

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MORUA, INC.	:	ORDER
	:	DTA NO. 820557
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, 2002.	:	_____

Petitioner, Morua, Inc., 2058 Virgil Place, Bronx, New York 10473, 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, 2002.

A small claims hearing was scheduled before Presiding Officer Frank Barrie at the offices of the Division of Tax Appeals, 641 Lexington Ave., New York, New York on Thursday, March 16, 2006 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated June 8, 2006 that the default determination be vacated. The Division of Taxation filed a response to petitioner's application to vacate the default dated July 10, 2006.

Petitioner, Morua, Inc., appeared by Mr. Edwin Rivera. The Division of Taxation ("the Division") appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, 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 April 18, 2003, the Division of Taxation received a Notification of Sale, Transfer or Assignment in Bulk (form AU 196.10) notifying the Division of the sale in bulk of the business assets of petitioner's pizzeria. The Division commenced a sales tax desk audit of petitioner for the period March 1, 2000 through November 30, 2002. On May 28, 2003, as part of that audit, the Division requested, in writing, access to petitioner's books and records for the period in issue. On June 20, 2003, the Division renewed its request for books and records. Petitioner failed to produce its books and records for the period at issue. Accordingly, the Division estimated petitioner's taxable sales based on external indices and issued a Notice of Determination dated October 25, 2003 in the amount of \$14,056.04 plus penalty and interest.

2. By conciliation order dated April 30, 2004, the Bureau of Conciliation and Mediation Services sustained the Notice of Determination. Petitioner next filed a petition for hearing with the Division of Tax Appeals. A small claims hearing was scheduled for petitioner in New York City on March 16, 2006. A notice of small claims hearing, dated February 6, 2006, was mailed to petitioner to advise it of the impending small claims hearing.

3. On March 16, 2006, Presiding Officer Frank Barrie called the ***Matter of Morua, Inc.***, involving the petition here at issue. Petitioner failed to appear at the hearing either by an officer or employee of the corporation or by its authorized representative. No one representing petitioner attempted to contact the Division of Tax Appeals in any manner. The representative of the Division of Taxation moved that petitioner be held in default.

4. On March 29, 2006, Presiding Officer Barrie found petitioner in default and denied the corporation's petition.

5. Petitioner filed an application, dated June 8, 2006, to vacate the March 29, 2006 default. The application consisted of an affidavit made by Mrs. Jitka Morua, wife of the owner of petitioner. In her affidavit Mrs. Morua asserted that her husband, Mr. Martin Morua, was very ill with diabetes and had undergone a kidney transplant after years of waiting for the operation. The petition contained extensive medical records of Mr. Morua which substantiate petitioner's claims of Mr. Morua's ill health. Accordingly, it is accepted as a fact that Mr. Morua was hospitalized at the time of the scheduled hearing and was too ill to appear on behalf of the corporation.

6. Mr. Edwin Rivera is petitioner's representative. Mr. Rivera is not a tax professional and does not appear to have any understanding of the tax appeals process. He is the director of the Bronx Homeward Bound Program and has appeared as petitioner's representative only by the special permission of the Tax Appeals Tribunal.

Petitioner received two separate assessments for sales and use taxes involving two different taxable periods. Petitioner paid one of the assessments. Mr. Rivera asserts that he became confused, thinking that the assessment here at issue had been paid when, in fact, it had not. He did not appear for the hearing because he thought that the matter had been resolved by payment of the tax.

7. With respect to the merits of petitioner's case, Mrs. Morua asserts in her affidavit that the attorney representing petitioner at the sale of the business assets conspired with petitioner's landlord such that proceeds of the sale were paid to the landlord to cover unpaid back rent. Mrs. Morua asserts that she had no intention of paying the landlord for the rent owed because he had deceived her by inflating the level of sales that she could expect from the operation of the pizzeria.

8. In addition, in its petition, petitioner asserts that the Division's estimate of gross sales did not take into account leasehold improvements paid out of the Moruas' savings or that the Moruas invested and lost more than \$200,000.00 in the pizzeria.

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 hearing scheduled in this matter or obtain an adjournment. Therefore, the small claims 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 it had 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. On the date of the scheduled hearing, Mr. Morua was in the hospital and could not have appeared on petitioner's behalf. Mr. Rivera did not appear due to his confusion over the different assessments. Considering the totality of the circumstances in this matter, I find that petitioner has demonstrated reasonable cause for its failure to appear at the scheduled hearing.

D. However, petitioner is also required to demonstrate that it has a meritorious case. On audit the corporation failed to make available upon the Division's request any source documentation of its sales for the period at issue in this matter, i.e., March 1, 2000 through November 30, 2002. Under such circumstances the Division was authorized to estimate the corporation's sales tax liability (Tax Law § 1138[a][1]; *Matter of Licata v. Chu*, 64 NY2d 873, 487 NYS2d 552). Any audit methodology utilized by the Division to estimate sales must be reasonably calculated to reflect taxes due, but exactness in the outcome of the audit is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden then rests with petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452).

E. Even if all of petitioner's assertions concerning its conflicts with its landlord and disputes over back rent are true, they do nothing to prove that the amount of tax assessed was erroneous. Petitioner does not allege that it now has or that it ever had adequate books and records from which the correct sales tax due could be calculated. Having failed to keep adequate records for the years at issue, petitioner is now unable to show by clear and convincing evidence that the audit methodology was unreasonable or that the amount assessed was erroneous. Indeed, petitioner does not claim to have any relevant evidence to introduce at a hearing.

F. It must be concluded that although petitioner has established reasonable cause for its failure to appear at its scheduled hearing, it has failed to demonstrate that it has a meritorious case.

G. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on March 29, 2006 is sustained.

DATED: Troy, New York
February 1, 2007

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE