STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AKBAR AZAD	:	DECISION DTA NO. 819650
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 September 1, 1999 through May 31, 2001.	:	

Petitioner Akbar Azad, c/o A to Z Candy & Grocery, Inc., 38-56 Menard Drive, Carrollton, Texas 75010-6470, filed an exception to the determination of the Administrative Law Judge issued on October 21, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a 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 petitioner's motion to vacate a default determination entered against him.

FINDINGS OF FACT

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

In July 2001, the Division of Taxation ("Division") commenced a sales and use tax field audit of A to Z Candy & Grocery, Inc., which was owned by petitioner. The corporation operated a small retail store named A to Z Grocery Store. The Division issued Notice of Determination L-021662585-6, dated October 15, 2002, to petitioner as an officer or responsible person of the corporation, asserting sales and use tax due for the period September 1, 1999 through May 31, 2001.

Petitioner filed a request dated November 4, 2002 for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. The conference was scheduled for May 15, 2003; however, petitioner failed to appear for the conference. On June 13, 2003, a Conciliation Default Order was issued. On September 8, 2003, the Division of Tax Appeals received from petitioner a petition protesting the assessment here at issue. In his petition, petitioner argued that he was not the owner of the store during the period of the audit. It is noted that although the petition listed Hemang Shah, CPA, as petitioner's representative in this matter, Mr. Shah has not participated in any aspect of this proceeding.

On January 15, 2004, the Division of Tax Appeals mailed to petitioner, petitioner's representative and the Division, a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing. A response from the Division selected the date of June 8, 2004. No response was received from either petitioner or his representative. On May 3, 2004, the Division of Tax Appeals mailed notices of hearing

advising the parties that a hearing was scheduled for the instant matter on June 8, 2004 at 10:00 AM.

By letter dated June 4, 2004, petitioner requested an adjournment of the hearing scheduled for June 8, 2004. No reason for the request was stated. By letter dated June 7, 2004, the Assistant Chief Administrative Law Judge of the Division of Tax Appeals denied the request since good cause for the adjournment had not been shown to exist.

On June 8, 2004 at 10:00 A.M., Administrative Law Judge Catherine M. Bennett called the ***Matter of Akbar Azad***, involving the petition here at issue. Present was Mr. Maslyn as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. The attorney for the Division moved that petitioner be held in default.

On July 14, 2004, Administrative Law Judge Bennett issued a determination finding petitioner in default.

On August 17, 2004, petitioner filed an application to vacate the June 14, 2004 default determination. In his application, petitioner indicated that he had asked for an adjournment of his hearing due to health problems. He listed his doctor's name and telephone number and indicated that medical records will be presented at the time of the next hearing. Attached to the application was an invoice addressed to Ali Azad for medical tests performed on May 7, 2004. Petitioner did not explain who Ali Azad is or what laboratory tests performed in May had to do with a hearing held in June.

With regard to the merits of his case, petitioner asserted that he moved to Texas in October 1999 and sold only nontaxable items until the premises were subleased to a new owner. Petitioner asserted that the "premises had a new owner during most of the said time until the

expiration of the lease." Attached to the application to vacate was a copy of the sublease agreement which provided, among other things, that it was effective as of February 1, 2001 (although signed on March 29, 2001). In addition, it provided that the "premises should be strictly be [sic] used for the sale of candy, groceries, lottery, magazines, music, DVD, legitimate video films, ice cream, pastries, sandwitches [sic] etc."

The Division of Taxation filed a response dated September 7, 2004 arguing that petitioner has shown neither a reasonable excuse for his default nor a meritorious case. Specifically, the Division pointed out that, contrary to petitioner's assertion, most of the types of inventory listed in the sublease are in fact taxable items. Moreover, also contrary to petitioner's assertion, by the terms of the sublease, petitioner was in possession of the premises for substantially all of the audit period.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Chief Administrative Law Judge noted that the Rules of Practice and Procedure of the Tax Appeals Tribunal provide that 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 (***see***, 20 NYCRR 3000.15[b][2]). The Chief Administrative Law Judge pointed out that the Rules further provide that on 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***, 20 NYCRR 3000.15[b][3]).

The Chief Administrative Law Judge found that, as petitioner did not appear at the scheduled hearing or obtain an adjournment, a default determination was properly issued. The

Chief Administrative Law Judge concluded that petitioner failed to demonstrate that he had reasonable cause for his failure to appear for his hearing because he requested an adjournment of his hearing without stating a reason for the request. Although in his application to vacate the default petitioner stated that he was unable to attend the hearing because of an unspecified medical reason, the Chief Administrative Law Judge found that petitioner submitted insufficient evidence to document his claim. The Chief Administrative Law Judge further held that petitioner failed to explain why his representative did not appear at the hearing on his behalf if petitioner was too sick to attend the hearing.

The Chief Administrative Law Judge also concluded that petitioner failed to demonstrate that he has a meritorious case, in that he submitted no evidence to support his claim that he sold only nontaxable items subsequent to October 1999. Further, the sublease agreement submitted by petitioner showed that petitioner owned and operated the store for most of the audit period.

As a result, the Chief Administrative Law Judge denied petitioner's request to vacate the default determination and sustained the default determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he is a part owner of A to Z Candy & Grocery, Inc. which operated the A to Z Grocery Store until October 1999. Thereafter, petitioner asserts that the store was leased to and operated by another individual. Petitioner claims that his corporation did not own the goods sold by this individual and submitted a sale of inventory agreement as substantiation of his claim. Petitioner maintains that he failed to attend the hearing due to medical reasons and he submitted a letter from his physician to explain his condition. Petitioner argues that his representative would have attended the hearing on his behalf but it was

inconvenient for him to do so since the hearing was held in Troy and not in Queens. Petitioner asks for a new hearing to be held in Queens at which time his representative will present evidence that during the period at issue, a rental fee and lottery sales were the only sources of income for the corporation.

The Division, in opposition, argues that petitioner should not be allowed to submit evidence not made part of the record in his application to reopen his default. The Division asserts that petitioner has not shown an excuse for his default or a meritorious case. Further, the Division maintains that having failed to appear at the scheduled hearing without a valid excuse, petitioner is not entitled to request a new hearing to be held in Queens for the convenience of his representative.

OPINION

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). As a result, we reject petitioner's attempt on exception to assert as facts matters which were not made part of petitioner's application to vacate the default determination entered against him.

We find that the Chief Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the Chief Administrative Law Judge's order in any respect. Thus, we affirm the order

of the Chief Administrative Law Judge denying petitioner's application to vacate the default determination entered against him.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Akbar Azad is denied;

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

3. The order of the Administrative Law Judge holding petitioner Akbar Azad in default is affirmed; and

4. The petition of Akbar Azad is denied.

DATED: Troy, New York
June 9, 2005

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner