STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANK FRANCO	:	DECISION
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 December 1, 1979 through November 30, 1982.	:	
	:	
In the Matter of the Petition	:	
of	:	
JOSEPH CHIAPPERINO	:	
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 December 1, 1979 through November 30, 1982.	:	
	:	

Petitioners Frank Franco (DTA #800716) and Joseph Chiapperino (DTA #800717), filed exceptions to the order of the Administrative Law Judge issued on July 14, 1988 with respect to their written applications pursuant to 20 NYCRR 3000.10(b)(3) to vacate the default determinations issued by Administrative Law Judge Dennis M. Galliher on March 29, 1988. Petitioner Frank Franco appeared by Pollina & Pollina, Esqs. (Robert B. Pollina, Esq., of counsel). Petitioner Joseph Chiapperino appeared by Salvatore F. Quagliata, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Neither petitioner filed a brief in support of their exception. The Division submitted an affirmation in lieu of a brief. Oral argument was requested by petitioner Chiapperino but was denied.

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

ISSUE

Whether petitioners' applications to vacate a default determination rendered were properly denied.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On September 20, 1983, the Division of Taxation issued to each petitioner herein a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through November 30, 1982. The notices assessed against each petitioner additional sales and/or use tax due of $60,000.00, plus penalty and interest, on the ground that they were officers of Foxx Pools of Suffolk, Inc. and, as such, personally liable for payment of the tax, penalty and interest due from said corporation. Both Mr. Franco and Mr. Chiapperino timely filed petitions with the former State Tax Commission seeking revision of the notices dated September 20, 1983.

Pursuant to 20 NYCRR former 601.4, a prehearing conference was scheduled for September 13, 1984. Neither petitioners nor their representative, Robert B. Pollina, appeared for said prehearing conference and a default order was issued on November 23, 1984. Said default order was subsequently vacated at the request of petitioners' representative who indicated that an illness had prevented his appearance at the September 13, 1984 prehearing conference. These matters were rescheduled for prehearing conference to be held on June 13, 1985; however, said prehearing conference was adjourned at the request of petitioners' representative since he was engaged in Supreme Court on that date. A prehearing conference was scheduled and held on September 12, 1985. The matters could not be resolved and on April 11, 1986 Conferee E. A. Williams advised petitioners' representative that the files were being "forwarded to our hearing unit for further proceedings".

These matters were initially scheduled for formal hearing to be held on February 27, 1987 before Arthur Johnson, Hearing Officer. An adjournment was granted two days prior to the hearing inasmuch as petitioner Joseph Chiapperino had retained new counsel. The hearing was rescheduled to September 14, 1987 before Robert F. Mulligan, Administrative Law Judge. Three business days prior to hearing, an adjournment was requested and granted since petitioner Joseph Chiapperino had once again retained a new attorney.

On December 28, 1987, notices of hearing were mailed to petitioners and their respective representatives advising them of a hearing to be held on February 2, 1988. On January 27, 1988, Leonard J. Angelo, attorney for petitioner Joseph Chiapperino, drafted a letter to the Division of Tax Appeals in Albany, New York requesting, on behalf of both petitioners herein, an adjournment of the February 2, 1988 hearing since "[U]rgent personal business necessitates my presence outside the jurisdiction until February 10, 1988." Said letter was postmarked January 28, 1988 and received by the Division of Tax Appeals on February 3, 1988, one day after the scheduled hearing. Neither petitioners nor their representatives called to request an adjournment of the February 2, 1988 hearing.

As previously noted, default determinations were issued on March 29, 1988 to both Mr. Franco and Mr. Chiapperino wherein their petitions were denied due to their failure to appear at the February 2, 1988 hearing. The covering letter which accompanied each default determination advised petitioners that a default determination may be vacated upon written application if the applicant shows an excuse for the default and proof of a meritorious case. On April 6, 1988, Leonard J. Angelo, attorney for petitioner Joseph Chiapperino, made an application to vacate the March 29, 1988 default determination wherein he stated that:

> "On January 27, 1988, a request for an adjournment was submitted by counsel (see attached). In as much [sic] as a denial of this request was not forthcoming, counsel has awaited notification for an adjourned date. However, during that time period, counsel for petitioner has been taken ill with infectious hepatitis, rendering him disabled and unable to assume any professional responsibility until May 15, 1988 at the earliest."

On April 19, 1988, Robert B. Pollina, attorney for petitioner Frank Franco, made an application to vacate the March 29, 1988 default determination wherein he stated that:

> "Your deponent has been in contact with the law firm of Angelo & Fitzgerald. We received a letter from Mr. Angelo, who represents Joseph Chiaperrino [sic], that 'urgent personal business necessitates' his need to adjourn this matter.
>
> This office was advised that a new date would be set for a hearing and that we would be notified of the new date. My client relied on the fact that this matter would be adjourned, due to the 'urgent personal business' of the attorney for Joseph Chiaperrino [sic]."

On April 13, 1988, Daniel J. Ranalli, Administrative Law Judge, advised Mr. Angelo that his letter of April 6, 1988 "does not in any way conform to regulation section 3000.10(b) . . . which requires that the party seeking to vacate a default show an excuse for the default and a meritorious case." The Administrative Law Judge also advised Mr. Angelo that:

> "In view of the past history of this case, I will expect evidence of a compelling reason why no one appeared at the February 2, 1988 hearing and, moreover, I expect you to provide proof by documentation and affidavits that petitioner has a meritorious case. This material should be sent to me no later than 20 days following receipt of this letter. Otherwise, an order will be issued denying your application to vacate the default."

On April 26, 1988, the Administrative Law Judge forwarded Mr. Pollina a copy of the April 13, 1988 letter he sent to Mr. Angelo. The Administrative Law Judge further advised Mr. Pollina that:

> "Everything set forth in that letter applies equally to the above matter. Moreover, you did not even request an adjournment on behalf of your client. No adjournment was granted to anyone concerned with the hearing scheduled for February 2, 1988. Mr. Angelo certainly has no authority to grant adjournments and he had no authority to advise you that the hearing had been adjourned. Only the Administrative Law Judge assigned to the case may grant adjournments.
>
> Reiterating for your benefit the instructions given to Mr. Angelo, your letter of April 19, 1988 does not comply with the requirements of 20 NYCRR 3000.10(b) in seeking to vacate the default and you will have 20 days following receipt of this letter to send to me the material specified in my letter of April 13, 1988 to Mr. Angelo. Otherwise, an order will be issued denying your application to vacate the default."

On May 9, 1988 attorney Robert B. Pollina, on behalf of his client Frank Franco and also apparently on behalf of petitioner Joseph Chiapperino,[1] replied to the Administrative Law Judge's letters of April 13, 1988 and April 26, 1988. In said letter, Mr. Pollina states that:

> "Although I realize that Mr. Angelo did not have authority to grant adjournment, my reliance on his statement that this matter had been adjourned, was based on the fact that he had been out of his office for many weeks, suffering from hepatitis, and had made this fact known to the appeals tribunal. I have not in the past 24 years encountered an administrative agency that required an attorney to appear and represent a client while suffering from contageous [sic] hepatitis.
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> * * *
>
> My clients have a meritorious defense based upon the following: The computation of tax was arbitrary and capricious. It was not based upon records of business by Foxx Pools of Suffolk, Inc. It improperly computed the tax liabilities of Carefree Swimming Pools. It incorporated items of sale never completed, it duplicated items of sale from the same customers; it incorporated non-taxable items; it incorporated records not belonging to, or attributable to Foxx Pools of Suffolk, Inc. It incorrectly assessed use and sales taxes to the principals."

OPINION

In the determination below the Administrative Law Judge decided that petitioners' applications to vacate the default determinations issued against them should be denied. The basis of this decision was that petitioners did not show an excuse for the default or a meritorious case.

On exception petitioner Frank Franco contends that he has shown an excuse for the default and an underlying meritorious case. Specifically, he argues that his excuse for the default was that he was informed by an (unnamed) employee of the Tax Department that he would be advised of a new adjournment date when he attempted to confirm an adjournment sought by the representative of petitioner Joseph Chiapperino. Additional support for this excuse is based upon petitioner Franco's claim that he was informed prior to the February 2, 1988 hearing date that the representative for petitioner Chiapperino had become seriously ill and could not attend the

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[1]Although attorney Robert B. Pollina does not represent Joseph Chiapperino, his letter of May 9, 1988 was apparently intended as a response on behalf of both petitioners inasmuch as said letter referenced "Matter of Frank Franco, DTA #800716; Matter of Joseph Chiapperino, DTA #800717". The Administrative Law Judge received no response from Mr. Angelo as Mr. Chiapperino's attorney of record.

hearing. Petitioner Franco also contends that he has an underlying meritorious case in that the computation of the tax at issue was arbitrary and capricious, not based upon appropriate business records, incorporated improper items, and incorporated improper records.

Petitioner Joseph Chiapperino also contends that he has shown an excuse for the default and an underlying meritorious case. Specifically, petitioner Chiapperino contends that his default should be excused because the serious illness of his former representative justified the short notice that was given for the request for adjournment. Further, it is claimed that petitioner Chiapperino relied on some sort of representation that he would be notified of a new hearing date. Additionally, it is argued that the facts themselves present a sufficiently meritorious case such that the default determination should be vacated.

In response to the arguments by both of the petitioners the Division argues that the default determination should be sustained. In particular, the Division claims that neither petitioner has shown an excuse for default or a meritorious case. With respect to petitioner Franco the Division contends that the reliance by Mr. Franco's representative upon statements made by Mr. Chiapperino's representative does not provide a sufficient excuse for the default. Further, the Division asserts that petitioner Franco has not presented a meritorious case in that he has not supplied the affidavit required by the Supervising Administrative Law Judge in a letter issued to petitioner on April 13, 1988.

With regard to petitioner Chiapperino the Division contends that the request for an adjournment by his representative, which was received by the Division one day after the scheduled hearing, does not provide a sufficient excuse for the default at issue. In particular, the Division points to the lack of any well-defined reason for the default in the letter seeking the adjournment. Additionally, the Division argues that petitioner Chiapperino has made no effort to submit evidence that an underlying meritorious case exists.

We affirm the denial by the Chief Administrative Law Judge of petitioners' application to vacate the default determination issued by the Administrative Law Judge.

20 NYCRR 3000.10 provides, in pertinent part, as follows:

> "Section 3000.10. Hearings before administrative law judges. (a) Notice. After issue is joined (see, § 3000.4[b] of this Part), the administrative law judge unit shall schedule the controversy for a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.
>
> (b) Adjournment, default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the administrative law judge shall render a default determination against the dilatory party.
>
> (2) In 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." (Emphasis added.)

The record before us clearly indicates that neither of the petitioners nor their representatives appeared at the scheduled hearing. In addition, neither of the petitioners nor their representatives obtained an adjournment of the proceedings. As a result, we agree that both petitioners were in default and that the Administrative Law Judge properly rendered a default determination pursuant to 20 NYCRR 3000.10(b)(2) (see, Matter of Morano's Jewelers of Fifth Avenue, Inc., Tax Appeals Tribunal, May 4, 1989). The issue before us now is whether such default determination should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.10(b)(3) provides that "Upon 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." A review of the record before us indicates that petitioners have failed to meet these requirements.

We will first address the application of petitioner Chiapperino to vacate the default determination. The facts indicate that petitioner Chiapperino through his former representative, Mr. Angelo, sent a letter to the Supervising Administrative Law Judge on April 6, 1988 which was received on April 11, 1988. The letter purported to be an application to vacate the default

determination at issue. The letter, however, failed to state the reasons for the default by petitioner Chiapperino. It merely stated that as a denial of the requested adjournment was not forthcoming, counsel was therefore awaiting notification of the adjournment date. Additionally, the letter noted that Mr. Angelo had been taken ill with infectious hepatitis in the interim. Since the letter failed to conform to the requirements of 20 NYCRR 3000.10(b)(3), as it did not show an excuse for the default and a meritorious case, a letter was issued on April 13, 1988 by the Administrative Law Judge explaining the aforementioned requirements and recommending that petitioner Chiapperino comply with them. In addition, the Ranalli letter required that proof by documentation and affidavits be submitted with respect to a showing of a meritorious case. Neither petitioner Chiapperino nor his authorized representative submitted a response to the letter issued on April 13, 1988. The letter dated May 9, 1988 to Administrative Law Judge Ranalli by the authorized representative for petitioner Franco, Robert B. Pollina, cannot function as a response by petitioner Chiapperino because there is no evidence before us that Mr. Pollina was authorized to represent petitioner Chiapperino.

In light of the facts as stated above, we are compelled to conclude that petitioner Chiapperino has not shown an excuse for the default and a meritorious case as required by 20 NYCRR 3000.10(b)(3). Petitioner Chiapperino's claims on exception that his former representative, Mr. Angelo, was taken ill before the scheduled hearing date and that he was informed by someone that he would be notified of a new hearing date fail as well. Petitioner Chiapperino has provided no affidavits or documentation of any sort to support either of these claims. Further, the claim that the representative was ill is contradicted by Mr. Angelo's letter of April 6, 1988 which indicates that he contracted infectious hepatitis sometime after the February 2, 1988 scheduled hearing. Thus we conclude that a valid excuse was not established (see, Falso v. Norton, 89 AD2d 635, 453 NYS2d 88). Lastly, petitioner Chiapperino has at no time attempted to put forward evidence of a meritorious case. Petitioner Chiapperino's claim on exception that "the facts themselves" provide a basis for a meritorious case is conspicuously lacking of any sort of proof of such merit. Without a recital of the relevant facts, and their

application to the assessment at issue, the claim that the facts indicate a meritorious defense becomes merely a conclusory statement insufficient to establish the existence of an actual meritorious defense (see, Abrams v. Wiley, 117 AD2d 856, 498 NYS2d 556; compare, Tat Sang Kwong v. Budge-Wood Laundry Serv., 97 AD2d 691, 468 NYS2d 110). As a result, we conclude that petitioner Chiapperino's application to vacate the default determination was properly denied.

We next address whether petitioner Franco's application to vacate the default determination issued was properly denied. We agree that the application should be denied. The facts indicate that on April 19, 1988 petitioner Franco's representative wrote a letter to the Administrative Law Judge which purported to be an application to vacate the default determination. Since the letter only minimally outlined an excuse for the default and since it failed to provide any explanation of a meritorious case, the Administrative Law Judge issued a letter on April 26, 1988 to petitioner Franco's representative explaining the deficiencies in the attempted application to vacate the default judgement. Further, the April 26, 1988 letter also incorporated the substance of the April 13, 1988 letter from the Administrative Law Judge to petitioner Chiapperino's representative and a copy of such letter was attached thereto.

Petitioner Franco's representative responded to the April 26, 1988 letter by way of a letter issued to the Supervising Administrative Law Judge on May 9, 1988. Such letter, while failing to provide the affidavits and documentation requested, included a more thorough explanation of the excuse for default being offered and it also contained an attempt to establish a meritorious case. With regard to the excuse for default offered petitioner Franco's representative claimed that the default was based on his reliance upon statements made by petitioner Chiapperino's representative that the matter had been adjourned due to the fact that petitioner Chiapperino's representative had been suffering from infectious hepatitis for many weeks. We find this explanation to be wholly unsatisfactory. First, the claim that petitioner Chiapperino's representative had been suffering from infectious hepatitis for any period at all prior to the scheduled hearing date is contradicted by the letter from petitioner Chiapperino's representative to the Supervising Administrative Law

Judge issued on April 6, 1988 which indicates that he contracted infectious hepatitis sometime after the February 2, 1988 scheduled hearing. Additionally, no documentation or affidavits of any sort were offered in support of this claim (see, Falso v. Norton, supra). Further, there is no evidence of any attempt being made by petitioner Franco's representative to confirm such an adjournment with the Division of Tax Appeals other than a claim offered for the first time on exception that petitioner Franco's representative contacted someone who advised him that he would be informed of the adjourned hearing date. As a result, we conclude that a valid excuse has not been established by petitioner Franco.

Lastly, we address whether petitioner Franco has provided a sufficient explanation such that he has shown that a meritorious case exists. Mere conclusory statements not supported by facts will not suffice to prove a meritorious case; a prima facie showing of legal merit is required (see, D. Sanders, P.C. v. H. A. Sanders, Arch., 140 AD2d 787, 527 NYS2d 660; Tat Sang Kwong v. Budge-Wood Laundry Serv., supra; Picotte Realty v. Araguna, 87 AD2d 955, 451 NYS2d 220).

The statement in the May 9, 1988 letter from Robert B. Pollina does not provide sufficient assertions of fact or explanation of how the facts apply to the assessment at issue to show that a meritorious case exists. First, the letter does not state the records made available upon audit, nor explain the audit methodology employed and the types of transactions taxed. Without such information it is impossible to evaluate the alleged errors of the audit. Second, the errors are alleged in very general terms without sufficient detail to determine if they would constitute errors if proved. Finally, the letter is not in affidavit form, in spite of Administrative Law Judge Ranalli's specific request for such proof in his April 26, 1988 letter to Mr. Pollina. For all of these reasons, we conclude that petitioner Franco has not established a meritorious case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners, Frank Franco and Joseph Chiapperino, are in all respects denied;

2. The determination of the Chief Administrative Law Judge denying the applications of petitioners Frank Franco and Joseph Chiapperino to vacate the default determination rendered is sustained;

3. The determination of the Administrative Law Judge holding petitioners Frank Franco and Joseph Chiapperino in default is affirmed;

4. The petitions of Frank Franco and Joseph Chiapperino are in all respects denied; and

5. The notices of determination issued on September 20, 1983 are sustained.

DATED: Troy, New York
September 14, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner