review of petitioner's application shows it does not contain any reason for his default in appearance at the May 9, 1990 hearing and, even if it were determined that petitioner had a reasonable excuse for defaulting in appearance at the hearing, he has not shown that he has a meritorious case. The Division further argues that there is no question that petitioner did not comply with the provisions of section 1141(c) of the Tax Law which requires the purchaser to notify the Division "at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor," thus, petitioner's failure to timely notify the Division exposes him, as a matter of law, to personal liability for sales tax due from the bulk seller. Finally, the Division argues that to the

extent petitioner refers to facts not presented to the Administrative Law Judge in his application to vacate his default, or seeks to offer new or additional evidence, such actions are improper and should be disallowed.

We reject petitioner's attempt at this late date to introduce new evidence after the record has been closed. As we held in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record" (Matter of Schoonover, supra; see also, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories Serv. Corp., Tax Appeals Tribunal, December 15, 1988).

We also affirm the denial by the Chief Administrative Law Judge of petitioner's application to vacate the default determination issued by the Administrative Law Judge.

20 NYCRR 3000.10 provides, in pertinent part, as follows:

> "(a) Notice. After issue is joined (see, § 3000.4[b] of this Part), the administrative law judge unit shall schedule the controversy for a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.
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> "(b) Adjournment, default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the administrative law judge shall render a default determination against the dilatory party.
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> "(2) In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (Emphasis added.)

The record before us clearly indicates that petitioner did not appear at the scheduled hearing for which he had received notice. In addition, petitioner failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and that the Administrative Law Judge properly rendered a default determination pursuant to 20 NYCRR 3000.10(b)(2) (see, Matter of Morano's Jewelers of 5th Ave., Tax Appeals Tribunal, May 4, 1989).

The issue before us now is whether such default determination should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.10(b)(3) provides that "[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case" (see, Matter of Franco, Tax Appeals Tribunal, September 14, 1989; Matter of Kow, Tax Appeals Tribunal, December 15, 1988).

A review of the record below and the exception filed by petitioner shows a failure by him to present any reasonable excuse for his failure to appear and any evidence of a meritorious case for consideration by the Tribunal. Petitioner, in filing his notice of exception, stated he did not appear at said hearing because of the continuing cost of legal representation and, more importantly, because neither he nor an attorney on his behalf could have made any worthwhile contribution to such hearing and the issues to be determined. This statement clearly offers no reasonable excuse for petitioner's failure to appear. Further, we find it inadequate to substantiate a meritorious case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Jose M. Suarez d/b/a Thornwood Service Center is denied;

2. The order of the Chief Administrative Law Judge denying the application of petitioner Jose M. Suarez d/b/a Thornwood Service Center to vacate the default determination rendered is sustained;

3. The order of the Chief Administrative Law Judge holding petitioner Jose M. Suarez d/b/a Thornwood Service Center in default is affirmed;

4. The petition of Jose M. Suarez d/b/a Thornwood Service Center is in all respects denied; and

5. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

DATED: Troy, New York
June 25, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner