STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH F. GUERRA	:	ORDER DTA NO. 823578
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period June 1, 2002 through May 31, 2008.	:	

Petitioner, Joseph F. Guerra, 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, 2002 through May 31, 2008. A hearing was scheduled before Presiding Officer Barbara Russo at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York, on Thursday, August 18, 2011 at 12:00 P.M. Petitioner failed to appear and a Default Determination was duly issued on September 1, 2011. Petitioner, appearing pro se, filed an undated written application, which was received by the Division of Tax Appeals on October 31, 2011, requesting that the Default Determination be vacated. The Division of Taxation did not file a written opposition to petitioner's application. Upon a review of the entire case file in this matter, Administrative Law Judge Herbert M. Friedman, Jr., issues the following order.

FINDINGS OF FACT

1. During the period in issue, petitioner was engaged in the business of snow removal from real property, services that were subject to tax under Articles 28 and 29 of the Tax Law.

2. The Division of Taxation (Division) found that petitioner did not file a Certificate of Registration or any sales or use tax returns for the period in issue.

3. In June 2008, the Division commenced a sales and use tax field audit of petitioner for the period in issue. As part of that audit, the Division requested in writing from petitioner books, records, and other material documents including source records. An additional request for books and records was made in writing on July 30, 2008.

4. The Division determined that petitioner failed to maintain or produce the requested books and records.

5. As a result, the Division estimated the amount of tax due by petitioner based on external indices. The Division calculated petitioner's gross sales for the period in issue based on information obtained from his income tax filings and found additional taxable sales of $347,305.00. Consequently, Notice of Determination L-031177067 was issued to petitioner on December 11, 2008 asserting additional tax due of $27,784.00, plus penalty and interest.

6. Petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS) seeking to dispute the statutory notice. On February 12, 2010, a Conciliation Order, CMS No. 227798, was issued by BCMS in which petitioner's request was denied and the statutory notice was sustained.[1]

7. On April 1, 2010, petitioner filed a petition with the Division of Tax Appeals in protest of the Conciliation Order dated February 12, 2010. On the petition, petitioner listed his address as "549 Robert Quigley Dr., Scottsville, NY 14546." There was no other address for

[1] The Conciliation Order was mailed to petitioner at "Celebrity Motors, 549 Robert Quigley Drive, Scottsville, NY 14546-1041." There is no evidence that the Conciliation Order was undelivered.

petitioner listed on the petition. Therein, petitioner elected to have the proceeding conducted in the Small Claims Unit (Tax Law § 2012) and alleged the following:

> There was an attempt to collect the sales tax but the customers refused to pay it.

8. Petitioner also added the following notations to his petition:

> I was not looking for a refund But an appeal/Hearing in the Amount in Questioned [*sic*]. I'll Be Back in NY State LATE Oct. . Nov 1st.

and

> Please schedule this action after Nov 1st as I will be out of the state of NY till then . . as I am each & every yr [*sic*].

No forwarding address was listed by petitioner.

9. On April 7, 2010, the Division of Tax Appeals sent a letter to petitioner at the Scottsville, New York, address confirming a telephone conversation of that date which verified his address. This letter did not mention any other address for petitioner.

10. On April 20, 2010, petitioner sent a copy of the letter referenced in Finding of Fact 9 to the Division of Tax Appeals. The return address on the envelope containing this correspondence was petitioner's Scottsville, New York address.

11. By letter dated April 27, 2010, the Division of Tax Appeals Petition Intake Unit sent an acknowledgment letter to petitioner. The acknowledgment letter was mailed to the same address listed as petitioner's on the petition and most recent correspondence, i.e., 549 Robert Quigley Drive, Scottsville, NY 14546. There is no evidence that this letter was undelivered.

12. A Notice of Small Claims Hearing was sent to petitioner on July 11, 2011. The notice was sent to the only address petitioner had provided the Division of Tax Appeals, i.e., 549 Robert Quigley Dr., Scottsville, NY 14546. The notice advised petitioner of a hearing scheduled

in the instant matter for August 18, 2011 at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York. Also stated in the notice was the following:

> Failure to appear at the scheduled hearing may result in dismissal of the petition. Any adjournment may be requested but will be granted only for good cause and only if the request is received in writing by the Division of Tax Appeals at least 15 days prior to the hearing date . . . .

13. On August 18, 2011, at the date, time and location stated in the Notice of Small Claims Hearing, Presiding Officer Barbara Russo called the ***Matter of Joseph F. Guerra*** involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a representative. Neither petitioner nor anyone acting on his behalf contacted the Division of Tax Appeals to seek an adjournment of the hearing, or for any other reason. The representative of the Division moved that petitioner be held in default. On September 1, 2011, Presiding Officer Russo found petitioner in default and denied his petition with the issuance of a Default Determination. The Default Determination, together with a letter by Supervising Administrative Law Judge Ranalli explaining the procedure by which an order vacating the default may be sought, were sent to petitioner by certified mail on September 1, 2011.[2] This correspondence was returned to the Division of Tax Appeals on September 21, 2011 as "unclaimed" and "unable to forward."

14. Nevertheless, petitioner filed an application seeking to vacate the September 1, 2011 default on October 27, 2011. On the envelope in which the application was sent, in the space provided for the mailer's return address, petitioner wrote his name and listed his address as "549 Robert Quigley Dr., Scottsville, NY 14546." The application contained the following unsworn

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[2] The Default Determination and Supervising Administrative Law Judge Ranalli's letter were sent to petitioner at 549 Robert Quigley Dr., Scottsville, NY 14546, again, the only address provided by petitioner (***see*** Finding of Fact 15).

statement:

> I Joseph Guerra make a motion to vacate default order. I was unaware of the court proceedings that had taken place Sept 2011. I moved to Phoenix AZ in 2009 for work and come back to Rochester New York in (October-Feb) to see my children and grandchildren and also for work if I can get any. I still have a home here in Rochester but I only received this letter after arriving here this past week. I requested this appeal/hearing approx. 20 months ago and I didn't hear anything about it till [*sic*] now. Also my phone number is still in your system as it was repeated to me (By Tax Appeal Dept) (5852041120)

Attached to petitioner's application were copies of Supervising Administrative Law Judge Ranalli's letter of September 1, 2011 (***see*** Finding of Fact 13) and petitioner's Arizona Driver License, issued April 14, 2010 and listing a Glendale, Arizona, address. Petitioner did not provide any additional information pertaining to the merits of his application.

15. At no time prior to submission of the instant application on October 27, 2011 did petitioner inform the Division of Tax Appeals of an address other than his Scottsville, New York, address. There is no evidence of a forwarding address having been left with the United States Postal Service.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "[i]n 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 "[u]pon 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. Based upon the record presented in this matter, it is clear that petitioner did not appear at the hearing scheduled in this matter or obtain an adjournment. Therefore, Presiding Officer Russo 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 Determination was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and prove the existence of a meritorious case (20 NYCRR 3000.13[d][3]; ***Matter of Zavalla***; ***Matter of Morano's Jewelers of Fifth Avenue***).

C. In order to prevail on the instant application, petitioner must initially demonstrate a reasonable excuse for failing to appear at the hearing. Petitioner's application is premised on the claim that he moved to Phoenix, Arizona, in 2009 and, therefore, did not timely receive the Notice of Small Claims Hearing. He asserts that although he continued to maintain his home in Scottsville, New York, and would return on occasion, he did not return to it during the pertinent period until October 2011. Thus, he states that he received the Notice of Small Claims Hearing after the hearing was held on August 18, 2011.

Petitioner's position on this point is undermined by the record as a whole, however. The petition, filed by petitioner in April 2010, or after his claimed move to Arizona, solely listed petitioner's Scottsville, New York, address. All correspondence received by the Division of Tax Appeals from petitioner listed the Scottsville, New York, return address. The Notice of Small Claims Hearing sent to petitioner on July 11, 2011 was sent to the same Scottsville, New York, address as petitioner listed as his return address on the envelope in which the instant application was mailed to the Division of Tax Appeals. There is no evidence of the notice being returned as undelivered. As such, petitioner was provided with 37 days notice of the scheduled hearing on

August 18, 2011, or sufficiently in advance of the hearing. Crucially, petitioner never informed the Division of Tax Appeals of an Arizona (or any other) address prior to this application. As a result, the Division of Tax Appeals could not have mailed petitioner's notice of hearing to any other address. The mere claim of untimely receipt of a notice that was properly sent to petitioner's only known address does not constitute a reasonable excuse for his failure to appear at hearing. Therefore, petitioner does not meet the first prong of the test for vacating a Default Determination and his application must be denied.

D. A default determination may be vacated only upon petitioner's satisfaction of both requirements of 20 NYCRR 3000.13[d][3]: (1) a showing of the existence of a valid excuse for his absence, and (2) a showing of the existence of a meritorious case. Given petitioner's failure to demonstrate the existence of a valid excuse for his absence from the scheduled hearing, it is unnecessary to contemplate the existence of a meritorious case as doing so cannot change the outcome of this order. Nonetheless, assuming, arguendo, that petitioner had proved the existence of a valid excuse for his absence, petitioner's application is also void of a showing of the existence of a meritorious case.

An application to vacate a default determination should be denied when "it is not shown that there is a meritorious [case], for the courts should not be burdened with unfounded claims to relief nor should a just cause be delayed by the interposition of an unwarranted defense" (***Investment Corp. of Phila. v. Spector***, 12 AD2d 911, 210 NYS2d 668, 669 [1961], citing ***Rothschild v. Haviland***, 172 App Div 562, 563, 158 NYS 661 [1916]). Moreover, the existence of a meritorious case is not established "merely by presenting a proposed answer . . . in conclusory form" (***id.***). When a petitioner's application fails to elaborate on what he intends to prove and also fails to detail what documents establish the merits of his case, the "meritorious

case" requirement of 20 NYCRR 3000.13(d)(3) has not been met (***Matter of Saffner***, Tax Appeals Tribunal, October 19, 2006). Petitioner's application does not address the merits of his case in any manner. There is no evidence or argument included discussing the substance of his claim. Therefore, absent evidence of a meritorious case, his application must fail on this prong as well.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on September 1, 2011 is sustained.

DATED: Troy, New York
January 19, 2012

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE