STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MOHAMED H. KASSIM, ALI ALI SALIM AND KOWSIL BURGOS	:	DECISION DTA No. 811580
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 June 1, 1987 through May 31, 1990.	:	

Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos, c/o Melvin L. Greenwald, Esq., 401 Broadway, New York, New York 10013, filed an exception to the order of the Administrative Law Judge issued on August 4, 1994. Petitioners appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners did not file a brief. The Division of Taxation filed a letter brief in opposition to petitioners' exception. The six-month period to issue this decision began on November 18, 1994, the date by which petitioners could submit a reply brief. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether adequate grounds were presented by petitioners 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 January 20, 1993, the Division of Tax Appeals received a petition from Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos for revision of a determination or for refund of sales

and use taxes for the period June 1, 1987 through May 31, 1990. Attached to the petition was a Conciliation Order issued by the Bureau of Conciliation and Mediation Services dismissing petitioners' request for a conciliation conference because it was filed nearly two years late.

In the petition, petitioners allege that they never received a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Theyacknowledged that their attorneys may have received a copy, but that these attorneys did not notify petitioners of such notice of determination. Petitioners also argued that they did not operate the business in question for the entire audit period and that the amounts assessed are estimates, not based on fact and are arbitrary.

On May 10, 1993, the Division of Taxation ("Division") filed an answer to the petition, denying petitioners' claims and stating that a notice of determination was issued to petitioners on August 20, 1990 and that petitioners did not mail a request for conciliation conference until August 12, 1992. As a result, the Division alleged, the request was late and the petition should be denied.

On October 1, 1993, the calendar clerk of the Division of Tax Appeals sent a letter to petitioners and their representative, Melvin L. Greenwald, Esq., advising them that the Division of Tax Appeals anticipated scheduling a hearing on the petition during the weeks of either January 24, 1994 or March 14, 1994, and that petitioners should, by November 1, 1993, inform the Division of Tax Appeals as to any preferences they had regarding the scheduling of the hearing.

Neither petitioners nor their representative responded to the calendar clerk's letter. On December 20, 1993, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioners and their representative, informing them that a hearing on their petition had been scheduled for Thursday, January 27, 1994 at 1:15 P.M. Enclosed with the hearing notice was a letter from the calendar clerk advising petitioners and their attorney that, inasmuch as the jurisdictional issue of the timeliness of their request for conference had been raised, the

hearing would limit itself solely to this issue.

On January 27, 1994 at 4:20 P.M., Administrative Law Judge Catherine M. Bennett called the matter for hearing. Neither petitioners nor their representative appeared. Kenneth Schultz, Esq., appeared for the Division. Mr. Schultz explained that he had telephoned petitioners' attorney, Melvin Greenwald, Esq., the day prior to the hearing, and that Mr. Greenwald had told him that he knew about the scheduled hearing but that he did not intend to appear. Mr. Schultz then moved that a default order be issued to petitioners for their failure to appear at the hearing.

There being no further communications from petitioners or Mr. Greenwald, Judge Bennett issued a default determination against petitioners on March 3, 1994.

On July 5, 1994, the Division of Tax Appeals received a letter from Mr. Greenwald applying to have the default order vacated. As an excuse for his failure to appear, Mr. Greenwald alleged that in January 1994 petitioners Mohamed H. Kassim and Ali Ali Salim were visiting Yemen, and because of "political unrest" could not leave the country. He further alleged that petitioner Kowsil Burgos "did not have the capacity or ability to make any decisions or proceed in the matter of this petition." Mr. Greenwald offered no reason why he, personally, did not appear at the hearing.

In support of a meritorious case, Mr. Greenwald raised various arguments as to why the Division's assessment was erroneous; however, as to the only issue before the Division of Tax Appeals, i.e., the threshold jurisdictional issue of the timeliness of petitioners' protest of the assessment, Mr. Greenwald offered no proof, no allegations and no argument.

On July 14, 1994, the Division filed a response in opposition to petitioners' application to vacate the default order. The Division's attorney, Mr. Schultz, by affidavit, indicated that Mr. Greenwald is neither authorized to represent nor file a petition on behalf of Mohamed H. Kassim or Kowsil Burgos because the only power of attorney filed in this matter runs from petitioner Ali Ali Salim to Mr. Greenwald. A check of the file in this matter indicates Mr. Schultz's statement to be accurate. Mr. Schultz therefore avers that the petition, signed only

by Melvin Greenwald, Esq., is jurisdictionally defective.

Mr. Schultz reiterated that on January 26, 1994, the day prior to the hearing, he telephoned Mr. Greenwald, who told Mr. Schultz he was not going to appear. During the conversation, Mr. Greenwald did not mention any of the problems he later alleged in his application to vacate the default order.

As to the merits of the jurisdictional issue, Mr. Schultz argues that the request for conciliation conference was not filed until nearly two years after issuance of the notice of determination, and that petitioners' allegation in their petition that they never received such notice is without merit. Thus, he argues, the default determination should not be vacated.

OPINION

A default determination can be vacated if the petitioner can demonstrate both an excuse for the default and a meritorious case (20 NYCRR 3000.10[b][3]).

In the order issued below, the Chief Administrative Law Judge decided that petitioners' application to vacate the default determination issued against them should be denied, the basis being that petitioners failed to demonstrate both a reasonable excuse for the default and a meritorious case.

The Chief Administrative Law Judge's order found meritless the explanations offered on behalf of petitioners Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos, holding that petitioners have not established an excuse for their failure to appear and, further, with regard to the requirement of showing a meritorious case, held that: 1) petitioners have submitted no proof in support of the arguments that the conference request was timely; 2) only petitioner Ali Ali Salim filed a power of attorney authorizing Mr. Greenwald to represent him; 3) there are no petitions in the record signed by the other petitioners; and 4) the petition is jurisdictionally defective with respect to Mahamed H. Kassim and Kowsil Burgos and would have to be dismissed as to them in any case.

On exception, petitioners argue that: 1) they never received any assessment notice, the Division is under an obligation to prove the mailing or service of such notice to petitioners so

that the time within which petitioners must act would commence and because the Chief Administrative Law Judge has disregarded the issue of service, petitioners are deprived of their due process rights; 2) petitioners were deprived of the opportunity to file a reply to the Division's opposition; 3) the jurisdictional defense concerning a power of attorney not having been executed by two of the petitioners is time barred; 4) the statement allegedly made by the Division's representative concerning his telephone conversation with petitioners' representative is inaccurate; and 5) the conference request can be timely only if notice of the assessment was properly served upon petitioners.

The Division, in reply, disputes petitioners' claim that they were not provided with a copy of the Division's submission in opposition and, further, argues that petitioners' due process rights have not been infringed.

The Division also argues that: 1) the burden is on the defaulting party to demonstrate an excuse for the default and a meritorious case; 2) petitioners fully availed themselves of the opportunity to meet this burden by petitioners' representative's letter of June 25, 1994, which was petitioners' application to vacate the default; 3) petitioners were afforded due process and were not deprived of the right to be heard; and 4) petitioners' notice of exception should be denied in its entirety.

We affirm the denial by the Chief Administrative Law Judge of petitioners' 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.

> "(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 petitioners nor their representative appeared at the scheduled hearing for which they had received notice. In addition, petitioners failed to obtain an adjournment of the proceedings. As a result, we agree that petitioners were 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 Fifth 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 Capp, Tax Appeals Tribunal, January 2, 1992; Matter of Franco, Tax Appeals Tribunal, September 14, 1989).

A review of the record below and the exception filed by petitioners shows a failure to present an acceptable excuse for not appearing at the scheduled hearing as well as evidence of a meritorious case for consideration by this Tribunal. In fact, petitioners' exception to this Tribunal fails to address the issue before us, namely, why should the default order issued by the Chief Administrative Law Judge be vacated.

With respect to petitioners' contention that the Division was obligated to produce evidence of mailing, the Division would have been required to produce such evidence if the matter proceeded to a hearing on the merits on the issue of the timliness of the petition (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). However, the instant matter never reached this stage because petitioners failed to appear at the scheduled hearing.

We, therefore, affirm the determination of the Chief Administrative Law Judge that petitioners have failed to present an acceptable excuse as well as establishing a meritorious

case. The Chief Administrative Law Judge accurately and adequately addressed these issues and we affirm based on the rationale stated in the order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos is denied;

2. The order of the Chief Administrative Law Judge denying the application of Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos to vacate the default determination rendered is sustained;

3. The order of the Chief Administrative Law Judge holding Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos in default is affirmed;

4. The petition of Mohamed H. Kassim, Ali Ali Salim and Kowsil Burgos is, in all respects, denied; and

5. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 20, 1990 is sustained.

DATED: Troy, New York
May 11, 1995

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

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