STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MORANO'S JEWELERS OF FIFTH AVENUE, INC.	:	DECISION
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 November 30, 1982.	:	

Petitioner, Morano's Jewelers of Fifth Avenue, Inc., 751 Fifth Avenue, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on May 12, 1988 with respect to its 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 November 30, 1982 (File No. 800971). Petitioner appeared by Stanley A. Teitler, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner opted not to file a brief stating it would be an affront to the Tribunal to cite hornbook law of what petitioner believes are basic due process arguments. The Division filed a letter in lieu of a brief. Oral argument was held, at the request of petitioner, on November 9, 1988.

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

ISSUES

I. Whether petitioner failed to appear for the hearing and was thus in default.

II. If petitioner was in default, whether there was good cause and a meritorious case allowing for the default to be vacated.

III. If the case is continued, whether the Division should be prohibited from contacting petitioner's out-of-state customers to verify that items purchased were actually shipped to said customers.

FINDINGS OF FACT

Due to our disposition of this case, we set aside findings of fact "2", "3" and "4" of the Administrative Law Judge's determination. We find the remaining facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts are as follows.

Petitioner, Morano's Jewelers of Fifth Avenue, Inc., operates a retail jewelry store at 751 Fifth Avenue, New York, New York. It also sells at wholesale.

THE HEARING

A Notice of Hearing was issued to petitioner and to petitioner's representative, Stanley A. Teitler, Esq., on November 30, 1987, notifying them that this matter was scheduled for a hearing before the Division of Tax Appeals on January 5, 1988 at 9:15 A.M. On December 17, 1987, the attorney for the Department of Taxation and Finance wrote to petitioner's representative stating as follows:

> "By now I am sure you are aware that the above matter is scheduled for Formal Hearing on January 5, 1988 at 9:15 a.m. We will have until 1:15 p.m. on that day. Any portion of the hearing not concluded by then may resume the next morning at 9:15 a.m.
>
> Should you have any questions, please do not hesitate to contact me."

On January 5, 1988 at 9:15 A.M., petitioner appeared by Jerochim Bergstein, an employee of Stanley A. Teitler, P.C., petitioner's representative, who advised the Administrative Law Judge that he had been instructed to make a statement for petitioner on the record. The Administrative Law Judge requested Mr. Bergstein to call his employer immediately, as petitioner could possibly be held in default for failure to proceed. Mr. Bergstein called his office and reported that he was unable to contact Mr. Teitler. Mr. Bergstein acknowledged on the record that Mr. Teitler knew

about the proceedings but would not be appearing and had sent him, Mr. Bergstein, in his place.

The Administrative Law Judge elected to open the hearing record and after the presentation of the Division's case, accepted Mr. Bergstein's statement. The statement was as follows:

> "It is Morano's of Fifth Avenue's contention that this hearing is totally without merit.
>
> There is presently pending a criminal contempt proceeding against our client. Until all criminal proceedings are settled, we cannot allow - we should not allow any civil liability to be assessed against Mr. Morano. Thank you."

In the afternoon following the aforementioned proceedings, Mr. Teitler and Mr. Bergstein appeared at the offices of the Division of Tax Appeals. The Administrative Law Judge then reopened the record for the purpose of taking argument from Mr. Teitler and the Department's attorney as to the status of the proceedings. Mr. Teitler stated that he had sent Mr. Bergstein, a law student and not a member of the New York Bar, to the hearing to make the aforementioned statement for the purpose of obtaining an adjournment. The Department's attorney took the position that the hearing had been completed or, in the alternative, that petitioner had been in default. Petitioner's representative requested that the matter be continued and stated petitioner's position which is condensed below.

MISCELLANEOUS FACTS

There was no prior hearing in this matter. There was a prehearing conference at the Tax Appeals Bureau after which the conferee initially proposed that the assessment based on out-of-state sales be cancelled. The conferee, however, was overruled by his supervisors.

The New York County Grand Jury, conducting an investigation as to possible evasion of sales tax by petitioner for years including at least a portion of the years at issue, issued a subpoena duces tecum against petitioner and Joseph Morano. Although petitioner and Mr. Morano were unsuccessful in quashing or modifying the subpoenas or in obtaining a stay, they nevertheless did not appear and contempt proceedings were commenced. After a

considerable amount of litigation in State and Federal courts, petitioner and Joseph Morano were convicted of contempt and were fined $250.00 and Mr. Morano was sentenced to 30 days incarceration. The conviction was under appeal at the time of the hearing scheduled for January 5, 1988. On November 10, 1988 the Appellate Division, First Department, reversed the contempt adjudication (Grand Jury Subpoena Duces Tecum Served Upon Morano's of Fifth Avenue, Inc., 533 NYS2d 869).

OPINION

In the decision below the Administrative Law Judge determined that petitioner had not sent a qualified representative on his behalf to attend the hearing at hand. As a result, it was concluded that petitioner was in default. Additionally, it was noted that petitioner failed to show either an excuse for the default or a meritorious case.

On exception petitioner contends that the Administrative Law Judge abused his discretion and acted arbitrarily and capriciously in failing to grant petitioner's request for a continuance. Specifically, petitioner contends that there was no default as counsel appeared in the afternoon on the day of the hearing. Further petitioner argues that the proceedings as they were run constituted a gross violation of its rights to due process of law. Accordingly, petitioner seeks to have the default judgment vacated.

In response, the Division argues that the decision of the Administrative Law Judge should be sustained. Specifically, the Division contends that petitioner has done nothing to explain his behavior on the day of the hearing. Additionally, it is argued that petitioner has failed to establish an underlying meritorious case. As a result, the Division urges that the default judgment be sustained and that petitioner be penalized for proceeding in a frivolous manner.

We agree with the Administrative Law Judge that petitioner was in default as he failed to appear for the hearing conducted on January 5, 1988. 20 NYCRR 3000.10 provides, in pertinent part, as follows:

> "Section 3000.10. Hearings before administrative law judges. (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.
>
> (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.
>
> (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 neither petitioner nor an authorized representative of petitioner, as authorized pursuant to 20 NYCRR 3000.2, appeared at the scheduled hearing. In addition, neither petitioner nor an authorized representative obtained 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).

The determination below, however, also contains language that indicates that petitioner does not qualify to have the default determination vacated. While the record does not indicate that petitioner moved to vacate the default, the determination indicates that the Administrative Law Judge, in effect, precluded such a motion. As a result, we will treat petitioner's exception as an appeal of a denial of a motion to vacate a default determination pursuant to 20 NYCRR 3000.10(b)(3).

In order for a default determination to be vacated 20 NYCRR 3000.10(b)(3) provides that "Upon 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." The determination below notes that "petitioner has shown neither an excuse for the default nor a meritorious case." Such a showing by the petitioner, however, was precluded as the default

determination contained language which foreclosed a motion to vacate such a default. We do find that on exception, however, petitioner has adequately met this burden.

While we have yet to confront a situation involving the application of 20 NYCRR 3000.10(b)(3) in order to vacate a default determination, the courts of New York have interpreted similar language in a very liberal manner. Among those courts it is well settled that the adjudication of a case on the merits is preferred to a default, especially when the default has not caused undue delay or prejudice to the opposing party (see, Stolpiec v. Weiner, 100 AD2d 931; Stark v. Marine Power & Light Co., 99 AD2d 753). In the present case we find no evidence that the Division of Taxation was prejudiced in any manner as a result of petitioner's default. Further, we find that petitioner has shown both an excuse for the default as well as a meritorious case sufficient to allow for the vacating of the default determination.

The excuse offered by petitioner for his delay was the erroneous belief that a law clerk could and would obtain a continuance of the proceeding when he appeared at the hearing in the morning of January 5, 1988. As the clerk was without the necessary qualifications to represent petitioner as required by 20 NYCRR 3000.2(a)(2) the Administrative Law Judge properly determined that petitioner was in default of the proceedings. We believe, however, that the reason for petitioner's default was excusable. While petitioner's mistaken belief as to proper representation and procedure is not a wholly satisfactory excuse, we find that it is sufficient under the circumstances to warrant vacating the default determination. In conjunction, petitioner's appearance later in the day to try and cure the default indicates the nondeliberateness of the delay and a good faith intent to carry out the proceedings (see, Stolpiec v. Weiner, supra; Zaldua v. Metropolitan Suburban Bus Auth., 97 AD2d 842).

We also find that petitioner has satisfactorily shown a meritorious case. While it is true that mere conclusory statements not supported by the facts will not suffice to prove a meritorious case, all that is required is a prima facie showing of legal merit (see, D. Sanders, P.C. v. H. A. Sanders, Arch., 140 AD2d 787; Tat Sang Kwong v. Budge-Wood Laundry Serv., 97 AD2d 691, 692; Picotte Realty v. Araguna, 87 AD2d 955, 956; Investment Corp. of Phila. v. Spector, 12

AD2d 911). Here we are satisfied that petitioner has met this burden as he has asserted facts pertaining to the propriety of the Division's assessment against Morano's. Specifically, petitioner has asserted that it offered records on audit which it claims are full and complete thereby precluding the Division from disallowing petitioner's claimed out-of-state sales. As such, we believe petitioner has asserted facts adequate to demonstrate the existence of a possible meritorious case. As a result, we conclude that petitioner is entitled to have the default determination vacated.

Lastly, however, we do note that while petitioner has qualified to have the default determination vacated, this by no means excuses the conduct which led petitioner to initially default at the hearing stage. By vacating the default, we do not intend to sanction such conduct in any way. Regretfully, we do not possess the power to impose costs or any other monetary penalties. However, we do order that this matter be scheduled for hearing and the hearing be held and concluded as expeditiously as possible.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that the exception of the petitioner, Morano's Jewelers of Fifth Avenue, Inc., is granted to the extent the default determination of the Administrative Law Judge is reversed.

DATED: Troy, New York
May 4, 1989

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

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