STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANHATTAN AVE. LIQUOR CORP.	:	ORDER DTA NO. 825646
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 September 1, 2009 through November 30, 2011.	:	

Petitioner, Manhattan Ave. Liquor Corp., 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 September 1, 2009 through November 30, 2011. A small claims hearing was scheduled before Presiding Officer Barbara J. Russo at the offices of the Division of Tax Appeals in New York, New York, on Thursday, February 27, 2014 at 11:45 A.M. Petitioner failed to appear and a Default Determination was duly issued on March 20, 2014. Petitioner, appearing by David R. Portlock, E.A., filed a written application on May 9, 2014, requesting that the Default Determination be vacated. The Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a written opposition to petitioner's application on June 12, 2014. Upon a review of the entire case file in this matter, Administrative Law Judge Barbara J. Russo issues the following order.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination, dated September 24, 2012 (assessment number L-038596870), to petitioner, Manhattan Ave. Liquor Corp.,

asserting sales and use taxes due in the amount of $5,500.61, plus interest and penalty for the period September 1, 2009 through November 30, 2011.[1]

2. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on January 22, 2013.

3. BCMS issued a Conciliation Order Dismissing Request, dated February 8, 2013, to petitioner, stating:

> The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on September 24, 2012, but the request was not mailed until January 22, 2013, or in excess of 90 days, the request is late filed.

4. On April 29, 2013, petitioner filed a petition with the Division of Tax Appeals in protest of the Conciliation Order Dismissing Request. Therein, petitioner elected to have the proceeding conducted in the Small Claims Unit.

5. On January 21, 2014, notices of a small claims hearing were mailed to petitioner and petitioner's representative advising that a small claims hearing was scheduled for the instant matter on Thursday, February 27, 2014 at 11:45 AM at 633 Third Avenue, 36th Floor, New York, New York 10017. 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 . . . .

[1] The Division asserts in its response to petitioner's motion to vacate the default determination that the notice is dated October 15, 2012. The conciliation order dismissing request, which was issued in response to petitioner's request for a conciliation conference for the notice at issue states the notice was issued on September 24, 2012. The Notice and Demand for Payment of Tax Due, dated January 9, 2013, referring to assessment number L-038596870, states that the notice of determination at issue was sent on September 24, 2012. Neither party submitted the subject notice of determination into the record.

6. On February 27, 2014, at the date, time and location stated in the Notice of Small Claims Hearing, Presiding Officer Barbara J. Russo called the ***Matter of Manhattan Ave. Liquor Corp.,*** involving the petition at issue herein. Petitioner failed to appear at the hearing in person or by its authorized representative. Neither petitioner nor anyone acting on its behalf contacted the Division of Tax Appeals to seek an adjournment of the hearing, or for any other reason. The representative of the Division of Taxation moved that petitioner be held in default.

7. On March 20, 2014, Presiding Officer Russo found petitioner in default and denied the 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 and petitioner's representative on March 20, 2014.

8. Petitioner filed an application seeking to vacate the March 20, 2014 default on May 9, 2014. The application consists of a letter from petitioner's representative stating that:

> A hearing was scheduled for February 27, 2014 for the sole purpose of resolving the threshold jurisdictional issue of the timeliness of the request for conference, before addressing the merits of the matter.
>
> Unfortunately, we missed the appointment. It did not get onto the schedule, probably attributable to a move of our offices from Queens Village, NY to 6927 164th Street; Fresh Meadows, NY and the ensuing difficulty of the tax season immediately following the move.

Attached to petitioner's application was a copy of the petition filed on April 29, 2014 and the attachments thereto, which included correspondence from the Division together with a Statement of Proposed Audit Change for Sales and Use Tax dated July 24, 2012, correspondence from petitioner's representative to the Division dated October 1, 2012, a copy of a Notice and Demand for Payment of Tax Due, dated January 9, 2013, a copy of a Request for Conciliation

Conference dated January 22, 2013, and a copy of a power of attorney form. Petitioner did not include a copy of the underlying notice of determination or provide any additional information pertaining to the timeliness of the filing of his request for conciliation conference in protest of the notice of 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. 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, 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 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. Petitioner's representative's excuse for failing to appear at the scheduled hearing because "it did not get onto the schedule" does not constitute a valid excuse (***see Matter of Estruch***, Tax Appeals Tribunal, May 20, 2010 [holding that petitioner's claim that the hearing

notice was misfiled was not a valid excuse for failing to appear at a scheduled hearing]). Additionally, while the representative claims that the hearing date "did not get onto the schedule, probably attributable to a move of our offices," the representative does not contend that the hearing notice was mailed to the wrong address or that the office moved prior to the date the hearing notice was issued. Moreover, assuming, arguendo, that the representative forgot to place the matter on his schedule, it remains unexplained why petitioner, by its president, Carmen Rosario, who also received the hearing notice, did not appear at the hearing or at the very least did not contact the representative to inquire about the hearing notice he received. Accordingly, I find that petitioner has failed to show a valid excuse for not attending the hearing.

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 its 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 its 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 has failed to show that its protest of the underlying notice of determination was filed within the time period allowed by statute. Rather, petitioner contends that its request for a conciliation conference was filed within 90 days of the notice of tax due, dated January 9, 2013. Contrary to petitioner's argument, the notice of tax due is not the statutory notice that gives rise to a right to protest. Rather, a taxpayer may protest a *notice of determination* by filing a request for conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (***see*** Tax Law § 1138[a][1]). Petitioner has presented no evidence to dispute that the statutory notice of determination was issued on September 24, 2012 or that the request for conciliation conference was filed within 90 days of that date. Additionally, petitioner's bald assertion in the petition that "there is no discrepancy in the gross receipts shown on the corporate income tax returns and the gross receipts shown on the sales tax return" is insufficient to establish a meritorious case of the underlying issues giving rise to the protest.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on March 20, 2014 is sustained.

DATED: Albany, New York
August 14, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE