STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NI'S HONG KONG KITCHEN, INC.	:	ORDER DTA NO. 820814
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, 2001 through August 31, 2002.	:	

Petitioner, Ni's Hong Kong Kitchen, Inc., c/o Heng Xiang Ni, 631 46th Street, Brooklyn, New York 11220, 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 September 1, 2001 through August 31, 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 Wednesday, January 24, 2007 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated February 25, 2007 that the default determination be vacated. The Division of Taxation filed a response dated March 27, 2007 to petitioner's application to vacate the default.

Petitioner appeared by Sauwah So, CPA. The Division of Taxation ("the Division") appeared by Daniel Smirlock, 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. In December 2003, the Division commenced a sales tax field audit of petitioner's business for the period September 1, 2001 through February 28, 2003. As part of that audit, the Division requested access to petitioner's books and records. Petitioner was unwilling or unable to produce all of the records requested by the Division. Accordingly, the Division deemed petitioner's records to be inadequate and instead employed a utility factor to calculate the amount of additional taxable sales. The Division determined additional sales tax due from petitioner in the amount of $17,143.18, plus penalty and interest, and issued a Notice of Determination in that amount on March 28, 2005. Penalty included the additional penalty assessed under Tax Law §1145(a)(1)(vi) for underreporting in excess of 25%. The notice covered only the period September 1, 2001 through August 31, 2002, apparently because petitioner sold its business sometime in 2002. A Bureau of Conciliation and Mediation Services ("BCMS") order dated October 28, 2005 reduced the amount of tax assessed to $10,537.86, plus penalty and interest.

2. On November 8, 2005, a petition was filed on behalf of petitioner. On December 18, 2006, a Notice of Small Claims hearing was sent to petitioner and to petitioner's representative advising them that their hearing would be held on January 24, 2007.

3. On January 24, 2007, Presiding Officer Frank Barrie called the ***Matter of Ni's Hong Kong Kitchen, 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 the petitioner contacted the Division of Tax Appeals in any manner. The Division was represented at hearing by James M. Gastle, Tax Auditor I, from the Division's Buffalo

District Office. Mr. Gastle moved that petitioner be held in default. On February 6, 2007, Presiding Officer Barrie found petitioner in default and denied the corporation's petition.

4. Petitioner filed an application dated February 25, 2007 to vacate the February 6, 2007 default. The application included a copy of petitioner's Sales Tax Certificate of Authority (form DTF-17 A) upon which someone had written that the business was sold on January 31, 2002. The application also included a copy of a letter dated January 4, 2007 from petitioner's representative to the Division's Office of Counsel requesting an adjournment of petitioner's January 24, 2007 hearing. This letter was not addressed to any individual in the Office of Counsel and it is unknown who ultimately received it. Similarly, it is unknown when the letter was mailed to the Division of Taxation or, indeed, if the letter was ever mailed to the Division of Taxation. The Division of Tax Appeals never received a copy of this letter prior to receiving petitioner's application to vacate the default determination and was unaware of its existence. The representative of the Division of Taxation, Mr. Gastle, was similarly unaware of this letter.

5. Neither petitioner nor petitioner's representative ever contacted the Division of Tax Appeals in any manner to request an adjournment of petitioner's hearing or to inquire why the Division of Tax Appeals had failed to respond to petitioner's January 4, 2007 letter to the Division of Taxation.

6. Although he makes no express arguments in his application to vacate the default, petitioner's representative is apparently arguing that reasonable cause exists for his failure to appear at the hearing because of his January 4, 2007 letter to the Division of Taxation. Petitioner's representative also argues that petitioner has a meritorious case because the Division's audit is based upon an estimate which is inaccurate because petitioner did not own the restaurant for the entire period of the audit.

7. The Division filed an affirmation in opposition to petitioner's application dated March 27, 2007 in which the Division argues that petitioner has shown neither a reason for failing to appear at its hearing nor established that it has a meritorious case.

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. Apparently petitioner's representative was confused regarding to whom he should have directed his request for an adjournment. However, even if that is true, he has not explained why he did not contact the Division of Tax Appeals when he received no response to his request. He certainly had no way of knowing whether his request had been granted or denied. The

representative of the Division traveled all the way from the Buffalo area to New York City to attend the small claims hearing. The small claims presiding officer traveled all the way from the Albany area to New York City to preside at petitioner's hearing. I do not think it is asking too much to expect petitioner's representative to make a simple telephone call to verify that he would not be attending the scheduled hearing. Had he done so, petitioner's failure to make a proper request for adjournment of its hearing would have come to light and the representative of the Division and the presiding officer would have been spared unnecessary trips. Accordingly, I find that petitioner has not established reasonable cause for its failure to appear at the scheduled hearing.

D. Because petitioner was unable to produce adequate records at the time of the audit, the Division estimated petitioner's tax liability based upon a utility factor. Petitioner's representative has in turn created his own estimate of tax due based upon facts which are not supported by any evidence in the record. The copy of petitioner's Sales Tax Certificate of Authority is not proof of when the business was sold. It is unknown who entered the date on the certificate or how that individual ascertained the date of sale. Moreover, the BCMS Conciliation Order has already reduced the amount of the assessment significantly. Petitioner has failed to demonstrate that it is entitled to a greater reduction than has already been granted by the Conciliation Order and that the reduction that it now seeks does not duplicate the reduction already ordered at the conciliation conference. Accordingly, I find that petitioner has failed to demonstrate that it has a meritorious case.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on February 6, 2007 is sustained.

DATED: Troy, New York
July 5, 2007

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE