STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CITY LINE SERVICE STATION, INC.	:	ORDER DTA NO. 822382
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 June 1, 2001 through February 29, 2004.	:	

Petitioner, City Line Service Station, 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 June 1, 2001 through February 29, 2004.

A hearing was scheduled before Presiding Officer Barbara Russo at the Westchester District Office of the Department of Taxation and Finance, 90 South Ridge Street, Rye Brook, New York, on Wednesday, August 12, 2009, at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated November 5, 2009 that the default determination be vacated. The Division of Taxation filed a response dated November 12, 2009 to petitioner's application to vacate the default.

Petitioner appeared by Costas Kreatsoulas. 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 Division of Taxation issued Notice of Determination L-026609425 to petitioner assessing sales and use tax in the amount of $86,469.84 plus penalty of $34,451.39 and interest in the amount of $82,636.08. The reason for this sales and use tax assessment is not discernable from the information contained in the case file. Petitioner requested a conference before the Bureau of Conciliation and Mediation Services (BCMS) and a conciliation order dated April 6, 2007 was issued sustaining the Notice of Determination. On July 1, 2008 (452 days later), a petition was filed protesting the BCMS conciliation order. The petition alleges that the Division of Taxation did not take into account all of petitioner's records in making its calculations. On September 10, 2008, the Division of Taxation filed its answer to the petition. In its answer, the Division denied making any error in issuing the notice and affirmatively stated that the burden of proof is upon petitioner to show that the notice is erroneous or otherwise improper. The answer did not raise any issue regarding the timeliness of the petition. Inasmuch as this proceeding is a small claims proceeding, the Division of Tax Appeals did not raise the issue of the timeliness of the petition within the context of a Notice of Intent to Dismiss because of the prohibition contained in regulation 20 NYCRR 3000.13(c)(3).

2. On July 6, 2009, the Division of Tax Appeals advised the parties that a small claims hearing was scheduled in the Westchester District Office of the Department of Taxation and Finance, 90 South Ridge Street, Rye Brook, New York, on Wednesday, August 12, 2009, at 9:15 A.M. The hearing notice was mailed to both petitioner and petitioner's representative at the mailing address of petitioner's representative (5586 Broadway, Bronx, NY 10463) because that was the only address given in the petition. Neither hearing notice was returned to the Division of Tax Appeals by the U.S. Postal Service.

3. On August 12, 2009, Presiding Officer Barbara Russo called the ***Matter of City Line Service Station, 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 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.

4. On August 27, 2009, Presiding Officer Russo found petitioner in default and denied the corporation's petition.

5. Petitioner filed an application dated November 5, 2009 to vacate the August 27, 2009 default. The application is on stationery of petitioner's representative. This stationery lists the representative's address as: 9 Ascot Road, Yonkers, NY 10710. The application consists of a letter from petitioner's representative stating that they never received the hearing notice because they moved their offices in January of 2009. In addition, it includes a letter from the Division's auditor which states:

> I have been advised by Office of Counsel that the small claims protest regarding City Line Service Station has been concluded by way of a default determination being issued. Based thereon, here is the return of the notebooks that you sent into my office in hopes of having them considered as the basis of further adjustment to your client's audit liability.

Petitioner's representative is of the opinion that the auditor's letter proves that the notebooks mentioned in the letter would have been the basis for further reduction to petitioner's audit liability.

6. The Division of Taxation submitted a letter in opposition to the application to vacate the default. In it, Mr. Matthews stated:

> I have received a copy of the application to vacate the default determination in the above referenced matter. It is the Department's position that the petitioner has not established a basis to vacate the default. The small claims hearing scheduled in

this matter was to focus upon the untimeliness of the protest, and in the Department's view would not reach the merits. Prior to the hearing date the petitioner was granted a courtesy conference by Audit but did not provide adequate records for any adjustments to be made.

The Division did not submit any proof of mailing of the Conciliation Order to petitioner.

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***; ***Matter of Morano's Jewelers of Fifth Avenue***).

C. Petitioner has established that both the copy of the hearing notice mailed to petitioner and the copy mailed to its representative were mailed to an old address which was no longer valid. The hearing notices were not returned to the Division of Tax Appeals by the U.S. Postal

Service. There is no evidence that the notices were forwarded to the representative's new address. Thus, petitioner's claim that he never received the notice of hearing is certainly plausible. Accordingly, petitioner has established that it had a valid excuse for not attending the hearing.

D. It would appear from the dates on the conciliation order and on the petition that the petition was filed late having been filed 362 days after the due date of the petition. However, this issue was not raised in the Division's answer or in any other manner which would have put petitioner on notice that the timeliness of the petition needed to be addressed. In any event, the Division bears the initial burden of proving proper mailing in order to establish the untimely filing of a request for conciliation or petition for hearing (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). It would be inappropriate to shift this burden to petitioner in this case since the Division alone is in possession of the proof of mailing of the conciliation order.

E. Nevertheless, it is incumbent on petitioner to show that it has a meritorious case. This it has failed to do. Although not actually stated, it may be inferred that petitioner was the subject of an estimated assessment due to its failure to keep adequate books and records. To establish a meritorious case, petitioner must demonstrate that it now has sufficient books and records to perform an accurate audit of petitioner's sales and use tax returns or, at the very least, that it has sufficient records to cause a reduction in some portion of the existing assessment. While reference is made to a notebook or notebooks, petitioner has not submitted any such notebook with its application. Petitioner has not described the contents of its notebook or explained how it would affect the audit results already obtained. Thus, it is impossible to determine whether this

notebook would result in any change in the assessment issued against petitioner. Accordingly, it must be concluded that petitioner has failed to establish a meritorious case.

F. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on August 27, 2009 is sustained.

DATED: Troy, New York
March 25, 2010

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE