STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EUGENE LINDER	:	DECISION DTA No. 809971
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 1991.	:	

Petitioner Eugene Linder, Savilinnantie 1 B 18, 33230 Tampere, Finland, filed an exception to the order of the Chief Administrative Law Judge issued on October 8, 1992. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief. A reply brief was due by January 8, 1993, which date began the six-month period for the issuance of this decision. No reply brief was received. Oral argument, requested by petitioner, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

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 September 23, 1991, the Division of Tax Appeals received a petition from Eugene Linder for refund of sales and use taxes. Based on the petition and conciliation order attached thereto, petitioner, a citizen and resident of Finland, apparently purchased tangible personal property in New York State on which he paid sales tax. He claimed a refund of such sales tax in the amount of $466.89.

On November 4, 1991, the Division of Taxation ("Division") filed an answer to the petition, denying the allegations raised and arguing that there is no provision in the Tax Law for a refund of sales tax paid on property purchased and delivered in New York State when such property is subsequently removed from the State by the purchaser.

On December 17, 1991, Arthur Johnson, Presiding Officer, sent a Notice of Small Claims Hearing to petitioner indicating that his petition had been scheduled for hearing on Thursday, January 23, 1992 at 2:45 P.M. in Troy, New York.

On January 2, 1992, petitioner wrote to Mr. Johnson asking for an adjournment of the January hearing due to the time needed for visa and air ticket arrangements. He also suggested that the hearing be held in Finland.

Mr. Johnson granted petitioner's request for an adjournment by letter dated January 6, 1992. He also enclosed waiver of hearing forms suggesting that petitioner handle the matter by submission of documents without the need for appearance at a hearing. Mr. Johnson explained to petitioner that small claims hearings could be held only in New York State, not in Finland, and that petitioner would be responsible for paying travel expenses to the hearing location. Finally, Mr. Johnson asked petitioner to advise of a convenient hearing date should he not choose to submit the matter.

On or about June 22, 1992, petitioner contacted Mr. Johnson by telephone and advised that he was in Toronto, Canada and requested a hearing in New York City on June 25, 1992. Mr. Johnson scheduled the hearing for June 25, 1992 at 10:45 A.M. Mr. Johnson then notified Allen Caplowaith, Presiding Officer, who was in New York City. Mr. Caplowaith advised that he was available to hear the case on June 25. The Division was notified and an auditor was designated to represent it at the hearing.

On June 25, 1992 at 10:45 A.M. Mr. Caplowaith called the matter for hearing. Petitioner did not appear. Harry Bleiberg, representing the Division, did appear. Mr. Caplowaith waited until 12:00 noon at which time he took Mr. Bleiberg's motion for default.

There being no further communications from petitioner, a default determination was issued against him on August 27, 1992.

On September 16, 1992, the Division of Tax Appeals received petitioner's application to vacate the default order. In the application he stated, with respect to the June 25, 1992 hearing, that, "[a]lthough I was informed about this hearing I was not able to attend it, since at the time my 71-year old mother was suffering from high blood pressure which required my constant presence at her bedside." Petitioner also alleged several facts in support of his argument that he has a meritorious case.

The Division responded to petitioner's application by letter dated September 21, 1992 arguing that petitioner had demonstrated neither an excuse for the default nor a meritorious case.

In various documents and letters, including the petition, letter to Mr. Johnson of January 2, 1992 and application to vacate the default, petitioner has alleged certain facts concerning the transaction in issue in this matter. These facts are summarized as follows:

(a) Petitioner bought property and took possession of such property in New York City.

(b) Shop owners in New York City assured him he could get a refund of the sales tax paid by filing a refund claim with the Division.

(c) An airline official provided petitioner with a claim for refund form at John F. Kennedy International Airport as he was departing the United States for Finland. There were numerous blank forms available at the airport for travelers in circumstances similar to petitioner's.

(d) Petitioner, at some time prior to departure, had transferred the property to an unidentified individual who was also leaving for Finland. This individual actually carried the property out of the country and redelivered it to petitioner in Finland.

OPINION

In the order issued below, the Chief Administrative Law Judge found that petitioner's reason for failing to attend the hearing was reasonable and constituted an excuse for the default under 20 NYCRR 3000.10(b)(3). However, the Chief Administrative Law Judge found that petitioner did not show a meritorious case, the other requirement that must be met under 20 NYCRR 3000.10(b)(3) in order to set aside the default order. The Chief Administrative Law

Judge stated that "[e]ven if petitioner proved every fact he alleged, he would not prevail" (Order, p. 4). The Chief Administrative Law Judge, relying on Matter of Hazan, Inc. v. Tax Appeals Tribunal (152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, 557 NYS2d 306) and Matter of Continental Arms Corp. v. State Tax Commn. (130 AD2d 929, 516 NYS2d 338, revd on other grounds 72 NY2d 976, 534 NYS2d 362), determined that the transaction was properly subject to sales tax, as petitioner clearly took possession of the merchandise within New York State.

On exception, petitioner asserts that: (1) he did not purchase the property, in the sense that he only provided the funds to pay for it; (2) he did not take possession of the property in New York State; (3) he never touched the property in New York State; (4) he did not remove the property from New York State; (5) he took possession of the property in Finland; and (6) another individual took the property from the shop and brought it to the airport. Petitioner further argues that the facts indicated by him present a meritorious case.

In response, the Division argues that the default determination should not be vacated because petitioner has not presented any facts to demonstrate a meritorious case.

The issue before this Tribunal then is whether petitioner has shown a meritorious case. We find that he has not.

The Division's regulations provide as follows:

> "[t]he sales tax is a 'destination tax,' that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate" (20 NYCRR 525.2[a][3], emphasis added).

Petitioner has stated that he did not take possession of the property in New York State, that he did not take the property out of New York and that he never even touched the property in New York State. However, petitioner did not assert that the individual who did take the property from the shop and out of the State was not his agent or designee. The above regulation clearly states that delivery takes place when the property is "transferred by the vendor to the purchaser or his designee" (20 NYCRR 525.2[a][3], emphasis added). Therefore, petitioner has failed to allege facts that show that he did not receive control over the property in New York and the sale was not subject to sales tax (see, Matter of Hazan, Inc. v. Tax Appeals Tribunal, supra). Absent a

showing that the person who took the property out of the shop was not petitioner's agent, we find that petitioner has not presented a meritorious case. Therefore, we affirm the order of the Chief Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eugene Linder is denied;

2. The order of the Chief Administrative Law Judge denying the application of petitioner Eugene Linder to vacate the default determination rendered is sustained;

3. The determination of the Aministrative Law Judge holding petitioner Eugene Linder in default is affirmed; and

4. The petition of Eugene Linder is denied.

DATED: Troy, New York
June 3, 1993

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

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

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