

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KONG ABSTRACT CO., LLC	:	ORDER
	:	DTA NO. 824995
for Redetermination of a Deficiency or for Refund of Mortgage Recording Tax under Article 11 of the Tax Law with Respect to an Instrument Recorded on November 30, 2007.	:	

Petitioner, Kong Abstract Co., LLC, filed a petition for redetermination of a deficiency or for refund of mortgage recording tax under Article 11 of the Tax Law with respect to an instrument recorded on November 30, 2007.

A hearing was scheduled before Presiding Officer Barbara J. Russo at the offices of the Division of Tax Appeals, NYS Department of Taxation & Finance, Metro-NYC Regional Office, 15 Metro Tech Center, Brooklyn, New York, on July 18, 2013 at 1:45 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner, appearing by Oliver Zhou, Esq., has made a written request that the default determination be vacated. On November 14, 2013, the Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a written response in opposition to petitioner's application to vacate the default determination.

Upon review of the entire case file in this matter, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On April 26, 2012, petitioner, Kong Abstract Co., LLC, filed a petition with the Division of Tax Appeals protesting a notice from the Division of Taxation (Division) denying a request for refund of mortgage recording tax with respect to a mortgage recorded with the City Register of the City of New York on November 30, 2007 in the amount of \$3,930.00. The refund denial, dated June 2, 2011, indicated that the refund claim was based on a Real Property Law § 339-ee tax credit applicable to a mortgage made for an individual condominium unit. The Division disallowed the claim because one of the conditions for the credit is that the first condominium unit sold must be conveyed within two years from the time the mortgage for the condominium development was recorded. The mortgage for the development was recorded on November 30, 2007. However, according to the refund denial, the first unit was sold on February 5, 2010. In order to be eligible for the tax credit, the first unit would have to show a conveyance date no later than November 30, 2009. Thus, the refund was denied.

2. Petitioner claimed in its petition that the condominium sponsor failed to provide a Real Property Law § 339-ee affidavit and exhibit at the time of filing the mortgage, and petitioner paid the full amount of the mortgage recording tax. Petitioner alleges that the Division disallowed the refund claim because the Division mistakenly concluded that the sponsor did not sell the first unit in the two-year time period, contrary to what actually occurred. Petitioner attached to the petition a copy of a signed and notarized deed evidencing the conveyance of a condominium unit known as Unit No. 1906, located at 150 Myrtle Avenue, Brooklyn, New York. The deed was signed and notarized on November 24, 2009. It was recorded with the City Register of New York on December 4, 2009.

3. In its answer, the Division of Taxation reiterated that the mortgage for the condominium development was recorded on November 30, 2007 but that the first condominium sold shows a conveyance date of February 5, 2010, which is more than two years after the mortgage for the development was recorded.

4. On June 10, 2013, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and the Division of Taxation advising them that a hearing had been scheduled for Thursday, July 18, 2013, at 1:45 P.M. at the Metro-NYC Regional Office, 15 Metro Tech Center, Brooklyn, New York.

5. On July 18, 2013, at 2:30 P.M., Presiding Officer Barbara Russo commenced a hearing in the *Matter of Kong Abstract Co., LLC*. Petitioner did not appear at the hearing and a default was duly noted.

6. On July 30, 2013, prior to a default determination being issued, petitioner sent a Notice of Motion to Vacate Default Judgment.

7. Presiding Officer Russo responded to petitioner's letter on August 7, 2013, stating that because a default determination had not yet been issued the motion was premature, but that she would treat the motion as an objection to the Division's motion for default, made at the hearing. The presiding officer rejected petitioner's objection to the motion for default determination, stating that, contrary to petitioner's allegation that its representative arrived at the hearing location at 2:00 P.M. and was advised that the presiding officer had left the location at 2:15 P.M., she had, in fact, waited 45 minutes after the scheduled start time for petitioner or its representative to appear, and only after petitioner did not appear did the presiding officer go on the record and receive the Division of Taxation's motion for default.

8. On August 15, 2013, Presiding Officer Russo issued a default determination against petitioner, denying the petition in this matter.

9. On October 9, 2013, petitioner filed an application to vacate the default determination. In the application, petitioner's representative stated that he arrived 15 minutes late for the hearing, and when he arrived, he could not find the hearing room and no one else knew where it was and could not help him. He claims he called the Division of Tax Appeals offices in Albany, New York and was informed that the presiding officer left the hearing location at 2:15 P.M. and that a default was entered against him. At that point, the representative apparently left the building.

10. The records of the calendar clerk of the Division of Tax Appeals indicate that on July 15, 2013, the date of petitioner's hearing, two other hearings were held at the same Brooklyn location in matters where both petitioners appeared pro se, and neither petitioner had problems finding the hearing location.

11. The Division of Taxation's response, filed on November 14, 2013, opposed the application arguing that petitioner's representative's excuse lacks credibility in that he admittedly arrived 15 minutes late, and it is doubtful that the calendar clerk at the Division of Tax Appeals would have advised him that a default had been entered against him at 2:15 P.M., when the presiding officer and Division's representative were, at that time, still awaiting his arrival in the hearing room. The Division reiterated its argument that petitioner did not file a timely claim for refund because the first conveyance of a unit of the Myrtle Avenue condominium development was not made until February 5, 2010, more than two years after the development mortgage was recorded. Additionally, the Division alleges that petitioner failed to file a timely petition with the Division of Tax Appeals since the letter denying the refund claim, dated June 2, 2011, advised

petitioner that it had 90 days to protest the denial. The petition for hearing with the Division of Tax Appeals was filed on April 26, 2012. This claim has not previously been made by the Division, and no documents evidencing mailing of the denial were attached to its response to the application to vacate the default determination.

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. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division of Taxation’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 a valid excuse for its failure to appear at the hearing. While many of the facts alleged appear to be sketchy and lacking in credibility, and while at least two

other unrepresented petitioners, who were not educated attorneys, appeared without difficulty on the same day, it seems clear that somehow petitioner's attorney became lost in the Brooklyn Metro Tech Center on that day. Accordingly, petitioner has met the first criterion to have the default order vacated.

D. More importantly, petitioner has also established a meritorious case. It is clear from the deed attached to the original petition in this matter that a conveyance took place of a condominium unit in the Myrtle Avenue development on November 24, 2009. This date would appear to be within the two-year requirement of Real Property Law § 339-ee, thus establishing a meritorious case. At no time, either in its original answer or in its response to the application to vacate, has the Division addressed this deed or indicated that it would not qualify petitioner for the refund.

E. A more difficult issue is raised by the allegation in the Division's response to the application, to the effect that the original petition was filed late, thus depriving the Division of Tax Appeals of jurisdiction. This is the first time such a critical issue has been raised. No mention of it was made in the Division's original answer, and no mailing documentation was submitted with its response evidencing that the refund denial was in fact properly mailed on June 2, 2011 to petitioner and its representative. In order to properly raise this issue, the Division will be required to amend its answer to include the new issue and allow it to be addressed at the new hearing.

F. It is ordered that the request to vacate the default order be, and it is hereby, granted, and the Default Determination issued on August 15, 2013 is vacated. This matter will be rescheduled for hearing as soon as circumstances may permit.

DATED: Albany, New York
January 30, 2014

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE