

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**EMERALD INTERNATIONAL HOLDINGS, LTD.** : ORDER  
for Revision of Determinations or for Refund of Sales and : DTA NOS. 827663  
Use Taxes under Articles 28 and 29 of the Tax Law for : AND 827664  
the Period December 1, 2011 through February 28, 2014. :  

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Petitioner, Emerald International Holdings, Ltd., filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2011 through February 28, 2014. A hearing was scheduled before Administrative Law Judge Kevin R. Law in Albany, New York, on Monday, August 14, 2017 at 10:30 AM. Petitioner failed to appear and a default determination was duly issued on September 14, 2017. Petitioner, by Otu Obot, its president, has made a written application, dated September 21, 2017, that the default determination be vacated. The Division of Taxation, by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), submitted its written opposition on October 23, 2017. Petitioner was granted permission for a reply, which was submitted on November 13, 2017, and began the 90-day period for rendering this order. Upon a review of the entire case file in this matter, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, issues the following order.

***FINDINGS OF FACT***

1. On or about June 1, 2016, petitioner, Emerald International Holdings, Ltd., filed separate petitions with the Division of Tax Appeals protesting notices of determination for sales and use

taxes due from the Division of Taxation (Division) issued on February 27, 2015 and May 29, 2015, respectively. The basis for the subject notices was the Division's assertion that, pursuant to a sales tax audit, petitioner failed to maintain or provide adequate books and records for alcohol purchases. As a result, the Division performed an indirect audit, relying on third party purchase records, and determined that petitioner failed to pay the correct amount of tax for the audit period. The Division also asserted penalties under Tax Law § 1145 (a) (1) (i) for unpaid tax and Tax Law § 1145 (a) (1) (vi) for underreporting in excess of 25% of the amount required to be reported.

2. In its petitions, petitioner made numerous assertions assailing the procedures followed by the Division during its audit, the subsequent issuance of the subject notices, and in its conciliation conference before the Bureau of Conciliation and Mediation Services. In particular, petitioner stated that the conciliation conferee acted in "bad faith" and was "disingenuous," the second notice of determination was issued by the Division in retaliation for its dispute of the first notice, and that petitioner's actual purchases did not support the audit results.

3. On October 11, 2016, petitioner filed a motion for summary determination in both of its cases. Those motions were denied by Administrative Law Judge Kevin R. Law by an order dated January 26, 2017. The order stated that issues of fact existed that required a hearing.

4. On February 10, 2017, petitioner filed a motion to recuse Administrative Law Judge Law and to vacate his order of January 26, 2017 denying summary determination. Petitioner asserted that the basis for recusal of Administrative Judge Law was his demonstration of bias in his order denying petitioner's motion for summary determination. The motion to recuse was denied by the supervising administrative law judge by order of March 16, 2017.

5. By letter of March 21, 2017, Administrative Law Judge Law scheduled a prehearing conference call for petitioner and the Division for April 25, 2017. Administrative Law Judge Law expressly stated in that letter that the parties would select a date and location for the hearing. Petitioner responded by letter of March 28, 2017, stating that, as the administrative law judge was not recused as he should have been, it would not participate in any prehearing conference calls or hearings over which he presided.

6. On July 10, 2017, the calendar clerk of the Division of Tax Appeals sent two notices of hearing to petitioner and the Division advising them that a hearing in the above matters had been scheduled for Monday, August 14, 2017, at 10:30 A.M., at the offices of the Division of Tax Appeals, Agency Building #1, 2<sup>nd</sup> Floor, Albany, New York.<sup>1</sup>

7. On August 14, 2017, at 11:25 A.M., Administrative Law Judge Law commenced a hearing as scheduled in the *Matters of Emerald International Holdings, Ltd.* The Division appeared by its attorney. Petitioner did not appear at the hearing and a default was duly noted.

8. On September 14, 2017, Administrative Law Judge Law issued a default determination against petitioner, denying the petition in this matter.

9. On September 21, 2017, petitioner filed this application to vacate the default determination. In the application, petitioner alleged that the “administrative law judge was duly notified in writing, that petitioner, will not attend the hearing scheduled for August 14, 2017.” As further excuse for its failure to attend, petitioner asserted that the administrative law judge was disqualified and that “attendance at the August 14, 2017 hearing would have been a waste of everybody’s time . . . .”

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<sup>1</sup>The notices of hearing were reissued to petitioner and the Division on August 1, 2017, in order to correct a typographical error in the caption concerning the period at issue. The date, time, and location of the hearing remained unchanged from the original notices, however.

10. As to the merits of its case, petitioner, in its application, reiterated the same arguments raised in its petitions. In essence, petitioner asserted that throughout the audit and conciliation process, the Division refused to answer numerous questions regarding its use of third-party vendor information and the results of the audit. Moreover, petitioner asserted that the Division “backdated” the notice of determination. Petitioner did not provide any documentation or other proof concerning these assertions with its application to vacate.

11. In its opposition to the instant application, the Division noted that an adjournment of the hearing was never requested and argued that petitioner made no attempt to provide a reasonable excuse for the default. Moreover, the Division added that petitioner’s unexcused failure to appear at the hearing required the issuance of a default determination. Finally, the Division maintained that petitioner’s substantive opposition consists of unsupported allegations, thereby failing to demonstrate a meritorious case.

### ***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 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, “[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 3000.15 [b] [3]).

B. Petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law judge correctly granted the Division of Taxation’s motion for default

pursuant to 20 NYCRR 3000.15 (d) (2) (*see Matter of Hotaki*, Tax Appeals Tribunal, December 14, 2006; *Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995).

C. Once the default determination was issued, it was incumbent upon petitioner to show an acceptable excuse for not attending the hearing and to show that it had a meritorious case (20 NYCRR 3000.15 [d] [3]; *see Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006; *Matter of Zavalla*). Simply put, petitioner has not established an acceptable excuse for its failure to appear at the hearing. As the Division points out, petitioner was fully aware of the hearing and made a conscious decision not to appear. Petitioner's displeasure at the previous denials of its motions for summary determination and recusal does not rise to the standard of acceptable excuse for its failure to appear. Accordingly, petitioner has not met the first criterion to have the default determination vacated.

D. Furthermore, petitioner has not established a meritorious case. "In order to meet the meritorious case criterion for vacatur, petitioner must make a prima facie showing of legal merit, and may not rely on conclusory statements unsupported by the facts" (*Matter of Gordon*, Tax Appeals Tribunal, January 29, 2015). Indeed, petitioner's motion to vacate consists of conclusory statements and lacks any evidence whatsoever to support its underlying case or meet its burden on the substantive issues. As a result, petitioner's motion fails on this prong as well.

E. The application of petitioner, Emerald International Holdings, Ltd., to vacate the default determination of September 14, 2017 is denied.

DATED: Albany, New York  
January 25, 2018

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

