

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

STEPHEN ROBINS :

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, 1999 through August 31, 2001. :

DECISION
DTA NOS. 819602,
819603, 819604
AND 819605

In the Matter of the Petition :

of :

ROCKWELLS RESTAURANT CORP. :

for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period December 1, 1998 through August 31, 2001 :
for the Quarters ended November 30, 2000 through :
February 28, 2002. :

Petitioners Stephen Robins and Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed an exception to the order of the Chief Administrative Law Judge issued on December 2, 2004. Petitioners appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer Murphy, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a letter in lieu of a formal reply brief. Oral argument was not requested.

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

ISSUE

Whether the Chief Administrative Law Judge properly denied petitioners' motion to reopen the default determinations entered against them.

FINDINGS OF FACT

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

For the five sales and use tax quarters commencing on September 1, 2000 and running through November 30, 2001, petitioner Rockwells Restaurant Corp. ("Rockwells") filed sales and use tax returns reporting in the aggregate \$320,217.40 in tax due. Eleven of the checks submitted during this period by Rockwells in payment of the tax due were dishonored by its bank. As a result, the Division of Taxation ("Division") issued notices and demands L-019517103, L-020107359, L-020687413, L-020884050 and L-021140745, for a total of \$318,794.47, consisting of \$254,162.42 in tax, \$19,753.58 in interest and \$44,879.43 in penalty. Rockwells filed five requests for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") (CMS No. 188507, 190112, 192342, 193176 and 193196). Rockwells' requests were denied on May 9, 2003. Rockwells filed a petition (DTA # 819604) with the Division of Tax Appeals asking only that penalty be abated.

For the period December 1, 2001 through February 28, 2002, Rockwells filed its quarterly sales and use tax return reporting \$66,134.53 in tax due. The three checks submitted by Rockwells in payment of the tax due were all dishonored by its bank. As a result, the Division

issued Notice and Demand L-021585761 in the amount of \$81,460.27 consisting of tax of \$66,134.53, interest of \$4,709.60 and penalty of \$10,616.14. Rockwells filed a request for a conciliation conference with BCMS (CMS No. 194935). Its request was denied on May 9, 2003, and it filed a petition (DTA # 819605) with the Division of Tax Appeals asking only that penalty be abated.

On August 23, 2001, the Division commenced a sales tax field audit of Rockwells. Rockwells' sales records were reviewed in detail and no additional tax was found due with respect to its sales. However, additional tax was determined to be due with respect to Rockwells' asset purchases and expenses in the amount of \$10,406.82 with interest of \$1,895.56. Penalty was not assessed. On August 12, 2002, the Division issued Notice of Determination L-021379053 in the amount of \$12,302.38. Rockwells filed a request for a conciliation conference with BCMS (CMS No. 194504). Its request was denied on May 9, 2003, and it filed a petition (DTA # 819603) with the Division of Tax Appeals asking only that penalty be abated.

On September 3, 2002, the Division issued Notice of Determination L-021387289 to petitioner Stephen Robins as a responsible officer of Rockwells Restaurant Corp. for the period June 1, 1999 to August 31, 2001. The determination asserted tax due in the amount of \$8,354.28 and interest of \$1,346.17 for a total of \$9,700.45. No penalty was asserted due. Mr. Robins filed a request for a conciliation conference with BCMS (CMS No. 194505). His request was denied on May 9, 2003, and he filed a petition (DTA # 819602) with the Division of Tax Appeals asking only that penalty be abated.

The assistant calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated November 18, 2003 to petitioners and to the Division

advising them to contact each other to set a mutually convenient hearing date during the months of March or April 2004. The hearing was initially scheduled for March 25, 2004 but was rescheduled to May 25, 2004 in order to allow the parties time to reach a resolution of these matters without the need for a hearing.

On March 19, 2004, Ms. Murphy wrote to Mr. Robins to give him one last opportunity to qualify for the Division's amnesty program. She informed him that:

If you sign the withdrawals by March 24, 2004, your denial of Amnesty will be reversed on March 31st and payment must be received by April 12th. Failure to make payment within the time stated will result in default, penalty and interest will remain and you will lose your protest rights.

Mr. Robins never signed the withdrawal of hearing or made the payments referenced by Ms. Murphy in her letter.

On March 23, 2004, Administrative Law Judge Joseph W. Pinto, Jr. advised the parties that:

Pursuant to our telephone conversation of earlier today, the above-referenced matters have been adjourned for 60 days and the hearing originally scheduled for Thursday, March 25, 2004 has been postponed until May 25, 2004. If there remains a need for a hearing on that date, it will occur at the Division of Tax Appeals in Troy, NY.

On April 19, 2004, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that the hearing was scheduled for May 25, 2004 in Troy, New York.

On May 25, 2004 at 10:30 A.M., Administrative Law Judge Thomas C. Sacca called *The Matter of Stephen Robins and The Matter of Rockwells Restaurant Corp.*, involving the petitions here at issue. Present was Ms. Murphy as representative for the Division. Petitioners

did not appear, and no representative appeared on their behalf. The attorney for the Division moved that petitioners be held in default.

On May 28, 2004, Administrative Law Judge Sacca issued determinations finding petitioners in default.

On July 29, 2004, petitioners filed an application to vacate the May 28, 2004 default determinations. In the application, Mr. Robins explained that he did not attend the hearing because he thought that the matter would be resolved through amnesty. He indicated that “I made a phone call to the tax department around mid-May and was told that my amnesty was reinstated and a notice had been sent to us.”

On September 1, 2004, the Division filed a letter in opposition to the application to vacate the default determinations. In her letter, Ms. Murphy points out that petitioners lacked reasonable cause for their failure to appear at hearing:

To reiterate, Mr. Robins knew what needed to be done to avoid a Division of Tax Appeals hearing and to obtain the relief for which he petitioned. Yet, he chose not to sign the document that would have eliminated the need for a hearing and failed to pay the necessary tax and reduced amnesty interest that would have enabled these liabilities to be closed under amnesty. Whether petitioners intended to obtain amnesty but were unable to do so because of unforeseen circumstances or were merely trying to delay collection of the tax is unimportant. Petitioners had the options either to withdraw their petitions as part of the amnesty process or appear at hearing. Since they failed to withdraw their petitions, they should have appeared at hearing.

Moreover, Ms. Murphy argues that petitioners have failed to demonstrate a meritorious case:

How can petitioners argue a meritorious case for abatement of penalty if these notices encompassed six sales tax quarters where most returns were filed with no remittance (dishonored checks or non-remit returns)? . . . Further, the length of time and the number of incidents involved

(i.e., non-remittance returns filed) compellingly suggests that the non-payment could not have been inadvertent or otherwise attributable to an oversight.

THE ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

In his order, the Chief Administrative Law Judge noted that pursuant to section 3000.15(b)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 *et seq.*), if 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.” The Chief Administrative Law Judge further observed that section 3000.15(b)(3) of such rules 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 Chief Administrative Law Judge found that petitioners did not appear at the scheduled hearing or obtain an adjournment and the Administrative Law Judge correctly granted the Division’s motion for default. The Chief Administrative Law Judge concluded that petitioners had failed to demonstrate that they had reasonable cause for their failure to appear for their hearing or that they had a meritorious case.

The Chief Administrative Law Judge held that petitioners were clearly informed of what they had to do to qualify for amnesty and they failed to do it. The Chief Administrative Law Judge found that petitioners failed to appear at the hearing by their own choice and, having intentionally defaulted in appearing, they cannot demonstrate that they had reasonable cause to have done so. The Chief Administrative Law Judge determined that as petitioner Rockwells Restaurant Corp. repeatedly remitted bad checks over a period of more than one year, it must

have been intentional and petitioners failed to even attempt to explain why so many bad checks were issued.

The Chief Administrative Law Judge noted that two of the petitions involved in this proceeding concerned assessments wherein no penalties were asserted and as the only relief requested was the elimination of penalties, it would be pointless to vacate the default determinations for these petitions as no relief is available in any event.

As a result, the Chief Administrative Law Judge denied petitioners' request to vacate the default determinations and sustained the default determinations issued on May 28, 2004.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they did do what was required of them to obtain amnesty regarding the assessments herein that were eligible for amnesty. Further, petitioners maintain that, as they were not contacted prior to the hearing for a prehearing conference, they assumed that there was no need for an actual hearing. Petitioners have also attempted to submit documentary evidence on exception to prove that they withdrew their petitions as required in order to obtain amnesty and, in fact, amnesty was granted. In their brief, petitioners also agree with that portion of the Chief Administrative Law Judge's order which concluded that it would be pointless to vacate the default determination for the two petitions (DTA Nos. 819602 and 819603) challenging assessments in which no penalty was asserted due as the only relief sought was the elimination of penalties.

The Division, in opposition to petitioners' exception, argues that the order of the Chief Administrative Law Judge should be affirmed.

OPINION

We affirm the denial by the Chief Administrative Law Judge of petitioners' application to vacate the default determinations issued by the Administrative Law Judge.

20 NYCRR 3000.15 provides, in pertinent part, as follows:

(a) *Notice.* After issue is joined (*see*, § 3000.4[c] 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.

The record before us clearly indicates that petitioners failed to appear 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 the Administrative Law Judge properly rendered default determinations pursuant to 20 NYCRR 3000.15(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 determinations should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.15(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; *see also, 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. Further, we have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (*see, Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). The issue before us on exception is whether the Chief Administrative Law Judge properly denied petitioners’ motion to vacate the default determinations issued by the Administrative Law Judge, not whether amnesty was ultimately granted to petitioners for one or more of the assessments at issue. As a result, we reject petitioners’ attempt on exception to assert as facts matters which were not made part of their application to the Chief Administrative Law Judge to vacate the default determinations entered against them.

We find that the Chief Administrative Law Judge accurately and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Thus, we affirm the order of the Chief Administrative Law Judge denying petitioners’ application to vacate the default determinations entered against them.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stephen Robins and Rockwells Restaurant Corp. is denied;
2. The order of the Chief Administrative Law Judge is affirmed;
3. The petition of Stephen Robins is denied;
4. The petition of Rockwells Restaurant Corp. is denied;
5. The denial by the Chief Administrative Law Judge of petitioners' application to vacate the default determinations issued by the Administrative Law Judge is affirmed; and
6. The default determinations issued on May 28, 2004 are sustained.

DATED: Troy, New York
September 1, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner