STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

LEONARD ZIMMERMAN, OFFICER OF HAPPY TIMES OF NANUET, INC. : DECISION DTA No. 808398

:

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, 1987 through November 30, 1988 :

Petitioner Leonard Zimmerman, Officer of Happy Times of Nanuet, Inc., Route 45 and Pomona Road, Pomona, New York 10970 filed an exception to the order of the Administrative Law Judge issued on September 5, 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, 1987 through November 30, 1988. Petitioner appeared by Robert P. Kassel, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

Petitioner filed a memorandum in support of his exception. The Division of Taxation filed a letter brief in opposition. Oral argument was not requested.

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 Chief Administrative Law Judge. These facts are set forth below.

A conciliation default order, dated May 4, 1990, was issued to petitioner, Leonard Zimmerman, by the Bureau of Conciliation and Mediation Services. This order

indicated that a conciliation conference had been scheduled for April 20, 1990 and neither petitioner nor his representative appeared.

In response to the conciliation order, petitioner filed a petition with the Division of Tax Appeals on July 9, 1990.

On December 16, 1990 a Notice of Small Claims Hearing was sent to petitioner and his representative advising them that a hearing was scheduled for Thursday, January 24, 1991 at 9:15 A.M. in New York City.

On the day of the hearing an adjournment was granted to enable the parties to resolve the matter without a hearing. On February 14, 1991, the Division of Taxation's representative advised the Presiding Officer, James Hoefer, that it did not appear that the case could be settled without a hearing.

On April 8, 1991 a Final Notice of Small Claims Hearing was sent to petitioner and his representative, Stuart A. Ditsky, advising them that a hearing was scheduled for Thursday, May 16, 1991 at 10:45 A.M.

On May 16, 1991 the Presiding Officer, James Hoefer, called the instant matter for hearing. Neither petitioner nor his representative appeared and neither had previously contacted Mr. Hoefer or any other Division of Tax Appeals employee with an explanation.

On June 25, 1991 the default order was issued to petitioner.

On July 11, 1991, petitioner's new representative, Robert P. Kassel, Esq., filed an application to vacate the default. The Division of Taxation, by letter dated July 25, 1991, opposed the application.

In the application, petitioner's representative alleged that

> "I was originally consulted by Dr. Zimmerman in connection with this matter about May 1, 1991. As Dr. Zimmerman was thereafter out of town, I was unable to communicate with him and neither he nor I arranged to call the Division [of Tax Appeals] to request a postponement of the hearing date."

In the application Mr. Kassel further stated that

> "I believe that the records will clearly establish that Dr. Zimmerman is not a person required by the statute to collect the taxes owed . . ."

OPINION

The Chief Administrative Law Judge determined that petitioner did not offer a reasonable excuse for not appearing at the hearing, as petitioner failed to even offer a reason. Further, the Administrative Law Judge concluded that petitioner failed to demonstrate that his case was meritorious, alleging no facts to support the existence of a valid claim.

On exception, petitioner asserts that he has demonstrated reasonable cause for failing to appear at the hearing, and that he has alleged facts which constitute the framing of a meritorious case.

In opposition, the Division of Taxation (hereinafter the "Division") states that the order of the Chief Administrative Law Judge should be affirmed.

We affirm the Chief Administrative Law Judge's denial of the petition to vacate the default judgment of the Presiding Officer.

The rules of procedure of the Tax Appeals Tribunal state:

> "(c)(4) After the petition and answer have been served, the controversy shall be at issue and the small claims unit shall schedule the controversy for a small claims 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.
>
> "(d) 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 presiding officer 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 presiding officer 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.

> "(3) 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" (20 NYCRR 3000.9[c][4]; [d][1]-[3]).

The record before us indicates that petitioner did not appear for the small claims hearing scheduled on May 16, 1991, and further indicates that petitioner failed to have the proceedings adjourned. Therefore, the Presiding Officer correctly issued a default order pursuant to 20 NYCRR 3000.9(d)(2) (see, Matter of Tong, Tax Appeals Tribunal, January 23, 1992).

The question before the Tribunal is whether this default order should be vacated. The Chief Administrative Law Judge denied petitioner's request for vacation of the default, finding that petitioner failed to offer a reasonable excuse for his failure to appear at the hearing on May 16, 1991, and further failed to present evidence which demonstrated that petitioner had a meritorious case (20 NYCRR 3000.9[d][3]). We find no reason to alter the order of the Chief Administrative Law Judge.

On exception, petitioner alleges that his failure to appear was the result of his being out of town, and confusion among petitioner, his CPA (petitioner's initial representative), and counsel (petitioner's current representative). This does not amount to a reasonable excuse for failure to appear. Petitioner's failure to make any contact, either by appearing at the hearing or communicating with the Presiding Officer prior to the hearing to request an adjournment, requires the issuance of a default order. The confusion and inaction alleged on exception do not justify vacating the default order.

Petitioner also alleges that the failure to set forth a meritorious claim was due to the failure of petitioner's then representative, his CPA, to adequately set out petitioner's position in the petition for a small claims hearing received by the Division of Tax Appeals on July 11, 1990. This is not the document upon which the denial of the petition to vacate the default order was based. Rather, the Chief Administrative Law Judge looked to petitioner's application to vacate the default order (prepared by petitioner's counsel), dated July 11, 1991, as the basis for his denial of the petition to vacate the default order.

The Chief Administrative Law Judge found that the petition to vacate the default order contained only a conclusory statement claiming that petitioner is not a person required to collect tax, and otherwise lacked any supporting factual allegations. This is an insufficient basis to set aside the default order (State by Abrams v. Wiley, 117 AD2d 856, 498 NYS2d 556; but cf., Tat Sang Kwong v. Budge-Wood Laundry Serv., 97 AD2d 691, 468 NYS2d 110 [where the defendant set forth facts sufficient to make a prima facie showing]). Therefore, the Chief Administrative Law Judge was correct in denying the petition to vacate the default order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leonard Zimmerman, Officer of Happy Times of Nanuet, Inc. is denied;

2. The order of the Chief Administrative Law Judge is affirmed;

3. The petition of Leonard Zimmerman, Officer of Happy Times of Nanuet, Inc. is denied; and

4. The default determination issued June 25, 1991 is sustained.

DATED: Troy, New York
April 16, 1992

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner