STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **MEGAN-FRANKLIN, INC.** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 1994 through May 31, 2000 and June 1, 2001 through August 31, 2003.	ORDER DTA # 821341

Petitioner, Megan-Franklin, Inc., 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 periods June 1, 1994 through May 31, 2000 and June 1, 2001 through August 31, 2003.

A hearing was scheduled before Administrative Law Judge Dennis M. Galliher at the offices of the Division of Tax Appeals, New York State Workers' Compensation Board, Rochester, New York 14614, on Friday, June 15, 2007 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated August 20, 2007 that the default determination be vacated. On September 28, 2007, the Division of Taxation filed an affirmation, including the affidavit of Michael J. Hall and attached exhibits, in opposition to petitioner's application to vacate the default.

Petitioner, Megan-Franklin, Inc., appeared by its president, David Forness. The Division of Taxation ("Division") appeared by Daniel Smirlock, Esq. (Michael J. Hall, 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, Administrative Law Judge Dennis M. Galliher issues the following order.

FINDINGS OF FACT

1. The matter here at issue relates to an assessment issued against petitioner, Megan-Franklin, Inc. More specifically, petitioner was assessed by the Division, pursuant to a Notice of Determination dated April 18, 2005 (Notice No. X-559573187-1), as the purchaser, transferee or assignee of certain tangible personal property constituting business assets of an entity known as 492 Pearl Street, Inc. The Division maintained that such purchase, transfer or assignment constituted a bulk transfer per Tax Law § 1141(c), that the pretransfer notice requirements with regard to such transfer were not fulfilled by petitioner as required per statute, and that as a consequence petitioner is liable for the taxes owed by the transferor. In this case, the taxes owed by the transferor were set forth on some ten separately numbered notices of determination.

2. Petitioner filed a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference was held on May 17, 2006, and thereafter a Conciliation Order was issued on June 30, 2006 sustaining the assessment against petitioner.

3. Petitioner continued its challenge by filing a petition with the Division of Tax Appeals on September 28, 2006. By a letter dated October 11, 2006, the Division of Tax Appeals acknowledged the petition and forwarded a copy of it to the Division's Office of Counsel. In turn, the Division's representative, Michael J. Hall, filed the Division's answer to the petition on December 6, 2006.

4. On January 18, 2007, the Division of Tax Appeals issued a Notice to Schedule Hearing & Prehearing Conference to the parties requesting that they select a mutually convenient hearing date during either of the weeks of May 4, 2007 or June 11, 2007. On January 25, 2007, the Division of Tax Appeals issued a Revised Notice to Schedule Hearing and Prehearing Conference during either of the weeks of May 14, 2007 (as opposed to May 4, 2007) or June 11, 2007.

5. By a letter dated February 2, 2007, the Division's representative, Michael J. Hall, advised the Division of Tax Appeals that he and petitioner's president (and representative herein), David Forness, had agreed that the hearing should be held on Friday, June 15, 2007, in Rochester, New York.

6. On May 7, 2007, the Division of Tax Appeals issued a Hearing Notice to each of the parties advising them that a hearing was scheduled for Friday, June 15, 2007 at 9:15 A.M. in the Rochester offices of the Division of Tax Appeals. On June 1, 2007, the Division filed its Hearing Memorandum and furnished a copy of such memorandum to petitioner. Petitioner did not file a Hearing Memorandum.

7. On June 15, 2007 at 10:09 A.M., Administrative Law Judge Dennis M. Galliher called the ***Matter of Megan-Franklin, Inc.***, involving the petition here at issue. Present was Michael J. Hall, as representative for the Division, together with two Division employees prepared to offer testimony as witnesses in the matter. Petitioner did not appear, and no representative appeared on its behalf. Mr. Hall moved that petitioner be held in default. On August 2, 2007, Administrative Law Judge Galliher issued a Determination finding petitioner in default.

8. On August 20, 2007, petitioner filed an application to vacate the August 2, 2007 default determination. In the application, petitioner's representative Mr. Forness explained petitioner's failure to appear as follows:

> I was not able to attend the conference due to an illness a former employee has been suffering. . . . He has been a patient at Roswell Park Institute. [He] has cancer. Part of his tongue and right cheekbone has been removed. [He] is not able to talk. [He] appointed me the "proxy." Therefore, I am responsible for any decisions concerning [his] well-being. [He] has no family. To this day, [he] is an "in house" patient at Roswell Park. I have been visiting [him] every day. [He] is able to write notes to me. Most of the time I sit in his room and we watch television together. Upon request, I can get medical documentation from his surgeon. Also, you may call Roswell Park to verify that [he] is a patient.

Petitioner did not address the merits of the case.

9. On September 28, 2007, the Division filed a response in opposition to petitioner's application to vacate the default determination. The Division's affirmation in opposition, together with the exhibits attached thereto, sets forth the facts upon which the assessment against petitioner was premised. The Division's affirmation goes on to state that petitioner has not satisfied either of the two requisite criteria pursuant to which a default determination may be vacated. The Division notes, in this regard, that petitioner's application to vacate does not address the substantive merits of the matter and thus fails to demonstrate that petitioner has a meritorious case. Further, the Division states that Mr. Forness advised he would be pleading "no contest" on petitioner's behalf and would not be attending the hearing, has made no allegation that he needed to attend to any health care needs of his friend and former employee on the day of the hearing, and that he did not request an adjournment of the hearing, thus leaving no reasonable excuse for petitioner's nonappearance at the hearing.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "[i]n 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: "[u]pon 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, and the default determination was therefore correctly granted in response to 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 Moran'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 3000.15[b][3]; ***see also Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra.***).

C. There is a two-fold threshold to be met in order to allow for vacatur of a default determination. Petitioner must establish both a valid excuse for not appearing at the scheduled hearing and must also establish that it has a meritorious case. Unfortunately, petitioner has not met either of these requirements. While Mr. Forness's efforts to provide care, comfort and companionship to a former employee is certainly admirable, such efforts do not under the

circumstances of this matter constitute a reasonable excuse for failing to appear at the hearing. In addition, petitioner has made no effort whatsoever to establish that it has a meritorious case.

D. It is ordered that the request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on August 2, 2007 is sustained.

DATED: Troy, New York
November 1, 2007

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE