STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRILLUDENE LOGUE	:	ORDER DTA NO. 817534
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, 1988 through August 31, 1988.	:	

Petitioner, Brilludene Logue, 3410 Dereimer Avenue, #14M, Bronx, New York filed a petition 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, 1988 through August 31, 1988.

A hearing was scheduled before Presiding Officer Arthur Johnson at the offices of the Division of Tax Appeals, New York State Department of Health, 5 Penn Plaza, 6th Floor, Conference Room D, New York, New York 10002 on February 6, 2002 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request that the default determination be vacated. The Division of Taxation has filed a response opposing petitioner's request.

Petitioner appeared on her own behalf. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On September 26, 1988, petitioner registered a 1989 Ford automobile with the New York State Department of Motor Vehicles. To pay the sales tax due on the automobile, petitioner tendered a check in the amount of $1,575.92. The check was returned unpaid by petitioner's bank due to insufficient funds. Both the Motor Vehicle registration form and petitioner's dishonored check list petitioner's address as 34 Prospect St., B3-31, Yonkers, NY 10701. On February 15, 1989, the Division of Taxation issued a Notice and Demand for Payment of Sales and Use Taxes Due to Brilludene Logue at 34 Prospect St., B3-31, Yonkers, NY 10701. The notice asserted tax, penalty and interest due in the amounts of $1,575.92, $220.63 and $75.30, respectively, for a total amount due of $1,871.85. The explanation, "Your check #127 dated September 26, 1988, submitted in payment of sales tax due on a motor vehicle was returned unpaid by the bank marked 'Insufficient Funds', " was also contained on the notice.

2. Petitioner's personal income tax refunds for the years 1989, 1990, 1994, 1996 and 2000 were applied by the Division of Taxation in payment of petitioner's outstanding sales tax assessment. The total income tax refunds so applied amounted to $1,912.00. Petitioner misunderstood the notifications issued by the Division of Taxation in lieu of petitioner's refund checks. She believed that she had made a miscalculation on her income tax return each year. In 1997, petitioner made inquiry for the first time regarding the reason for the offset of her refunds by the Division of Taxation and eventually learned that the refund offsets were due to her sales and use tax liability. Petitioner requested a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. A conference was scheduled for September 13, 1999. However petitioner did not appear for her conference and a Conciliation Default Order dated October 8, 1999 was issued.

3. On January 19, 2000, the Division of Tax Appeals received a petition from Brilludene Logue protesting the Conciliation Default Order issued by the Bureau of Conciliation and Mediation Services. It is petitioner's contention that her liability for the sales tax was more than covered by the income tax refund offsets and that the imposition of interest in addition to tax is unfair. Petitioner asserts that she has yet to receive proof of any notification of the sales tax liability prior to her inquiry in 1997. Moreover, petitioner asserts that she has "no recollection of a bank statement regarding insufficient funds with regards to a check made out to the Department of Motor Vehicles ten years ago."

4. On December 31, 2001, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Division of Taxation advising them that a hearing had been scheduled for Wednesday, February 6, 2002 at 9:15 A.M. at the New York State Department of Health, 5 Penn Plaza, 6th Floor, Conference Room C, New York, New York 10002.

5. At no time did petitioner respond to the notice of hearing. On February 6, 2002, at 9:15 A.M., Presiding Officer Arthur Johnson commenced a hearing in the ***Matter of Brilludene Logue***. Petitioner did not appear at the hearing and a default was duly noted. On March 7, 2002, Presiding Officer Johnson issued a default determination against petitioner.

6. On April 1, 2002, petitioner filed an application to vacate the default determination. Petitioner asserted that due to an automobile accident she was unable to attend the scheduled hearing. Petitioner submitted with her application, copies of a police accident report indicating that petitioner was involved in an automobile accident on January 2, 2002 and copies of various medical reports, some related to the injury she sustained in the accident, but many concerning an unrelated injury. The reports indicate that petitioner was out of work on doctor's orders from

January 25, 2002 through February 1, 2002. Petitioner asserts that she was scheduled for "rehab and a visit to the neurologist" on February 4th, 6th and 8th, 2002 although this is not substantiated by the documentary evidence submitted by petitioner.

With respect to the merits of her case, petitioner asserts that she is "being over taxed as a result of a lack of follow-up notification from the agency in 1988." In addition, petitioner asserts that "I do not feel I should have to pay for all those years of interest added."

7. The Division of Taxation by its letter of April 17, 2002 opposes petitioner's request to vacate the default and asserts that petitioner has demonstrated neither reasonable cause for her default nor a meritorious case. The Division of Taxation points out that petitioner has not submitted proof that she was unable to attend the hearing and has not demonstrated that there was reasonable cause and a lack of willful neglect for her check being dishonored.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "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 presiding officer 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." (20 NYCRR 3000.13[d][2].) The rules further provide 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." (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (***see, Matter of Zavalla***, Tax Appeals Tribunal, August 31, 1995; ***Matter of Morano's Jewelers of***

Fifth Avenue, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that she has a meritorious case (20 NYCRR 3000.13[d][3]; ***see also, Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Avenue***, ***supra***).

C. Petitioner has demonstrated beyond any question that she was involved in an automobile accident about a month before her scheduled hearing. Moreover, she has demonstrated that she was unable to return to work until the very week of her hearing. While petitioner has not proven with documentary evidence that she had a medical appointment on the date of her hearing, her description of events is consistent and sufficiently plausible that it can be said that she demonstrated reasonable cause for her default.

D. However, petitioner has failed to demonstrate that she has a meritorious case. She has demonstrated no excuse for failing to properly pay the sales tax when it was due and has not so much as asserted that there was a reason for such failure. Petitioner does not dispute that her sales tax check was dishonored by her bank. In fact, she cannot, since a copy of the dishonored check was introduced into the record by the Division of Taxation. Instead, she merely asserts that she has "no recollection of a bank statement regarding insufficient funds with regards to a check made out to the Department of Motor Vehicles ten years ago."

However, petitioner does dispute the imposition of interest. She finds the imposition of interest unfair because she does not consider that she received proper notice of her liability. The purpose of interest is not to penalize the taxpayer but to reimburse the State for the use of the money (***Matter of Framapac Delicatessen***, Tax Appeals Tribunal, July 15, 1993; ***Matter of Rizzo***, Tax Appeals Tribunal, May 13, 1993). Essentially, failure to remit tax gives the taxpayer the use of funds which do not belong to her, and deprives the State of funds which belong to it.

Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (***Matter of Rizzo***, ***supra***).

Moreover, while petitioner does not consider that she received proper notification of her liability, the record does not bear out her contention. The Division of Taxation mailed to petitioner a Notice and Demand for Payment of Sales and Use Taxes Due at the address listed on petitioner's Motor Vehicle registration form and on petitioner's dishonored check. While that address is clearly not petitioner's present address, there is nothing in the record that would indicate that it was not petitioner's address at the time of the mailing of the notice.

In addition to the Notice and Demand, petitioner received five notifications from the Division of Taxation when her income tax refunds were applied against her sales and use tax liability. While it may be true that petitioner did not understand the nature of her liability, it is not because the Division of Taxation did not send her appropriate notifications. It is because petitioner did not follow up on any of the notifications until some nine years after failing to pay the sales and use tax due on her automobile.

E. Section 1145 of the Tax Law imposes penalty and interest on persons failing to pay the sales and use tax owed within the time to do so prescribed by Article 28 of the Tax Law. However, pursuant to section 1145(a)(1)(iii) of the Tax Law, if such failure to pay was due to reasonable cause and not due to willful neglect, all of the penalty and a portion of the interest may be remitted. In the instant matter, petitioner has failed to demonstrate, or even to allege, that her failure to pay the sales and use tax when due was due to reasonable cause and not due to willful neglect.

F. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued March 7, 2002 is sustained.

DATED: Troy, New York
July 3, 2002

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE