

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOSEPH CHAIKEL AS OFFICER OF AMY LIQUORS, INC.</b>	:	<b>ORDER</b>
	:	DTA NO. 822028
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Years 2001 through 2005.	:	

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Petitioner, Joseph Chaikel, as officer of Amy Liquors, Inc., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the years 2001 through 2005.

A small claims hearing was scheduled before Presiding Officer Barbara Russo at the offices of the Division of Tax Appeals, 1740 Broadway, 14<sup>th</sup> Floor, New York, New York, on Wednesday, March 25, 2009 at 2:45 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written application dated May 7, 2009 that the default determination be vacated. The Division of Taxation did not file a response to petitioner's application to vacate the default. Petitioner appeared by Lawrence R. Cole, CPA.

Upon a review of the entire case file in this matter as well as the arguments presented for the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. Petitioner protested three sales and use tax assessments: L-024846306 dated December 13, 2004, L-025031893 dated February 14, 2005 and L-025033056 dated February 14, 2005. In addition, petitioner filed two claims for credit or refund with respect to the assessments at issue. In his petition, petitioner requested “abatement of penalty and recomputation of interest and assessed periods.”

2. On February 17, 2009, the Division of Tax Appeals sent to petitioner and his representative a Notice of Small Claims Hearing advising them that their small claims hearing had been scheduled for Wednesday, March 25, 2009. On March 19, 2009, petitioner’s representative requested an adjournment of the hearing. He stated that petitioner’s physician had advised petitioner not to travel due to unspecified health reasons. In order to enable her to decide whether to grant the request for adjournment, Presiding Officer Barbara Russo requested by letter dated March 20, 2009 that petitioner submit a letter from his doctor advising petitioner not to travel. By letter dated March 23, 2009, petitioner’s representative again requested an adjournment of the hearing. In response, on the same date, Presiding Officer Russo again requested the letter from petitioner’s doctor and set a deadline of noon on the 24th of March for the submission of the letter. On March 24, 2009, Presiding Officer Russo advised petitioner’s representative that since the requested letter had not been submitted, no adjournment would be granted and the hearing would be held as scheduled.

3. On March 25, 2009, Presiding Officer Barbara Russo called the ***Matter of Joseph Chaikel as Officer of Amy Liquor, Inc.*** involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by his authorized representative. The representative of the Division of Taxation moved that petitioner be held in default.

4. On April 16, 2009, Presiding Officer Russo found petitioner in default and denied his petition.

5. Petitioner filed an application dated May 7, 2009 to vacate the April 16, 2009 default.

The application consists of a letter from petitioner's representative stating:

My client Joseph Chaikel informs me he did fax the enclosed doctor's note on March 25<sup>th</sup> 2009.

As a result, we respectfully request the default determination dated April 16, 2009 be vacated. Thank you.

6. It is noted that the representative's letter of May 7, 2009 did not contain an "enclosed doctor's note" as he would seem to suggest. Furthermore, the Division of Tax Appeals has no record of receiving a fax from petitioner or his doctor on March 25, 2009 or on any other date. Had petitioner faxed his doctor's note on March 25<sup>th</sup> as he claims, it would have been after the deadline set by the presiding officer in any event. In addition, it is noted that petitioner's application to vacate the default determination does not address the merits of his case in any manner.

#### ***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 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 3000.13[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 has failed to show a valid excuse for not attending the hearing. Although he has had repeated opportunities to provide a letter from his doctor explaining his inability to travel, petitioner has failed to do so. Moreover, petitioner's representative has not explained why he, the representative, could not attend the hearing even if petitioner was unavailable. He certainly knew that the presiding officer had not granted an adjournment. I can only conclude that his failure to appear at the hearing was planned and intentional.

D. Petitioner has also failed to show that he has a meritorious case. In fact, petitioner has failed to even address the merits of his case in his application to vacate his default determination.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on April 16, 2009 is sustained.

DATED: Troy, New York  
July 23, 2009

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE