

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

FRANK SCICCHITANO D/B/A BREADSTIX CAFÉ :

ORDER
DTA NO. 823518

for Review of a Proposed Refusal to Renew a Certificate of :
Authority under Articles 28 and 29 of the Tax Law dated
February 19, 2010. :

Petitioner, Frank Scicchitano d/b/a Breadstix Café, filed a petition for review of a Proposed Refusal to Renew a Certificate of Authority under Articles 28 and 29 of the Tax Law dated February 19, 2010. A hearing was scheduled before Administrative Law Judge Catherine M. Bennett at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York 12180, on Monday, May 17, 2010, at 1:00 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written application dated May 24, 2010 to vacate the default determination. The Division of Taxation filed a response dated June 23, 2010 in opposition to petitioner's application.

Petitioner appeared by Raymond W. Bulson, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall). Upon a review of the entire case file in this matter as well as the documents and arguments presented for and against the request to vacate the default determination, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination dated May 4, 2007, bearing assessment number L-028496203, in the amount of \$270,329.08, for sales and use tax due under Articles 28 and 29 of the Tax Law to petitioner, Frank C. Schiccitano, as a person

responsible for the taxes due of Theresa L. Ickes d/b/a the Breadstix Café. In due course, the Division issued to petitioner a Notice and Demand for Payment of Tax Due dated August 27, 2007 for said sales and use tax. Thereafter, the Division issued warrant E-028496203-W001-5 against petitioner for a total amount due of \$292,136.39, representing tax in the amount of \$130,423.68 plus penalty of \$102,191.51 and interest as of such date in the amount of \$59,521.20.

2. Petitioner commenced an action against the Division pursuant to Article 78 of the CPLR alleging that the Notice of Determination was not properly addressed to petitioner and that the Division's actions were affected by error of law, an abuse of discretion, and arbitrary and capricious. This action was ultimately settled by the parties pursuant to a stipulation dated February 9, 2009, whereby the parties agreed, among other things, that petitioner was a responsible person for the collection of the taxes due under said Notice of Determination and that said notice had been properly addressed to petitioner. In addition, the parties agreed that petitioner would pay the sum of \$132,841.33 to satisfy his liability with payment of \$30,000.00 on or before February 17, 2009, followed by 36 monthly payments in the amount of \$2,856.70 to commence on or before April 15, 2009.

3. Petitioner commenced payments pursuant to the terms of the stipulation and paid a total of \$67,193.73 of the amount owed as of June 22, 2010. However, petitioner has not been able to keep current with his payments according to the terms of the stipulation, with the result that he was deemed to be in default of the stipulation and became liable for the full amount of the original tax due plus all accrued penalty and interest minus the amounts already paid.

4. At some point during this period of time,¹ Theresa Ickes sold the Breadstix Café to petitioner in a bulk sales transaction. Petitioner was assessed tax, penalty and interest as the bulk sales transferee pursuant to notices of determination L-029821500-9, L-029821501-8, L-029821502-7 and L-029821503-6. The four assessments were the subject of a conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS) and were sustained by a conciliation order dated October 24, 2008. Petitioner did not appeal the conciliation order. These assessments have not been paid in full by petitioner.

5. The Division issued two additional notices of determination, L-032397066-9 and L-032967369-6, for sales and use tax due for the quarters ending May 31, 2009 and August 31, 2009. These assessments have now been paid in full. However, the Division also issued notices and demands L-033389620-6 and L-033511210-3 to petitioner for self assessed taxes due for the quarters ending November 30, 2009 and February 28, 2010. These liabilities have not been paid in full.²

6. On January 21, 2010, the Division received from petitioner a DTF-17-R, Application to Renew Sales Tax Certificate of Authority. On February 19, 2010, the Division issued to petitioner a Notice of Proposed Refusal to Renew a Certificate of Authority. This notice indicated that the Division was unable to renew petitioner's certificate of authority because "the applicant owes money to the Tax Department." Petitioner filed a petition dated February 22, 2010 challenging the Division's proposed refusal to renew his certificate of authority and an expedited hearing was scheduled for March 22, 2010 before Administrative Law Judge Catherine

¹ The exact date is not contained in the record.

² These notices were issued after the Notice of Proposed Refusal to Renew a Certificate of Authority and therefore cannot be considered as a basis for refusal to renew.

M. Bennett. Petitioner requested and received an adjournment of the scheduled hearing and agreed to a new hearing date of April 8, 2010. Petitioner requested an additional adjournment in order to pursue a settlement with the Division. Petitioner's request was granted and the hearing was adjourned until April 26, 2010 to allow the parties time to resolve this matter without the need for a hearing. Once again, petitioner requested and received an adjournment of the hearing. During a telephone conference, which included petitioner's representative, the administrative law judge and the Division's representative, a new, mutually agreed upon hearing date was set for May 17, 2010. The administrative law judge confirmed this date with a follow-up letter dated April 23, 2010.

7. On April 26, 2010, the Division of Tax Appeals mailed to petitioner and to petitioner's representative a Final Notice of Expedited Hearing scheduling a hearing in the instant matter for Monday, May 17, 2010 at 1:00 P.M. at the offices of the Division of Tax Appeals in Troy, New York. On May 17, 2010 at 1:00 P.M. Administrative Law Judge Catherine M. Bennett called the *Matter of Frank Scicchitano d/b/a Breadstix Café* regarding the petition here at issue. The Division was represented by Michael Hall. Neither petitioner nor his representative appeared at the hearing. Neither petitioner nor his representative contacted the Division of Tax Appeals or requested an adjournment of the hearing. Mr. Hall indicated on the record that he had twice attempted to contact petitioner's representative by telephone. Petitioner's representative did not return Mr. Hall's telephone calls. Mr. Hall moved that petitioner be found to be in default. On May 20, 2010, Administrative Law Judge Bennett found petitioner to be in default and ordered the petition of Frank Scicchitano d/b/a Breadstix Café denied.

8. On May 24, 2010, petitioner made an application to vacate the default determination. Petitioner stated that the reason for his failure to appear at the hearing is that "[f]or some

unknown reason the hearing scheduled in Rochester on May 17th, 2010 was not entered into the calendar at the Law Office of Raymond W. Bulson, Esq., so a request for a continuance was not sent.” With respect to the merits of his case, petitioner stated:

6. The delay in paying the sales tax was not intentional on Petitioner’s part. There was a large assessment that coincided with a Settlement Stipulation entered into with the Sales Tax Department in February, 2009 that appeared to be the same debt. This has since been clarified and Petitioner is diligently trying to reach a compromise settlement with the tax compliance office.

7. It is believed that a settlement can be agreed on this date to allow Petitioner to continue operating the restaurant in question as it is his sole means of income and without it would be unable to pay any amount on his sales tax liability.

* * *

10. Petitioner cannot maintain payments of the settlement without having his business fully operational. To do so, he must have his *Certificate of Authority* renewed to continue running his business and meet his financial responsibilities.

9. The Division has filed papers in opposition to petitioner’s application to vacate the default determination. In his affidavit, Mr. Hall asserts that petitioner has not established a reasonable excuse for his failure to appear at the hearing. He points out that both petitioner and petitioner’s representative were made aware by letter and by Final Notice of Expedited Hearing of the date and time of the May 17, 2010 hearing and the need to ask for an adjournment if they could not appear. In addition, Mr. Hall points out that in the days leading up to the scheduled hearing petitioner’s representative twice failed to return Mr. Hall’s telephone calls made for the purpose of discussing the case.

10. Mr. Hall asserts that petitioner has not demonstrated that he has a meritorious case. He argues that the substantive issue of this case is whether the Proposed Refusal to Renew a Certificate of Authority was proper and that all of the allegations contained in the petition and

application to vacate are irrelevant and immaterial because a variety of assessments remain unpaid.

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 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: “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 3000.15[b][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 administrative law judge correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*Matter of Estruch*, Tax Appeals Tribunal, May 20, 2010; *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]; *Matter of Estruch*; *Matter of Zavalla*; *Matter of Morano’s Jewelers of Fifth Avenue*).

C. Petitioner must show that he had a valid reason for failing to appear at his scheduled hearing. Petitioner’s stated reason for his failure to appear is that “[f]or some unknown reason the hearing scheduled in Rochester on May 17th, 2010 was not entered into the calendar at the Law Office of Raymond W. Bulson, Esq., so a request for a continuance was not sent.” I do not

consider an “unknown reason” to be a valid reason for failing to appear at a scheduled hearing. Indeed, if an “unknown reason” were sufficient to meet this requirement, the requirement would have no meaning at all.

Moreover, both petitioner and his representative were aware of the hearing date, having been notified in writing of the hearing date on more than one occasion. It does not appear to me that petitioner ever had any intention of appearing at the hearing since his representative indicates he would have sent a request for a continuance. This, of course, presupposes that another adjournment would have been granted.

Accordingly, I find that petitioner has not established a reasonable cause for his failure to appear at his hearing.

D. Petitioner must also establish that he has a meritorious case. Section 1134(a)(4)(B) of the Tax Law provides that:

Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the commissioner ascertains that (i) any tax imposed under this chapter or any related statute, as defined in section eighteen hundred of this chapter, has been finally determined to be due from such person and has not been paid in full . . . the commissioner may refuse to issue a certificate of authority.

Thus the only issue to be resolved in this matter is whether any tax has been finally determined to be due from petitioner and has not been paid in full. At the very least, petitioner must make some plausible argument why he does not owe the taxes that have been found to be due from him. Petitioner has failed to do this. Petitioner does not even suggest that he might not owe all of the taxes that the Division asserts that he owes. At best, petitioner is hoping to enter into some deferred payment arrangement with the Division. The Division is well within its rights in refusing to renew the Certificate of Authority of a vendor who owes back taxes. If the Division

ultimately decides that it is in the best interest of the state to enter into a deferred payment arrangement, it is free to do so. However, it cannot be compelled to enter into such an arrangement. Accordingly, petitioner has not established that he 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 May 20, 2010 is sustained.

DATED: Troy, New York
August 19, 2010

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE