STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GERALD B. TEPPER	:	ORDER DTA NO. 821878
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 2006.	:	

Petitioner, Gerald B. Tepper, filed a petition for revision of a determination or for refund of sales and use taxes under Article 28 and 29 of the Tax Law for the year 2006.

A hearing was scheduled before Presiding Officer Barbara Russo at the offices of the New York State Department of Taxation and Finance, 1740 Broadway, New York, New York, on Wednesday, February 18, 2009 at 1:15 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request, dated October 6, 2009, that the default determination be vacated. The Division of Taxation filed a response dated January 15, 2010 to petitioner's application to vacate the default.

Petitioner appeared pro se. 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. On November 29, 2003, petitioner, a resident of New York State, entered into a contract for the lease and purchase of a 2004 Lincoln Town Car. By the terms of this contract, petitioner was obligated to make monthly lease payments for a period of 36 months and then a final "balloon payment." Petitioner would become the owner of the vehicle at the time of the balloon payment unless he opted to cancel the contract and return the vehicle to the dealer. In any event, sales tax in the amount of $2,782.22 was collected on the entire amount of the contract (36 monthly payments plus the balloon payment) at the time of execution of the contract.

2. After paying the 36 monthly payments, petitioner exercised his option and returned the car to the dealer. Petitioner filed a claim for refund of sales tax in the amount of $1,674.74, contending that he did not owe the portion of the sales tax attributable to the balloon payment because he had opted not to purchase the car. Petitioner's claim was denied with the explanation that:

> When an individual leases a motor vehicle for a period of one year or more, the amount due under the agreement and for the entire period covered by the lease will immediately be subject to sales tax. This lease is considered a sale, and as such, it would be taxable in a like manner as any other sale of tangible personal property. That is, tax is due when title or possession transfers from the seller to the purchaser for consideration. There is no provision in the sales tax law that allows for a refund of the sales tax paid by the lessee even though the agreement with the motor vehicle manufacturer may allow you to be released from the final "balloon" payment and thereby terminating the lease prematurely.

It should be noted that under the circumstances described by petitioner, the lease was not terminated prematurely as suggested in the refund denial. Rather, petitioner chose to exercise his right to cancel the purchase of the motor vehicle which was also provided for in his contract.

Petitioner then requested a conference in the Bureau of Conciliation and Mediation Services (BCMS). After a conciliation conference was conducted, the request was denied and the denial of the refund claim was sustained.

3. On September 17, 2007, petitioner filed a petition with the Division of Tax Appeals challenging the conciliation order, which sustained the denial of the claim for refund. In his petition, petitioner alleges that:

> The contract between "Ford" and Myself is a Retail Installment Contract with an Option to Cancel The Contract after 36 Months and Return The Car To The Dealer. This is under Law in Realty [*sic*] a Voidable Contract at the Option of the Buyer. A Voidable Contract is Not A Final Agreement Until The Option Period Has Ended and The Final Steps Are Taken – Of – Accept and Fulfill Contract OR Terminate The Contract and Establish The Final Price Paid Per Contract Agreement.

The Division of Taxation filed an answer to the petition dated November 28, 2007 in which it denied petitioner's allegations and affirmatively stated that, "pursuant to section 1111(i) of the Tax Law any lease for a term of one year or more of a motor vehicle is subject to tax and any such tax shall be due and collected as of the date of the first payment under such lease" and that "there is no provision in the New York State sales and use tax law which allows for a refund of sales tax paid on a lease of a vehicle where the lessee relocates to another state where the lessee may also be required to pay tax."

It is noted that there is nothing in the record to suggest that petitioner relocated to another state or paid any sales tax to another state.

4. On January 12, 2009, the calendar clerk of the Division of Tax Appeals mailed to petitioner a Notice of Small Claims Hearing advising him of a small claims hearing to be held on February 18, 2009 at 1:15 P. M. at 1740 Broadway, 14th Floor, New York, NY 10019. On February 18, 2009, Presiding Officer Barbara Russo called the ***Matter of Gerald B. Tepper***

involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a duly authorized representative. In addition, 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. On March 12, 2009, Presiding Officer Russo found petitioner in default and denied his petition.

5. Petitioner filed an application to vacate the March 12, 2009 default. Petitioner mailed the application to the Bureau of Conciliation and Mediation Services. BCMS forwarded the application to the Division of Tax Appeals on October 15, 2009. In this application, petitioner asserts that he failed to appear for his hearing because he did not receive the Notice of Hearing because he was in the hospital and not getting mail. He asserted that he suffered from a number of health issues including heart and kidney disease. In addition, his wife passed away. With respect to the merits of his case, petitioner repeated the arguments made in his petition.

6. Because petitioner's description of his health issues as a basis for reasonable cause for failure to appear for his hearing was somewhat vague and lacking in detail, he was given additional time to submit documentation which would substantiate that he was, in fact, unable to attend his hearing. In addition, petitioner was requested to supply a copy of the contract at issue inasmuch as his description of it was somewhat imprecise. Despite being given additional time to submit documentation to substantiate his case, petitioner failed to submit any documentation.

7. On January 15, 2010, the Division of Taxation submitted a letter opposing petitioner's application and asserting without furnishing any specifics that petitioner failed to establish a meritorious case and a valid reason for his failure to appear at hearing.

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 he had a meritorious case (20 NYCRR 3000.13[d][3]; ***see also Matter of Zavalla***; ***Matter of Morano's Jewelers of Fifth Avenue***).

C. Petitioner's excuse for failing to attend his hearing is both lacking in any detail and not entirely plausible. Petitioner claims to have been unable to attend his hearing because he did not receive the hearing notice because he was in the hospital at the time the hearing notice was mailed to him. He does not give the dates he was in the hospital, nor does he explain why the hearing notice was not waiting for him when he returned home from the hospital. When asked to provide substantiation for his excuse, he was unable or unwilling to do so. However, it is recognized that petitioner's illnesses were longstanding and life threatening. Even if petitioner

did receive the hearing notice, it appears unlikely that he would have been able to attend the hearing because of his health issues. Accordingly, I find that petitioner's longstanding illnesses were sufficient to establish a valid excuse for petitioner's failure to appear for his hearing.

D. Section 1111(i) of the Tax Law provides special rules for the payment of sales and use tax in the case of motor vehicles leased for a period of one year or more. Rather than the tax being due upon each periodic lease payment, the total sales tax due based upon the total amount of the lease payments for the entire term of the lease must be paid at the inception of the lease. Also included are any amounts due or contracted to be paid under an option to renew such lease or similar contractual provision. If the lease is terminated early because the vehicle is stolen or destroyed in an accident or if the vehicle is moved out of the state, the lessee is not entitled to a refund because the entire amount of tax was due at the inception of the lease and is not changed by any subsequent event (***Matter of Miehle,*** Tax Appeals Tribunal, August 24, 2000; ***Matter of Moerdler,*** Tax Appeals Tribunal, April 26, 2001; ***Matter of Torquato,*** Tax Appeals Tribunal, October 12, 2000).

It should be noted that the provisions of Tax Law § 1111(i) only address the situations of a lease of a motor vehicle and any option to renew such lease (or a contractual provision similar to an option to renew such lease). This provision does not address the actual sale or an option for the sale of a motor vehicle which would involve the transfer of title as well as the transfer of possession of the motor vehicle. Similarly, regulation section 527.15 does not address the situation of an option for the sale of a motor vehicle or suggest that Tax Law § 1111(i) could apply to such a situation.

E. Petitioner entered into a contract which provided for a lease of an automobile of 36 months duration. By operation of Tax Law § 1111(i), the entire amount of sales tax due on all 36

lease payments was required to be paid as of the date of the first payment under such lease or as of the date of the registration of the automobile with the commissioner of motor vehicles, whichever is earlier.

In addition, the contract provided for the purchase of the automobile with title passing to petitioner upon completion of the lease and payment of the balloon payment. By operation of Tax Law § 1132 (a)(1), the entire amount of sales tax due on the purchase was required to be paid when the purchase price was collected from the purchaser. Because the purchase of a motor vehicle does not fall within the provisions of Tax Law § 1111(i), the cases cited in Conclusion of Law E do not apply. The provisions of Tax Law § 1132(e) apply instead. Section 1132(e) provides in part:

> The tax commission may provide, by regulation, for the exclusion from taxable receipts, amusement charges or rents of amounts representing sales where the contract of sale has been cancelled, the property returned or the receipt, charge or rent has been ascertained to be uncollectible or, in case the tax has been paid upon such receipt, charge or rent, for refund of or credit for the tax so paid. . . .

Regulation section 534.1(a)(5) does in fact provide for the refund or credit of sales and use tax paid with respect to cancelled sales and returned merchandise.

F. Tax Law § 1111(i) provides that at the inception of an auto lease which has a duration of one year or more, the lessee must pay sales tax due based upon the total amount of the lease payments for the entire term of the lease plus any amounts due or contracted to be paid under an option to renew such lease or similar contractual provision. The option to cancel the contracted purchase of the motor vehicle is not an option to renew such lease or a similar contractual provision involving as it does the transfer of both title and possession of the vehicle rather than merely the possession of the vehicle as is the case in a lease. Inasmuch as the provisions of section 1132(e) of the Tax Law authorize the refund of sales tax in the circumstances of a

cancelled purchase of a motor vehicle and inasmuch as the Division of Taxation has not explained why the provisions of section 1111(i) regarding leases should be applied to petitioner's purchase of a motor vehicle, I find that petitioner has established that he has a meritorious case.

G. It is ordered that the application to vacate the default determination be, and it is hereby, granted, and the Default Determination issued on March 12, 2009 is vacated. A new hearing will be scheduled in this matter in due course.

DATED: Troy, New York
March 25, 2010

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE