STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **TASTY SUB, LLC** for Revision of a Determination or for Refund of New York State Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for the Period June 1, 2013 through May 31, 2016.	DECISION DTA NO. 829008

Petitioner, Tasty Sub, LLC, filed an exception, dated December 8, 2021, to the order of the Supervising Administrative Law Judge issued on November 24, 2021. Petitioner also filed an exception, dated March 7, 2022, to the default determination of the Administrative Law Judge issued on June 3, 2021 and the order of the Administrative Law Judge issued on February 10, 2022. Petitioner appeared by Stuart B. Ratner, P.C. (Stuart B. Ratner, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel).

Petitioner filed briefs in support of the exceptions. The Division of Taxation filed letter briefs in opposition. Petitioner filed a reply brief. Oral argument was heard by teleconference on June 23, 2022, which date commenced the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's application to vacate a default determination should be granted.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge in his

November 24, 2021 order, except that we have modified finding of fact 22 and have added finding of fact 30 to reflect the record more fully. As so modified, the facts appear below.

1. On December 4, 2018, petitioner, Tasty Sub, LLC, filed a petition with the Division of Tax Appeals contesting notice of determination number L-046417786, dated May 12, 2017. The basis for the subject notice was the Division of Taxation's (Division's) assertion that, pursuant to a sales tax audit, petitioner collected $46,195.06 more sales tax than was remitted to the Division for the period in question. In addition, based upon the auditor's review of bank statements, petitioner underreported its sales. Consequently, the Division assessed $80,936.16 in additional sales tax. Finally, the Division's auditor determined that petitioner failed to pay tax on $158,502.98 of taxable capital purchases acquired during the audit period, resulting in additional tax due of $14,067.14.

2. From November 21, 2018 (prior to filing the petition) through January 21, 2021, petitioner was represented by Michael Buxbaum, CPA, of Buxbaum Sales Tax Consulting, LLC.

3. This matter was originally scheduled for hearing in New York City on May 13, 2020, but due to the COVID-19 public health emergency, and the New York State on PAUSE executive order (PAUSE Act), it was adjourned until hearings in the Division of Tax Appeals could safely resume and the PAUSE Act was lifted.

4. After the PAUSE Act was lifted, a conference call was scheduled for August 25, 2020 with Administrative Law Judge Kevin R. Law in order for the parties to select a hearing date.

5. On July 30, 2020, petitioner's then-representative, Mr. Buxbaum, sent the following email to the Hearing Support Unit at the Division of Tax Appeals:

> "Kindly inform ALJ Law that I will not be participating in this specific conference call.

> The Division of Tax Appeals current policy for administrative tax hearings is not consistent with its long-standing regulations.
>
> Policy –
>
> 1) Albany Hearing Attendance Instructions
> https://www.dta.ny.gov/pdf/covid19/ta-737-covid-19-albany-hearing-attendance-instructions-200716.pdf
>
> 2) COVID-19 Health Screening Report Hearings
> https://www.dta.ny.gov/pdf/covid19/ta736covid19healthscreeningreport.pdf
>
> Regulations –
>
> 3) Section 3000.15 Hearings before administrative law judges.
>
> d) Conduct of hearing. (1) At the hearing, the parties may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, impeach any witness regardless of which party first called the witness to testify, and rebut the evidence against them. All witnesses shall testify under oath or by affirmation.
>
> I do look forward to representing this small business taxpayer (in the future) at an administrative tax hearing and advocating for a reasonable resolution with the Division of Tax Appeals and the Audit Division in the future.
>
> Have a good summer."

6. On August 25, 2020, the scheduled conference call took place. Neither Mr. Buxbaum, nor anyone else on behalf of petitioner participated. Consequently, a hearing date of October 6, 2020 was selected. The hearing was also scheduled to be held in Albany, New York. A letter confirming the date and location of the hearing was sent to the parties after the conference call.

7. On September 14, 2020, a notice of hearing was sent to the parties advising them of the specific time and location for the October 6, 2020 hearing.

8. The October 6, 2020 hearing was adjourned at petitioner's request on September 22, 2020.

9. On September 30, 2020, the Administrative Law Judge and the parties participated in

a conference call during which a January 6, 2021 hearing date was mutually selected. The hearing was again selected to be held in Albany, New York.

10. On November 24, 2020, Supervising Administrative Law Judge Herbert M. Friedman, Jr., sent the parties (and all parties scheduled to appear at any in-person hearings between the date of the letter and January 31, 2021) a letter that stated as follows:

> "Effective immediately, due to the resurgence of coronavirus in areas throughout the state, all in-person hearings before the Division of Tax Appeals through January 31, 2021 will be converted to virtual hearings to be held on the same date and time as scheduled. If any party has a concern with participating in a virtual hearing, they should inform the assigned administrative law judge in writing as soon as practicable.
>
> As conditions change, we will revisit the situation and resume in-person hearings when public health conditions allow."

11. On November 25, 2020, Mr. Buxbaum sent an email to the Administrative Law Judge requesting that the matter be adjourned as petitioner refused to participate in a virtual hearing. No reason was given by Mr. Buxbaum for the general refusal. The adjournment request was denied because petitioner did not provide a valid reason for refusing to participate in the hearing.

12. Mr. Buxbaum responded to the denial in an email to the Administrative Law Judge as follows:

> "First, I will provide a valid reason after a common greeting of Happy Thanksgiving or Happy Holidays is offered to my email.
>
> In addition, you can select any reason that you want for creating your fake virtual reality hearing and asking me for an adjournment during the global pandemic.
>
> Stop wasting my time with this nonsense.
>
> -thanks for your outstanding cooperation and consideration."

13. On December 1, 2020, the calendar clerk of the Division of Tax Appeals sent notices of hearing to petitioner, Mr. Buxbaum, and the Division advising them that a hearing in the above matter was scheduled for Wednesday, January 6, 2021, at 10:30 a.m., by videoconferencing via Cisco WebEx. The access telephone number and meeting number for the hearing were included in the notice.

14. On December 1, 2020, Administrative Law Judge Law also sent a Cisco WebEx meeting invitation by email to the parties for the January 6, 2021 virtual hearing. Mr. Buxbaum responded by email stating: "I will NOT be joining your Web Ex."

15. In response to Mr. Buxbaum's emails in this and other matters, the supervising administrative law judge sent a letter to Mr. Buxbaum on December 3, 2020 that stated:

> "I have been made aware of correspondence to this agency in which you assert your groundless refusal to participate in the virtual hearing process in upcoming hearings.
>
> Please understand that the virtual hearing process at Tax Appeals comports with the requirements of the Tax Law and the Tax Appeals Tribunal's Rules of Practice and Procedure. The parties are afforded a full and fair opportunity to present witnesses, exhibits, argument, and to perform cross-examination. Indeed, all elements of due process are present. Moreover, this practice is consistent with that currently being implemented by the New York State court system.
>
> As a result of the health concerns arising from the coronavirus pandemic, all hearings before Tax Appeals scheduled through January 31, 2021 will be virtual hearings. If you or your clients have a legitimate reason for an inability to participate, that reason should be expressed, in writing, to the assigned administrative law judge in a timely manner. Please understand that simple refusal is not a valid reason. Otherwise, the hearings (as well as any related pre-hearing conference calls) will be held as scheduled. The consequences of your failure to participate will be your responsibility.
>
> Finally, based on the contents of your recent correspondence on this issue to several administrative law judges and administrative staff, I must remind you that all future correspondence with this agency should remain professional and respectful."

16. By email of that same date, Mr. Buxbaum responded to the supervising administrative law judge as follows:

> "Supervising Administrative Law Judge Herbert Friedman:
>
> REJECTED
>
> is your letter (with fake narratives and fiction and falsehoods) dated December 03, 2020.
>
> Furthermore, I remind YOU that when you write to me at this time of year the appropriate greeting is
>
> Happy Holidays."

17. On December 16, 2020, in response to a written procedural instruction by the administrative law judge, Mr. Buxbaum sent an email stating: "I will NOT be logging on to the WEBEX."

18. In response to Mr. Buxbaum's December 16, 2020 email, the Administrative Law Judge cautioned him that the failure of a party to appear would result in the rendering of a default determination.

19. On January 5, 2021, the day before the scheduled hearing, petitioner filed a motion for summary determination via email. Upon receipt of the motion, the Administrative Law Judge mailed and emailed the following to Mr. Buxbaum:

> "I am in receipt of your email attaching a copy of an electronic copy of a motion for summary determination. Please note that pursuant section 3000.5 (e) of the Tax Appeals Tribunal's Rules of Practice and Procedure, '[t]he filing a motion does not constitute cause for the postponement of a hearing from the date set, unless such continuance is specifically ordered by the administrative law judge following receipt of such motion.' Since the hearing is scheduled for tomorrow January 6, 2021, no postponement will be granted. If you want the motion papers considered and made part of the record at tomorrow's virtual hearing, then you should request that at the hearing. As I previously indicated to you, failure to appear at the hearing will result in the issuance of a default determination."

20. On January 6, 2021, a videoconference hearing via Cisco WebEx was commenced in this matter pursuant to the notice of hearing. Appearing for the Division was Brandon Batch, Esq. Neither Mr. Buxbaum, nor anyone else on petitioner's behalf, appeared at the hearing. Accordingly, the Division moved for a default determination in its favor.

21. Neither petitioner nor Mr. Buxbaum offered another reason for their decision not to appear at the hearing.

22. On June 3, 2021, Administrative Law Judge Law issued a determination that granted the Division's motion for a default determination against petitioner. The determination also denied petitioner's January 5, 2021 motion for summary determination and imposed a frivolous petition penalty in the amount of $500.00 upon petitioner pursuant to Tax Law § 2018.

23. By letter to the Division of Tax Appeals dated January 21, 2021, Mr. Buxbaum withdrew as petitioner's representative. On March 8, 2021, the Division of Tax Appeals was provided with a power of attorney, dated February 16, 2021, that appointed Stuart Ratner, Esq., as petitioner's new representative.

24. On July 1, 2021, petitioner filed an application to vacate the default determination. The application asserted that the default was due to Mr. Buxbaum's ineffective assistance of counsel. The application maintained that Mr. Buxbaum failed to appear without petitioner's full knowledge or awareness, and that petitioner was similarly unaware of his email communications with the Division of Tax Appeals. Further, petitioner argued that it was denied due process by Mr. Buxbaum's "bizarre and unexplained behavior before the Division of Tax Appeals and its administrative law judges." This behavior, according to petitioner, defeated its right to be adequately represented, as Mr. Buxbaum performed no acts on its behalf. Moreover, petitioner stated that Mr. Buxbaum's actions caused it to be unable to properly discover or introduce

relevant evidence into the record. In sum, petitioner stated that "(Mr.) Buxbaum should be considered as a bellwether for ineffective assistance of representation before the Division resulting in the Petitioner being denied an effective hearing on the merits of the Petitioner's case altogether."

25. As to the merits of the petition, petitioner's application to vacate the default asserted that the notice of determination is based on the Division's erroneous determination that it (i) collected $46,195.06 more sales tax from customers than was remitted to the Division; (ii) underreported its sales based upon a review of bank statements, resulting in an understatement of sale tax liability by $80,936.00; and (iii) purchased $158,502.98 of taxable equipment during the audit period without paying the requisite sales tax, which totaled $14,067.14. Petitioner further argued that it provided the auditor with all of its franchise sales reports that summarize every sale and accurately represent all of its sales. Finally, petitioner stated that it has new evidence that was not presented by Mr. Buxbaum that must be considered.

26. In support of its application to vacate the default, petitioner attached the declaration of Mohammad Rashid, its sole member. Mr. Rashid's declaration acknowledged that he was aware of the January 6, 2021 hearing and was reassured by Mr. Buxbaum that "he would handle the matter accordingly." Mr. Rashid's declaration added that he subsequently learned that Mr. Buxbaum disregarded the hearing. Consequently, Mr. Rashid stated that he felt misled.

As to the substance of the audit, Mr. Rashid stated that petitioner used sales reports produced by the cash register system required by its franchisor to determine gross sales. He added that petitioner's accountant, Kent Wahlberg, CPA, then calculated that 8% of petitioner's sales consisted of non-taxable sales and, accordingly, deducted that amount from gross sales on its sales tax returns. Mr. Rashid asserted that the bank deposit analysis performed by the

Division was erroneous as the additional funds in the account were not from unreported sales, but rather non-taxable intra-company bank transfers. Neither sales receipts nor specific bank statements were attached to Mr. Rashid's declaration. As for the capital equipment purchases, Mr. Rashid said that the franchisor made the purchases at issue on behalf of petitioner pursuant to the franchise agreement and paid the requisite sales tax. Again, documents evidencing this assertion were not attached to Mr. Rashid's declaration.

27. Also attached to petitioner's application was the declaration of Kent Wahlberg, CPA. Mr. Wahlberg has provided bookkeeping, accounting and tax preparation services to petitioner since 1995. He stated that petitioner is required by its franchisor to use a "specific franchise approved cash register system" that instantaneously electronically reports all sales activity to the franchisor. According to Mr. Wahlberg, petitioner used that report to calculate gross sales and, ultimately, taxable sales. He added that since the system does not differentiate between taxable and non-taxable sales, based on his industry experience, he applied an 8% discount to gross sales to account for non-taxable sales. Mr. Wahlberg also confirmed Mr. Rashid's statements regarding the intra-company bank deposits and equipment purchases. There were no supporting documents attached to Mr. Wahlberg's declaration specifically identifying petitioner's taxable and non-taxable sales for the period at issue.

28. Also attached to the application was the declaration of Heather Murray, Tax Specialist in the Tax Group at Franchise World Headquarters, LLC, which provided services to petitioner's franchisor. Ms. Murray was responsible for federal and state tax compliance for the franchisor and its related entities. She stated that, after a review of the franchisor's records, the equipment purchase identified by the Division's auditor was made by petitioner's franchisor and that the appropriate sales tax was paid. Ms. Murray did not attach the referenced records or any

other supporting documents to her declaration.

29. In opposition to the application to vacate the default, the Division asserted that petitioner failed to provide a valid excuse for the default. In support of this position, the Division pointed to Mr. Rashid's acknowledgement in his declaration that he was aware of the January 6, 2021 hearing and made a false assumption concerning the need to be at the hearing. Additionally, the Division argued that petitioner failed to establish a meritorious case. According to the Division, petitioner's claims in its application were unsupported and conclusory in nature. Moreover, the Division stated that petitioner has not offered any new or meaningful evidence to support its claims. Hence, according to the Division, the application must be denied.

30. On June 30, 2021, in addition to filing its application to vacate the default determination, petitioner also filed a motion to reopen the record based upon ineffective representation by Mr. Buxbaum and newly discovered evidence. That motion was denied by an order of the Administrative Law Judge on February 10, 2022.

THE ORDER OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge determined that the Administrative Law Judge correctly granted the Division's motion for default because petitioner did not appear at the scheduled hearing or obtain an adjournment. The Supervising Administrative Law Judge then considered whether petitioner had shown an acceptable excuse for not attending the hearing, as well as a meritorious case, both of which must be established to prevail on a motion to vacate a default. The Supervising Administrative Law Judge found that petitioner and its former representative were aware of the hearing and made a conscious decision not to appear. He determined that this was not an acceptable excuse for the default. The Supervising Administrative Law Judge rejected petitioner's argument that the default was excusable because

it resulted from ineffective assistance of counsel. The Supervising Administrative Law Judge noted that, generally, there is no right to effective counsel in administrative proceedings. The Supervising Administrative Law Judge also rejected petitioner's argument that the former representative's incompetence rendered him unqualified to represent a petitioner in a Division of Tax Appeals proceeding. The Supervising Administrative Law Judge observed that, as petitioner's former representative was formally qualified and properly appointed, this was not a basis to excuse the default.

The Supervising Administrative Law Judge also determined that petitioner failed to show a meritorious case. He found that petitioner's evidence of a meritorious case was conclusory, lacking in both supporting documentation and in specificity in the documentation that was provided.

ARGUMENTS ON EXCEPTION

Petitioner observes that the default determination punishes petitioner for its former representative's conduct. Petitioner asserts that it was not aware of its former representative's conduct at the time it occurred and emphasizes that it does not approve of or condone such conduct. Petitioner reasons that a default determination in the present matter will neither change the offending conduct nor assure respect for the procedural rules, as petitioner itself did not disregard those rules. Rather, petitioner asserts that a default will further diminish the integrity of the system by resolving the controversy on a non-meritorious basis.

Petitioner also contends that it has established a meritorious case. Petitioner notes that the Administrative Law Judge's June 3, 2021 default determination and order denying petitioner's January 5, 2021 motion for summary determination states that "whether sales were underreported and whether tax has been paid on asset purchases raise issues of fact" and

"[w]hether the amount of bank deposits exceeding taxable sales is a result of petitioner's underreporting its tax liability is clearly an issue of fact." Petitioner asserts that such "issues of fact" demonstrate a meritorious case. Petitioner further claims that the declarations offered by petitioner with its application provide a prima facie showing of legal merit.

The Division agrees with the Supervising Administrative Law Judge's order and asserts that petitioner has not shown an acceptable excuse for its failure to attend the hearing or that it has a meritorious case.

OPINION

Our Rules of Practice and Procedure (Rules) provide that "[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 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]). As neither petitioner nor its representative appeared at the scheduled hearing nor obtained an adjournment, the Administrative Law Judge properly rendered a default determination against petitioner pursuant to 20 NYCRR 3000.15 (b) (2).

Our Rules further provide that, "[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the [defaulting] party shows an excuse for the default and a meritorious case" (20 NYCRR 3000.15 [b] [3]). Our rule for vacating default judgments is consistent with the well-established principle that actions and proceedings should be determined on the merits where possible (***Matter of Morano's Jewelers of Fifth Avenue, Inc.***, Tax Appeals Tribunal, May 4, 1989, citing ***Stolpiec v Weiner***, 100 AD2d 931 [2d Dept 1984] and ***Stark v Marine Power & Light Co.***, 99 AD2d 753 [2d Dept 1984]).

As noted, petitioner does not seek to justify or in any way rationalize its former representative's conduct or his failure to appear at the hearing. Instead, petitioner argues that this conduct and failure should not be held against it. We disagree. There is no question that both petitioner and petitioner's former representative had notice of the hearing. Under such circumstances, we have held that a failure to appear at a hearing is not a valid excuse for a default (***Matter of Estruch***, Tax Appeals Tribunal, May 20, 2010; ***see also Matter of Emerald International Holdings, Ltd.***, Tax Appeals Tribunal, October 3, 2018). The egregious conduct of the representative here does not distinguish the present matter from our precedent and thus does not provide a basis for excusing the default. Additionally, as correctly observed by the Supervising Administrative Law Judge, and contrary to petitioner's argument on exception, the constitutional right to the effective assistance of counsel generally does not extend to civil actions or administrative proceedings, including proceedings in the Division of Tax Appeals (***Matter of Nusco, Inc.***, Tax Appeals Tribunal, March 31, 1994 citing ***Patricia W. Walston, P.C. v Axelrod***, 103 AD2d 769, 770 [2d Dept 1984] ***lv denied*** 64 NY2d 611 [1985]). Due process considerations in such settings require only that a party be afforded an opportunity to be represented by counsel (***Matter of Mera v Tax Appeals Trib. of State of N.Y.***, 204 AD2d 818, 820 [3d Dept 1994]). Petitioner is thus properly bound by his former representative's failure to appear at the scheduled hearing (***HBJOBaron Assoc. v Leahing***, 142 AD3d 585 [2d Dept 2016]).

While petitioner's failure to provide an acceptable excuse for its default is sufficient to require the denial of its exception, we also address the second requirement to vacate a default; that is, whether petitioner has established a meritorious case.

With respect to petitioner's asserted collection of $46,195.06 more sales tax from customers than was remitted, and petitioner's asserted understatement of sales tax liability by $80,936.16 based on a review of bank statements, petitioner has not established a meritorious case to show that these components of the assessment are in error. The declarations of Mr. Rashid and Mr. Wahlberg describe the method by which petitioner estimated its reported taxable sales and sales tax due, but do not deny that petitioner collected more in sales tax than it remitted. The same declarations also summarily claim that the excess bank deposits were from nontaxable sources. Such conclusory statements unsupported by facts are insufficient to establish a meritorious case (***Matter of Gordon***, Tax Appeals Tribunal, January 29, 2015).

With respect to petitioner's asserted failure to pay sales tax on certain capital asset purchases, however, the sworn declaration of Ms. Murray indicates that she reviewed the franchisor's records and found that sales tax was previously paid on the equipment purchases determined taxable during the audit (***see*** finding of fact 28). This is a prima facie showing of legal merit to this portion of petitioner's case (***see Matter of Morano's Jewelers of Fifth Avenue***). Petitioner has thus demonstrated a meritorious case for purposes of vacating the default.

Apparently out of an abundance of caution to avoid any procedural impediments to this Tribunal's review of the order denying the application to vacate the default determination, petitioner filed a second exception in this matter (notice of exception dated March 7, 2022). This second exception purports to contest both the default determination of the Administrative Law Judge issued on June 3, 2021 and the order of the Administrative Law Judge issued on February 10, 2022 (***see*** finding of fact 30). The body of the exception and the brief submitted therewith, however, are identical to the original exception and brief pertaining to the November 24, 2021

order sustaining the default. Moreover, the cover letter enclosed with the second exception indicates that petitioner seeks only to vacate the default. At oral argument, petitioner's representative clarified that the second exception, like the original exception, seeks to vacate the default determination. As this decision fully addresses petitioner's arguments as raised in its original exception, we deem the March 7, 2022 exception a nullity.

Even if considered separately, petitioner's March 7, 2022 exception is procedurally improper and thus properly dismissed. With respect to the June 3, 2021 default determination, our Rules do not permit an exception to such a determination. Rather, the Rules require petitioner to apply to the Supervising Administrative Law Judge to vacate the default (20 NYCRR 3000.15 [b] [3]). As in the present matter, an exception may be taken to the denial of such a motion. The March 7, 2022 exception would also appear to be untimely with respect to the June 3, 2021 default determination (***see*** 20 NYCRR 3000.17 [a]). With respect to the February 10, 2022 order, our Rules do not permit a motion to reopen on a default determination. As noted, the remedy for a default is an application to vacate. Even if such a motion was permitted, petitioner has not shown the existence of newly discovered evidence and has not alleged any fraud or misconduct on part of the other party, both of which are required to succeed on a motion to reopen (***see*** 20 NYCRR 3000.16 [a]).

Finally, we note that petitioner has not contested the frivolous petition penalty imposed by the June 3, 2021 default determination (***see*** finding of fact 22). Accordingly, we have not addressed such penalty in this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Tasty Sub, LLC, dated December 8, 2021, is denied;

2. The exception of Tasty Sub, LLC, dated March 7, 2022, is dismissed; and

3. The order of the Supervising Administrative Law Judge denying petitioner's application to vacate the default determination is affirmed.

DATED: Albany, New York
September 15, 2022

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner