

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RUDY PINKA, SR.** : ORDER  
for Revision of a Determination or for Refund of Sales : DTA NO. 821285  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period September 1, 2002 through November 30, :  
2002. :

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Petitioner, Rudy Pinka, Sr., 55 Smith Street, Sayville, New York 11782, 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, 2002 through November 30, 2002.

A hearing was scheduled before Administrative Law Judge Arthur S. Bray at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on Friday, March 9, 2007 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated April 5, 2007 that the default determination be vacated. The Division of Taxation filed a response in opposition to petitioner's application to vacate the default dated April 10, 2007.

Petitioner, Rudy Pinka, Sr., appeared by Kevin M. Flynn, Esq. The Division of Taxation ("the Division") appeared by Daniel Smirlock, Esq. (John E. Matthews, 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. The assessment here at issue relates to an assessment issued against a company called Craftsman Fence Corporation. Petitioner was assessed by the Division as a responsible officer of the corporation. The corporation filed a request for conciliation conference with the Bureau of Mediation and Conciliation Services (“BCMS”). This proceeding is currently pending in BCMS. Petitioner also filed a request for conciliation conference. However, petitioner’s request was deemed to be late and a Conciliation Order Dismissing Request was issued to petitioner on May 19, 2006.

2. Petitioner filed a petition protesting this Conciliation Order on August 16, 2006. On October 21, 2006, BCMS advised the Division of Tax Appeals that, based upon the receipt of additional information, it was rescinding the dismissal of petitioner’s request for a conference.

3. On October 25, 2006, the Division of Tax Appeals advised petitioner and Richard Bohner, CPA, petitioner’s representative at that time, of BCMS’s October 21, 2006 communication and requested that petitioner sign a stipulation of discontinuance of his proceeding in the Division of Tax Appeals. Petitioner was also advised that if the conciliation proceeding was not resolved to his satisfaction, he could once again proceed in the Division of Tax Appeals by filing a new petition. Petitioner was warned that if he did not sign the stipulation, a hearing would be scheduled for him in the Division of Tax Appeals. Petitioner failed to respond to the Division of Tax Appeals’ request.

4. On November 16, 2006, the Division of Tax Appeals issued a Notice to Schedule Hearing & Pre-Hearing Conference to the parties requesting that they select a hearing date. This notice was issued because petitioner failed to respond to the request to sign the stipulation of discontinuance. Petitioner also failed to respond to the Notice to Schedule Hearing.

5. On November 21, 2006, the Division's representative, John E. Matthews, Esq., contacted Mr. Pinka to once again ask him to complete a stipulation of discontinuance. Mr. Matthews again advised petitioner that he had the right to return to the Division of Tax Appeals if the matter was not resolved to his satisfaction at BCMS. Petitioner failed to respond to this request.

6. On January 29, 2007, the Division of Tax Appeals issued a hearing notice to the parties advising them that a hearing was scheduled for March 9, 2007 at 10:30 A.M. in the Troy offices of the Division of Tax Appeals. Petitioner failed to respond to this notice.

7. On March 9, 2007 at 11:11 A.M., Administrative Law Judge Arthur S. Bray called the *Matter of Rudy Pinka, Sr.*, involving the petition here at issue. Present was John E. 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 March 23, 2007, Administrative Law Judge Bray issued a determination finding petitioner in default.

8. On April 5, 2007, petitioner filed an application to vacate the March 23, 2007 default determination. In his application, petitioner's representative explained that petitioner failed to appear because of a misunderstanding on the part of petitioner's former representative that petitioner's case before the Division of Tax Appeals had been discontinued. Petitioner did not address the merits of his case.

9. On April 10, 2007, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default determination. The Division pointed out that petitioner was advised on several occasions of the need to withdraw his petition. Moreover,

since the corporation is currently engaged in conciliation efforts in BCMS, any reduction in the tax assessed against the corporation will inure to petitioner's benefit as well.

### **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. Petitioner has not established that there existed reasonable cause for his failure to appear at the hearing. Despite repeated attempts by the Division of Tax Appeals and the Office of Counsel to assist petitioner, he ignored their efforts. While he claims to have been confused, it appears to me that petitioner's failure to appear was intentional.

D. Petitioner has made no effort whatsoever to establish that he has a meritorious case.

E. As Mr. Matthews has pointed out, petitioner's corporation has filed a timely protest at BCMS wherein the merits of petitioner's case will be addressed. Any reductions to the corporation's liability will inure to petitioner's benefit as well. Accordingly, there would be no point to reopening this case.

F. It is ordered that the request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on March 23, 2007 is sustained.

DATED: Troy, New York  
July 26, 2007

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE