

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAHA ZEKRY	:	ORDER
	:	DTA NO. 819738
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 March 1, 2000 through November 30, 2000.	:	

Petitioner, Taha Zekry, c/o 42-17 28th Avenue, Astoria, New York 11103, 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 March 1, 2000 through November 30, 2000.

A hearing was scheduled before Administrative Law Judge Timothy Alston at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on Wednesday, February 2, 2005, at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated October 5, 2005 that the default determination be vacated. Petitioner appeared *pro se*.

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

FINDINGS OF FACT

1. For the period here at issue, petitioner operated a push-cart vending business. At some point, the Division of Taxation (“the Division”) issued an assessment of sales and use tax against petitioner. The record is completely devoid of details in this regard. Petitioner requested a

conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) and on October 24, 2003, a Conciliation Order Dismissing Request was issued because the request for conference was deemed “late filed.” On November 3, 2003, petitioner filed a petition for hearing with the Division of Tax Appeals. In his petition, petitioner stated that he did not own the push-cart and was not a person responsible for the sales tax. Petitioner named another individual who he believed should be responsible for the sales tax. Petitioner requested repeatedly to be represented by Mr. Tarek Agag, even though petitioner was repeatedly advised that Mr. Agag did not qualify to be a representative before the Division of Tax Appeals pursuant to the provisions of Tax Law § 2014(1). Mr. Agag is not an attorney, a certified public accountant, a public accountant or an enrolled agent.

2. On July 2, 2004, BCMS rescinded its Conciliation Order Dismissing Request and accepted petitioner’s request for a conciliation conference. Petitioner was repeatedly asked to sign a stipulation withdrawing his petition with the Division of Tax Appeals with the understanding that he could file a new petition if he was dissatisfied with the result of his conciliation conference. Petitioner failed to sign this stipulation.

3. On September 16, 2004, the Division of Tax Appeals mailed to petitioner and to the Division of Taxation a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing. They were to select a date in January or February of 2005 and select either Manhattan or Troy as the hearing location. Responses were due no later than October 18, 2004. The parties did not agree upon a date for the hearing. The Division of Taxation selected February 2, 2005 in Troy. Initially, petitioner did not respond at all. On December 27, 2004, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on February 2, 2005 at the offices

of the Division of Tax Appeals in Troy, New York. On January 4, 2005, after the hearing had already been scheduled, petitioner belatedly filed his response to the Notice to Schedule Hearing selecting the date of February 28, 2005 and the location of Kew Gardens, New York.

4. On February 2, 2005 at 10:30 A.M., Administrative Law Judge Timothy J. Alston called the ***Matter of Taha Zekry***, involving the petition here at issue. Present was John Matthews, Esq., as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. Mr. Matthews moved that petitioner be held in default. On February 15, 2005, Administrative Law Judge Alston issued a determination finding petitioner in default.

5. On October 5, 2005, petitioner filed an application to vacate the February 15, 2005 default determination. In his application, petitioner stated that he was unable to appear at his hearing. Petitioner did not explain why he was unable to appear. Moreover, petitioner did not address the merits of his case in any manner.

6. On October 20, 2005, petitioner was given a second opportunity to establish that he had a reasonable excuse for his failure to appear at hearing as well as a meritorious case. On November 4, 2005, petitioner again asked to have his default determination vacated. He stated that he was out of the state in February 2005. However, he did not specify which days during February he was out of the state, and he did not state whether he was out of the state on the day of his hearing. Petitioner again asked to be represented by Mr. Agag. He did not address the merits of his case whatsoever.

7. The Division of Taxation did not file a response to petitioner's applications to vacate the default determination.

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 petitioner 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 petitioner to show a valid excuse for not attending the hearing and to show that he had 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. Subdivision 1 of § 2014 of the Tax Law provides in part:

Appearances in proceedings conducted by an administrative law judge or before the tax appeals tribunal may be by the petitioner or the petitioner’s spouse, by an attorney admitted to practice in the courts of record of this state, by a certified public accountant licensed in this state, by an enrolled agent enrolled to practice before the internal revenue service or by a public accountant licensed in this state. The tribunal may allow any attorney, certified public accountant, or licensed public accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a petitioner in proceedings before the tribunal for a particular matter. . . .

Pursuant to Tax Law § 2014, Mr. Agag is not qualified to represent petitioner before an administrative law judge. Petitioner had the choice of either retaining a representative who meets the qualifications of section 2014 or proceeding without a representative. Petitioner chose to proceed without another representative.

D. Although he was given several opportunities to do so, petitioner has not addressed the reasons for his failure to appear for his hearing in this case with any specificity. While he may have been out of the state on the day of his scheduled hearing, petitioner has failed to say so unambiguously and has introduced no proof whatsoever in this regard. Had petitioner requested an adjournment of his hearing because he was required to be out of the state, that adjournment would in all likelihood have been granted. Instead, he simply failed to appear for the hearing.

E. Petitioner has also failed to demonstrate that he has a meritorious case. It is not sufficient to name another individual as the responsible party. While another individual may also be responsible for collecting and remitting the sales and use taxes, that would not absolve petitioner of his duties as a responsible person. In any event, petitioner has put forth no evidence that he is not a person responsible for the collection and remittance of the sales and use tax.

F. It is ordered that the request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on February 15, 2005 is sustained.

DATED: Troy, New York
May 18, 2006

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE