STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	ORDER DTA NO. 829008

Petitioner, Tasty Sub, LLC, filed a petition 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. A videoconferencing hearing via CISCO Webex was scheduled before an administrative law judge with the Division of Tax Appeals on Wednesday, January 6, 2021, at 10:30 a.m. Petitioner failed to appear and a default determination was duly issued on June 3, 2021. Petitioner, by Stuart B. Ratner, P.C. (Stuart B. Ratner, Esq.), brought a written application on June 30, 2021 to vacate the default determination. On August 27, 2021, upon extension, the Division of Taxation, by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel), filed an affirmation and exhibits in response to the application. Based upon a review of the entire case file in this matter, Herbert M. Friedman, Jr, Supervising Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

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 and 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 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 default determination against petitioner, denying the petition in this matter and imposing a frivolous petition penalty 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 this application to vacate the default determination. In the application, petitioner asserts that the default resulted due to Mr. Buxbaum's ineffective assistance of counsel. It maintains 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 argues 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 states that Mr. Buxbaum's actions caused it to be unable to properly discover or introduce relevant evidence into the record. In sum, petitioner states 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 asserts that the notice of determination is based on the 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 argues 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 states that it has new evidence that was not presented by Mr. Buxbaum that must be considered.

26. In support of its application, petitioner attached the declaration of Mohammad Rashid, its sole member. Mr. Rashid acknowledges 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 adds that he subsequently learned that Mr. Buxbaum disregarded the hearing. Consequently, Mr. Rashid states that he felt misled.

As to the substance of the audit, Mr. Rashid states that petitioner used sales reports produced by the cash register system required by its franchisor to determine gross sales. He adds 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 asserts 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 says 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 been providing bookkeeping, accounting and tax preparation services to petitioner since 1995. He states 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. It is that report that petitioner uses to calculate gross sales and, ultimately, taxable sales, according to Mr. Wahlberg. He adds that since the system does not differentiate between taxable and non-taxable sales, based on his industry experience, he applies an 8% discount to gross sales to account for non-taxable sales. Mr. Wahlberg also confirms Mr. Rashid's statements regarding the intra-company bank deposits and equipment purchases. There are 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 provides services to petitioner's franchisor. In her role, she is responsible for federal and state tax compliance for the franchisor and its related entities. She states 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, the Division asserts that petitioner failed to provide a valid excuse for the default. In support of this position, the Division points 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 argues that petitioner has failed to establish a meritorious case. According to the Division, petitioner's claims in its application are unsupported and conclusory in nature. Moreover, the Division states that petitioner has not offered any new or meaningful evidence to support its claims. Hence, according to the Division, the application must be denied.

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 (b) (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 [b] [3]; ***see Matter of Poindexter***, Tax Appeals Tribunal, September 7, 2006;

Matter of Zavalla). On the first issue, petitioner asserts that Mr. Buxbaum's "reprehensible" behavior throughout the hearing process denied it due process based on ineffective assistance of counsel. It is well-settled, however, that aside from certain narrow exceptions not present here, "the constitutional right to counsel does not extend to civil actions or administrative proceedings" (***Estafanous v New York City Environmental Control Bd.***, 136 AD3d 906 [2d Dept 2016; ***see Patricia W. Walston, P.C. v Axelrod***, 103 AD2d 769 [2d Dept 1984], ***lv denied*** 64 NY2d 611 [1985]; ***see also Matter of Nusco***, Tax Appeals Tribunal, March 31, 1994]. Moreover, a representative's apparently willful failure to appear at a scheduled hearing does not amount to a deprivation of any right to the effective assistance of counsel (***see Walston***). In the present case, petitioner, and its representative, were aware of the date, time and location of the hearing and made a conscious decision not to appear. By failing to do so, petitioner forfeited its opportunity to be heard on the merits of its petition and, under such circumstances, the Tax Appeals Tribunal has previously upheld the default determination (***see Matter of Emerald International Holdings, Ltd.***, Tax Appeals Tribunal, October 3, 2018; ***see also Matter of Estruch***, Tax Appeals Tribunal, May 20, 2010 [where petitioner's reliance on its representative, who subsequently failed to appear on its behalf, was an insufficient reason to vacate a default determination).

Petitioner also argues that Mr. Buxbaum's "incompetence" rendered him unqualified to represent it in this matter. In making this argument, petitioner cites to ***Matter of Coliseum Palace*** (Tax Appeals Tribunal, November 17, 1988) and ***Matter of Haber*** (Tax Appeals Tribunal, August 1, 1996). These cases, however, are inapposite to the matter here. Mr. Buxbaum was neither an unqualified representative under 20 NYCRR 3000.2 (as was the situation in ***Matter of Coliseum Palace***) nor the subject of an inherent conflict of interest (as in

Matter of Haber).

It is clear from petitioner's application that Mr. Buxbaum did not perform his representation to its satisfaction. He was, however, properly appointed and qualified prior to and at the time of the hearing, for which he was given notice and an opportunity to be heard. He simply refused to appear, a practice previously frowned upon by the Tax Appeals Tribunal. 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). On this issue, petitioner's application to vacate consists of conclusory statements and lacks sufficient evidence to support its underlying case or meet its burden on the substantive issues. The declarations offered by petitioner lack the supporting documentation and specificity required to demonstrate the merit of petitioner's position. As a result, petitioner's application fails on this prong as well.

E. The application of petitioner, Tasty Sub, LLC, to vacate the default determination of June 3, 2021, is denied.

DATED: Albany, New York
November 24, 2021

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