STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **IMRAN GAS CORP.** 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, 1994 through August 31, 1996.	:	ORDER DTA NOS 817897 AND 817898
In the Matter of the Petition of **ADIL BAYAT** 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, 1994 through August 31, 1996.	:	

Petitioners, Imran Gas Corp. and Adil Bayat, filed petitions 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, 1994 through August 31, 1996.

A hearing was scheduled before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York 10022 on January 9, 2001 at 10:30 A.M. Petitioners failed to appear and a default determination was duly issued. Petitioners have made a request by written motion that the default determination be vacated.

Petitioners appeared on this motion by Donald Schwartz, Esq. The Division of Taxation ("the Division") appeared by Barbara G. Billet, Esq. (Cynthia McDonough Esq., of counsel).

Upon a review of the evidence and arguments presented Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On June 22, 2000, the Division of Tax Appeals received petitions from Imran Gas Corp. and Adil Bayat protesting additional sales and use taxes imposed with respect to the gas station operated by the corporation of which Mr. Bayat is the sole owner and shareholder.

2. On September 19, 2000, the calendar clerk of the Division of Tax Appeals sent a notice to schedule hearing to petitioners, to petitioners' representative at that time, Mr. Louis M. Ruscito, and to the Division's attorney, Cynthia E. McDonough, Esq., directing them to set a mutually convenient date for a hearing during the months of January or February 2001. The calendar clerk was to be advised of the agreed upon date by October 25, 2000.

3. The Division responded on October 27, 2000 with a request that the hearing be held on January 9, 2001 in Troy, New York. The Division's attorney indicated that there had been no agreement with petitioner on the hearing date selected. Petitioner was sent a copy of the letter and request for the January 9, 2001 hearing date. Petitioners did not respond to the Notice to Schedule Hearing. On October 31, 2000, the Division submitted a revised response requesting a change of location to New York City.

4. On December 4, 2000, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioners informing them that a hearing on these petitions had been scheduled for Tuesday, January 9, 2001 at 10:30 A.M. in New York City.

5. At no time did the Division of Tax Appeals receive any communication from petitioners or Mr. Ruscito regarding the scheduling of the hearing.

6. On January 9, 2001, at 10:30 A.M., Administrative Law Judge Arthur S. Bray called the matter for hearing. Neither petitioners nor their representative appeared at the hearing. Ms. McDonough appeared for the Division and moved that a default order be issued to petitioners for their failure to appear.

7. On March 15, 2001, Judge Bray issued a default determination against petitioners.

8. On April 11, 2001, petitioners filed an application to vacate the default determination. Petitioners' application contained an affidavit from Mr. Ruscito which indicated at paragraph (4) that:

> I wrote a letter dated December 19, 2000 to the Supervising Administrative Law Judge, a copy of which is attached hereto and marked as Exhibit 1, requesting a brief postponement for the purpose of continuing settlement negotiations. Since I did not receive a response to my letter I assumed that a postponement had been granted.

9. Petitioners' application includes a copy of a letter dated December 19, 2000 addressed to the Supervising Administrative Law Judge of the Division of Tax Appeals. No such letter was ever received by the Division of Tax Appeals. In fact, petitioners have included no proof that the letter was ever mailed on or about December 19, 2000.

10. Mr. Ruscito's affidavit indicates that if the default is vacated, petitioners will demonstrate by the introduction of additional purchase invoices not previously considered by the examining officer that the examining officer's estimate of tax is incorrect.

11. The Division responded to the application in an affirmation dated May 10, 2001. In the affirmation, the Division points out that the purported letter requesting the adjournment of the hearing, which was never received by the Division of Tax Appeals, was also not received by the

Division of Taxation. The Division's representative, Ms. McDonough, indicates that she last spoke to Mr. Ruscito on November 21, 2000, at which time Mr. Ruscito promised to send to Ms. McDonough additional source documentation (i.e., cigarette purchase invoices). Mr. Ruscito never sent the documents or communicated with Ms. McDonough again.

The Division also argues that petitioners have not shown a meritorious case. The Division's representative recites Mr. Ruscito's history of dilatory behavior and repeated failure to produce promised documentary evidence as demonstrating that petitioners do not have a meritorious case.

12. A review of the petitions reveals that on November 25, 1998, petitioners requested a conciliation conference with the Bureau of Mediation and Conciliation Services ("BCMS"). On July 30, 1999, a conciliation default order was issued for failure to appear at conference. In August 1999, the default order was vacated. On March 31, 2000, a conciliation order was issued sustaining the statutory notice. On May 12, 2000, Mr. Ruscito wrote to Mr. Al Roth of BCMS to indicate that petitioner had "finished compiling evidence in our defense." In their petitions, petitioners indicate that this evidence consists of "a signed statement from the company that supplies us with merchandise that sales were indeed as we had originally stated on our sales tax returns."

Attached to the petition is a copy of the statement which is signed by Mr. Bill Serrano of Harold Levinson Associates dated March 20, 2000 wherein Mr. Serrano indicates that they "have no formal invoices or records on file" and that "they all were purged when we changed computer systems." He also indicates that "business dropped from a substantial amount to next to nothing." Nothing more specific is supplied by Mr. Serrano.

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 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." (20 NYCRR 3000.15[b][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 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioners did not appear at the scheduled hearing or obtain an adjournment. Therefore, the Administrative Law Judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(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 petitioners to show a valid excuse for not attending the hearing and to show that they have a meritorious case (20 NYCRR 3000.15[b][3]; ***see also, Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Avenue***, ***supra***).

C. Petitioners have not established a valid excuse for their failure to appear at the hearing. Mr. Ruscito's claim that he made a request for an adjournment is rejected. A review of the Division of Tax Appeals' records indicate that no such request was ever received. Moreover, petitioners have no proof that such a request was ever mailed. Mr. Ruscito's long history of delays and excuses robs him of any credibility in that regard. This is, after all, the second time petitioners have defaulted on the same case.

Even if we assume for the sake of argument that Mr. Ruscito mailed a request for an adjournment as he claims and it was somehow lost in the mails, petitioners still have not established reasonable cause for their default. If an adjournment request was made and never answered, simple prudence would dictate a follow-up call to determine whether the request was granted. It was not reasonable to simply assume that an adjournment had been granted. Accordingly, I find that petitioners have not demonstrated that they had a reasonable excuse for failing to appear at their hearing and thus have failed to meet the first criterion to have the default order vacated.

D. Petitioners have also failed to establish a meritorious case. A bare assertion of newly discovered evidence without any proof whatsoever is insufficient to demonstrate a meritorious case. Petitioners have been promising to submit the purchase invoices for several years. No such records have ever been produced. In fact, evidence in the record tends to show that the invoices in question were destroyed and are no longer available. Therefore, petitioners have failed to show a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued March 15, 2001 is sustained.

DATED: Troy, New York
August 23, 2001

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE