

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL SHAPIRO	:	ORDER
for Revision of a Determination or for Refund of Sales	:	DTA NO. 822684
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period May 1, 2004.	:	

Petitioner, Michael Shapiro, 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 May 1, 2004. A hearing was scheduled before Presiding Officer Barbara Russo at the State Office Building, 250 Veterans Memorial Highway, Hauppauge, New York, on Wednesday, July 15, 2009 at 10:45 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written application dated September 8, 2009 that the default determination be vacated. The Division of Taxation filed a response dated October 13, 2009 in opposition to petitioner's application. Petitioner submitted a copy of a letter written by him to the Division's counsel. This letter contained comments of a vituperative nature and was not considered in deciding this order.

Petitioner appeared pro se. The Division of Taxation appeared by Mark Volk, 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. The Division of Taxation issued a sales and use tax Notice of Determination, L-029554837, dated December 27, 2007 to Michael Shapiro based upon his alleged purchase of a 1990 30-foot “Cruisers” watercraft. Mr. Shapiro filed a request for a conciliation conference with the Bureau Of Conciliation and Mediation Services and a conciliation conference was scheduled for August 28, 2008. Mr. Shapiro failed to appear for his conference and a conciliation default order was issued on September 26, 2008.

2. Mr. Shapiro next filed a petition with the Division of Tax Appeals dated December 11, 2008, in which he contended that he did not owe sales tax because he has never owned a boat. On June 8, 2009, the calendar clerk of the Division of Tax Appeals issued to petitioner a Notice of Small Claims Hearing advising petitioner that a small claims hearing was scheduled for petitioner on Wednesday, July 15, 2009 at the State Office Building, 250 Veterans Memorial Highway, Hauppauge, NY 11757-5599 at 10:45 AM. Because petitioner lives part of the year in New York and part of the year in Florida, the calendar clerk mailed the hearing notice both to petitioner’s Shelly Drive address in Massapequa, New York, and to his Via Rosa address in Boca Raton, Florida.

3. On July 15, 2009, Presiding Officer Barbara Russo called the ***Matter of Michael Shapiro*** involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a duly authorized representative. Neither petitioner nor anyone 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 August 6, 2009, Presiding Officer Russo found petitioner in default and denied his petition.

4. Petitioner filed an application dated September 8, 2009 to vacate the August 6, 2009 default. In his application, petitioner claimed that he was never notified of the date of his hearing. The application contains a letter to petitioner from Ken Arbour, Manager, Customer Services, United States Postal Service, Boca Raton, Florida. The letter states:

Dear Mr. Shapiro,

This letter is to confirm that some of your mail was delayed and/or returned to sender between the dates of May 20, 2009 and July 22, 2009. The mail was delayed and/or returned to sender as the result of a Postal Service error in our forwarding system.

We apologize for the inconvenience this has caused you, and we are providing this letter to you to share with your correspondence [*sic*] that may have been impacted as a result of this postal error that has since been corrected.

In addition, the application states that petitioner does not owe New York State sales tax.

5. The Division of Taxation filed a response dated October 13, 2009 stating its opposition to petitioner's application because petitioner failed to establish a valid reason for not appearing at his hearing and failed to establish a meritorious case. The Division asked that petitioner's application be denied and the default determination be sustained.

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. Unfortunately, it would appear that petitioner is being less than completely candid in claiming that he never received notice of the hearing. While it is true that one copy of the hearing notice was not forwarded to him from Boca Raton to his Massapequa address in a timely manner, it is also true that the other copy of the hearing notice was mailed to him in a timely manner at his correct address in Massapequa. Accordingly, I must conclude that petitioner has failed to establish a valid excuse for not attending the scheduled hearing.

D. Petitioner has stated that he does not owe New York State sales tax. A conclusory statement of this sort is insufficient by itself to establish that petitioner has a meritorious case.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on August 6, 2009 is sustained.

DATED: Troy, New York
December 17, 2009

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE