

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

FRANK SCICCHITANO D/B/A BREADSTIX CAFÉ :

DECISION
DTA NO. 823518

for Review of a Proposed Refusal to Renew a Certificate of :
Authority under Articles 28 and 29 of the Tax Law dated
February 19, 2010. :

Petitioner, Frank Scicchitano d/b/a Breadstix Café, filed an exception to the order of the Administrative Law Judge issued on August 19, 2010. Petitioner appeared by Raymond W. Bulson, Esq. The Division of Taxation appeared by Mark Volk, Esq. (Michael J. Hall, of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner did not file 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 the default determination.

FINDINGS OF FACT

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

The Division of Taxation (Division) issued a Notice of Determination dated May 4, 2007, bearing assessment number L-028496203, in the amount of \$270,329.08, for sales and use tax due under Articles 28 and 29 of the Tax Law to petitioner, Frank C. Schiccitano, as a person responsible for the taxes due of Theresa L. Ickes d/b/a Breadstix Café. In due course, the Division issued to petitioner a Notice and Demand for Payment of Tax Due dated August 27, 2007 for said sales and use tax. Thereafter, the Division issued warrant E-028496203-W001-5 against petitioner for a total amount due of \$292,136.39, representing tax in the amount of \$130,423.68 plus penalty of \$102,191.51 and interest as of such date in the amount of \$59,521.20.

Petitioner commenced an action against the Division pursuant to Article 78 of the CPLR alleging that the Notice of Determination was not properly addressed to petitioner and that the Division's actions were affected by error of law, an abuse of discretion, and arbitrary and capricious. This action was ultimately settled by the parties pursuant to a stipulation dated February 9, 2009, whereby the parties agreed, among other things, that petitioner was a responsible person for the collection of the taxes due under said Notice of Determination and that said notice had been properly addressed to petitioner. In addition, the parties agreed that petitioner would pay the sum of \$132,841.33 to satisfy his liability with payment of \$30,000.00 on or before February 17, 2009, followed by 36 monthly payments in the amount of \$2,856.70 to commence on or before April 15, 2009.

Petitioner commenced payments pursuant to the terms of the stipulation and paid a total of \$67,193.73 of the amount owed as of June 22, 2010. However, petitioner has not been able to keep current with his payments according to the terms of the stipulation, with the result that he

was deemed to be in default of the stipulation and became liable for the full amount of the original tax due plus penalty and all accrued interest, minus the amounts already paid.

At some point during this period of time,¹ Theresa Ickes sold the Breadstix Café to petitioner in a bulk sales transaction. Petitioner was assessed tax, penalty and interest as the bulk sales transferee pursuant to notices of determination L-029821500-9, L-029821501-8, L-029821502-7 and L-029821503-6. The four assessments were the subject of a conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS) and were sustained by a conciliation order dated October 24, 2008. Petitioner did not appeal the conciliation order. These assessments have not been paid in full by petitioner.

The Division issued two additional notices of determination, L-032397066-9 and L-032967369-6, for sales and use tax due for the quarters ending May 31, 2009 and August 31, 2009. These assessments have now been paid in full. However, the Division also issued notices and demands L-033389620-6 and L-033511210-3 to petitioner for self-assessed taxes due for the quarters ending November 30, 2009 and February 28, 2010. These liabilities have not been paid in full.²

On January 21, 2010, the Division received from petitioner a DTF-17-R, Application to Renew Sales Tax Certificate of Authority. On February 19, 2010, the Division issued to petitioner a Notice of Proposed Refusal to Renew a Certificate of Authority. This notice indicated that the Division was unable to renew petitioner's certificate of authority because "the applicant owes money to the Tax Department." Petitioner filed a petition dated February 22,

¹ The exact date is not contained in the record.

² These notices were issued after the Notice of Proposed Refusal to Renew a Certificate of Authority and therefore cannot be considered as a basis for refusal to renew.

2010 challenging the Division's proposed refusal to renew his certificate of authority and an expedited hearing was scheduled for March 22, 2010 before Administrative Law Judge Catherine M. Bennett. Petitioner requested and received an adjournment of the scheduled hearing and agreed to a new hearing date of April 8, 2010. Petitioner requested an additional adjournment in order to pursue a settlement with the Division. Petitioner's request was granted and the hearing was adjourned until April 26, 2010 to allow the parties time to resolve this matter without the need for a hearing. Once again, petitioner requested and received an adjournment of the hearing. During a telephone conference, which included petitioner's representative, the administrative law judge and the Division's representative, a new, mutually agreed upon hearing date was set for May 17, 2010. The administrative law judge confirmed this date with a follow-up letter dated April 23, 2010.

On April 26, 2010, the Division of Tax Appeals mailed to petitioner and to petitioner's representative a Final Notice of Expedited Hearing scheduling a hearing in the instant matter for Monday, May 17, 2010 at 1:00 P.M. at the offices of the Division of Tax Appeals in Troy, New York. On May 17, 2010 at 1:00 P.M. Administrative Law Judge Catherine M. Bennett called the ***Matter of Frank Scicchitano d/b/a Breadstix Café*** regarding the petition here at issue. The Division was represented by Michael Hall. Neither petitioner nor his representative appeared at the hearing. Neither petitioner nor his representative contacted the Division of Tax Appeals or requested an adjournment of the hearing. Mr. Hall indicated on the record that he had twice attempted to contact petitioner's representative by telephone. Petitioner's representative did not return Mr. Hall's telephone calls. Mr. Hall moved that petitioner be found to be in default. On May 20, 2010, Administrative Law Judge Bennett found petitioner to be in default and ordered the petition of Frank Scicchitano d/b/a Breadstix Café denied.

On May 24, 2010, petitioner made an application to vacate the default determination. Petitioner stated that the reason for his failure to appear at the hearing is that “[f]or some unknown reason the hearing scheduled in Rochester on May 17th, 2010 was not entered into the calendar at the Law Office of Raymond W. Bulson, Esq., so a request for a continuance was not sent.” With respect to the merits of his case, petitioner stated:

6. The delay in paying the sales tax was not intentional on Petitioner’s part. There was a large assessment that coincided with a Settlement Stipulation entered into with the Sales Tax Department in February, 2009 that appeared to be the same debt. This has since been clarified and Petitioner is diligently trying to reach a compromise settlement with the tax compliance office.

7. It is believed that a settlement can be agreed on this date to allow Petitioner to continue operating the restaurant in question as it is his sole means of income and without it would be unable to pay any amount on his sales tax liability.

* * *

10. Petitioner cannot maintain payments of the settlement without having his business fully operational. To do so, he must have his *Certificate of Authority* renewed to continue running his business and meet his financial responsibilities.

The Division has filed papers in opposition to petitioner’s application to vacate the default determination. In his affidavit, Mr. Hall asserts that petitioner has not established a reasonable excuse for his failure to appear at the hearing. He points out that both petitioner and petitioner’s representative were made aware by letter and by Final Notice of Expedited Hearing of the date and time of the May 17, 2010 hearing and the need to ask for an adjournment if they could not appear. In addition, Mr. Hall points out that in the days leading up to the scheduled hearing, petitioner’s representative twice failed to return Mr. Hall’s telephone calls made for the purpose of discussing the case.

The Division asserts that petitioner has not demonstrated that he has a meritorious case. He argues that the substantive issue of this case is whether the Proposed Refusal to Renew a Certificate of Authority was proper and that all of the allegations contained in the petition and application to vacate are irrelevant and immaterial because a variety of assessments remain unpaid.

THE ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

In his order, the Chief Administrative Law Judge noted that pursuant to § 3000.15(b)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, 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 § 3000.15(b)(3) of such rules 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.”

The Chief Administrative Law Judge found that neither petitioner nor his representative appeared at the scheduled hearing or obtained an adjournment and the Administrative Law Judge correctly granted the Division’s motion for default. The Chief Administrative Law Judge concluded that petitioner had failed to demonstrate that he had reasonable cause for his failure to appear for his hearing or that he had a meritorious case.

The Chief Administrative Law Judge found that both petitioner and his representative were aware of the hearing date, having been notified in writing of such date on more than one occasion. The Chief Administrative Law Judge also pointed out that an “unknown reason” is not a valid excuse for failing to appear at a scheduled hearing. The Chief Administrative Law

Judge thus concluded that petitioner has not established that he had a reasonable cause for his failure to appear at the hearing.

Addressing whether petitioner established that he has a meritorious case, the Chief Administrative Law Judge noted that the only issue to be resolved in this matter is whether any tax has been finally determined to be due from petitioner and has not been paid in full. The Chief Administrative Law Judge noted that petitioner failed to make an argument as to why he does not owe taxes, nor does petitioner suggest that he might not owe all of the taxes that the Division asserts. The Chief Administrative Law Judge determined that the Division is well within its rights in refusing to renew a Certificate of Authority of a vendor who owes back taxes. The Chief Administrative Law Judge pointed out that the Division is free to enter into a deferred payment arrangement with petitioner if it chooses to do so; however, it cannot be compelled to do so. As such, the Chief Administrative Law Judge determined that petitioner failed to establish that he has a meritorious case.

As a result, the Chief Administrative Law Judge denied petitioner's request to vacate the default determination and sustained the default determination issued on May 20, 2010.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that his obligations under two of the assessments have been consolidated into the Stipulation of Settlement. Petitioner contends that two of the assessments have been paid in full. Petitioner concludes that his obligations have been paid and the Division should issue his Certificate of Authority to allow him to remain in business.

The Division argues that the Chief Administrative Law Judge correctly determined that the Default Determination should stand, as petitioner did not provide a reasonable excuse for his failure to appear at the hearing, nor does petitioner have a meritorious case.

OPINION

We affirm the denial by the Chief Administrative Law Judge of petitioner's application to vacate the default determination 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 neither petitioner nor his representative appeared at the scheduled hearing for which he had received notice. Petitioner also failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and the Administrative Law Judge properly rendered a default determination 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 determination 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 petitioner shows that petitioner has failed to present an acceptable excuse for not appearing at the scheduled hearing and has failed to supply evidence of a meritorious case for consideration by this Tribunal. First, we agree with the Chief Administrative Law Judge that petitioner has failed to show a valid excuse for his failure to appear at the hearing. The allegation that petitioner's representative failed to put the hearing date on his calendar is simply not a valid reason for not appearing at a hearing.

Next, we agree with the Chief Administrative Law Judge that petitioner has failed to establish that he has a meritorious case. Section 1134(a)(4)(B) of the Tax Law provides, in relevant part, that:

Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the commissioner ascertains that (i) any tax imposed under this chapter or any related statute, as defined in section eighteen hundred of this chapter, has been finally determined to be due from such person and has not been paid in full . . . the commissioner may refuse to issue a certificate of authority.

Petitioner has failed to make any argument why he does not owe the taxes determined to be due from him. Further, petitioner does not suggest that he may not owe all of taxes that the Division asserts he owes. As such, petitioner has not established a meritorious case.

We note that petitioner sought to introduce an Addendum to Stipulation of Settlement Discontinuance and Release with Index Number 7211-08, dated August 4, 2010, as additional evidence with his exception. Such new evidence is rejected. 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 do not consider as facts matters that were not made part of the record below.

Further, we reject petitioner's argument that both assessments L-033511210-3 and L-033386920-6 have been paid in full. As these notices were issued after the Notice of Proposed Refusal to Renew a Certificate of Authority, they cannot be considered as part of the record.

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 petitioner's application to vacate the default determination entered against him.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frank Scicchitano d/b/a Breadstix Café 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 Frank Scicchitano d/b/a Breadstix Café in default is affirmed; and
4. The petition of Frank Scicchitano d/b/a Breadstix Café is denied.

DATED: Troy, New York
May 5, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner