STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RONALD WEINER, OFFICER OF CONLO SERVICE CORP.	:	DECISION DTA NO. 801597
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 January 1, 1984 through February 29, 1984.	:	

Petitioner Ronald Weiner, officer of Conlo Service Corp., Box 2000, Lewisburg, Pennsylvania 17837, filed an exception to the order of the Chief Administrative Law Judge issued on October 27, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (John Matthews, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on December 1, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether adequate grounds were presented by petitioner to vacate a default order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On March 22, 1985, the former Tax Appeals Bureau of the former State Tax Commission received a perfected petition from Ronald Weiner, as officer of Conlo Service, Inc., for revision of a determination or for refund of sales and use taxes for the period January 1, 1984 through

February 29, 1984. In the petition, petitioner argued that certain sales of gasoline Conlo Service, Inc. made were tax free because the purchasers were registered motor fuel distributors which provided Conlo with resale certificates. Accordingly, petitioner alleged that such sales were not retail sales subject to sales tax.

The Division of Taxation ("Division") filed an answer dated July 29, 1985 which denied the allegations made in the petition except for the allegation as to provision of resale certificates as to which it denied having knowledge or information sufficient to form a belief. The answer stated that Ronald Weiner was an officer of Conlo Service Corp. and is therefore liable for sales tax owed by Conlo Service Corp. It also stated that a notice of determination for sales tax due had been issued against petitioner dated November 14, 1984 and that the sales tax had not been paid.

On February 21, 1990, Robert F. Mulligan, Administrative Law Judge, sent a Notice of Hearing to petitioner and his representative, informing them that a hearing on the petition had been scheduled for Wednesday, March 28, 1990 at 9:15 A.M.

Petitioner's attorney's notice was returned by the Postal Service marked "Attempted -- Not known." Petitioner responded by letter dated March 19, 1990 to Judge Mulligan, advising he was currently serving a four-year prison sentence and that he would be released in November 1990. He requested an adjournment until March of 1991 in order "to get things in order." Judge Mulligan adjourned the hearing and, by letter dated April 5, 1990, advised petitioner that he would recommend that the hearing not be rescheduled until after November 1990.

On October 1, 1990, the calendar clerk of the Division of Tax Appeals sent a letter to petitioner and his attorney, advising them that the Division of Tax Appeals anticipated scheduling a hearing on the petition during the week of February 25, 1991, and that petitioner should, by November 1, 1990, inform the Division of Tax Appeals as to any preferences he had regarding the scheduling of the hearing. There was no response to this letter.

On January 21, 1991, Thomas C. Sacca, Administrative Law Judge, sent a Notice of Hearing to petitioner, informing him that a hearing had been scheduled for Wednesday, February 27, 1991 at 9:15 A.M. The notice was sent to petitioner's prison address, but was returned by the Postal Service with an improper forwarding address, marked "No such street."

There were several other related cases which were consolidated for hearing with petitioner's case. These included two corporate petitioners, Conlo Service Corp. and Conlo Service, Inc., and three individuals, petitioner, his father, Isidore Weiner, and Harry Radinsky, all officers of the corporations. Petitioner's father had died prior to petitioner's release from prison.

On February 15, 1991, Judge Sacca notified petitioner that the hearing scheduled for February 27, 1991 would be adjourned because the hearing notices were mailed to the wrong address. He advised petitioner that the hearing would be rescheduled for May 1, 1991.

On March 25, 1991, petitioner, Isidore Weiner and the two corporations were again scheduled for hearing on Wednesday, May 1, 1991 at 1:15 P.M. Harry Radinsky had filed for bankruptcy prior to the February hearing and all proceedings against him were stayed on March 11, 1991.

The hearing with respect to petitioner was adjourned to allow him to attempt to settle his case by way of filing an offer in compromise with the Division. According to information supplied by the Division, petitioner did file an offer in compromise sometime in 1991, but the Division rejected the offer shortly after it was submitted. The remaining petitioners failed to appear at the hearing on May 1, 1991 and default orders were issued against them.

On March 15, 1994, since the Division of Tax Appeals had not received any updates on the progress of settlement negotiations between petitioner and the Division, the calendar clerk sent a calendar call notice to petitioner and the Division's attorney, advising them that the Division of Tax Appeals anticipated scheduling another hearing in July or August of 1994. The parties were to contact each other, set a mutually acceptable hearing date and notify the Division of Tax Appeals by May 2, 1994.

Petitioner did not respond to the calendar call at any time. The Division's attorney, John Matthews, responded on April 28, 1994, requesting that the hearing be scheduled on September 22, 1994 at 1:15 P.M. Mr. Matthews copied petitioner on his request and asked petitioner to contact him if the date was not convenient. Petitioner apparently did contact Mr. Matthews because, in a June 28, 1994 letter to petitioner, Mr. Matthews advised him that because the assessment in issue was nearly ten years old, the Division could not agree to a further adjournment.

On July 6, 1994, petitioner's new attorney, Guy L. Heinemann, sent a letter by fax to Assistant Chief Administrative Law Judge Daniel J. Ranalli, advising that petitioner had been sentenced to a term of imprisonment of 30 months to commence on August 12, 1994, and that he would be unable to attend the hearing to be scheduled in September. Judge Ranalli immediately advised petitioner that his hearing would be moved up to August 3, 1994 to enable him to attend. Accordingly, on July 7, 1994, Judge Ranalli sent a Notice of Hearing to petitioner informing him that a hearing had been scheduled for Wednesday, August 3, 1994 at 9:15 A.M.

By letter dated July 10, 1994 to Judge Ranalli, petitioner again requested an adjournment of the hearing, this time claiming that he was out of jail on bail and that he could not leave the "Eastern district jurisdiction." Judge Ranalli denied petitioner's request by letter dated July 18, 1994, informing him that his case had been delayed for nine years and it could not be delayed for another three years.

Judge Ranalli further advised:

> "You have known since March that we intended to schedule this hearing in July or August. In fact, we allowed you to pick any date you wished for a hearing. In spite of that you waited until the last possible moment, after we selected the date because you never responded to our letter, to request an adjournment.
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> "You created this situation and you will have to decide on your own course of action. I can only offer some alternatives. If you personally cannot or choose not to attend a hearing, you can appoint a qualified representative to appear for you. You can also handle this case through the mail by submission of documents and

> briefs. You will need the consent of Mr. Matthews, the Tax Department's attorney, to follow that route. The hearing, however, will not be adjourned."

By letter dated July 20, 1994, petitioner again requested an adjournment of the hearing, and by letter dated July 26, 1994, Judge Ranalli again denied his request.

On August 3, 1994 at 10:00 A.M., Administrative Law Judge Marilyn Mann Faulkner called the matter for hearing. Neither petitioner nor his representative appeared. John Matthews, Esq., appeared for the Division. Mr. Matthews moved that a default order be issued to petitioner for his failure to appear at the hearing.

There being no further communications from petitioner or his representative, Judge Faulkner issued a default determination against petitioner on August 25, 1994.

By letter dated September 9, 1994, petitioner asked to have the default order vacated. Judge Ranalli advised petitioner that his letter was insufficient to vacate the default order, and further advised petitioner that he would have to present proof of an excuse for the default and proof of a meritorious case.

On September 29, 1994, petitioner filed an application to vacate the default determination. As an excuse for failure to appear at the hearing, petitioner alleged that at the time of the hearing he had been released on bail and could not leave the New York City metropolitan area. No documentation, affidavits or any other type of evidence was submitted in support of this allegation.

In support of a meritorious case, petitioner stated:

> "The witnesses that I will get to testify will be two of my dispatchers at the time. These two employees handled all resale certificates and followed up on matters concerning up to date tax free sales."

Again, aside from this statement, no documentation of any kind was presented by petitioner in support of a meritorious case.

On October 7, 1994, the Division filed a response in opposition to petitioner's application. The Division argues that petitioner "was merely forbidden to leave [the metropolitan area] without the court's permission. He has not demonstrated that he requested such permission."

As to the merits of petitioner's case, the Division argues that:

> "he fails to allege any basis for cancellation of the assessments and fails to produce any evidence whatsoever in his behalf. Moreover, he has not indicated what the former employees might say; he proposed to rely upon the very documents the Division will use to prove its case, and; he has not indicated what records the federal government has nor how they will assist him."

OPINION

A default determination can be vacated if the petitioner can demonstrate both an excuse for the default and a meritorious case (20 NYCRR 3000.10[b][3]).

In the order issued below, the Chief Administrative Law Judge decided that petitioner's application to vacate the default determination issued against him should be denied, the basis being that petitioner failed to present sufficient evidence of a valid excuse for his failure to appear and also failed to demonstrate a meritorious case.

The Chief Administrative Law Judge's order held that petitioner, other than an unsworn statement in a letter, offered no proof of an excuse for his failure to appear at the scheduled hearing.

As to the second requirement that a meritorious case be shown in order to have a default determination vacated, the Chief Administrative Law Judge held that "[t]he core of this case appears to turn on whether Conlo Service Corp. received resale certificates from its customers" and "after nine years and four scheduled hearings, petitioner has still been unable to show that such resale certificates exist."

On exception, petitioner argues that: 1) Conlo Service provided properly completed resale certificates but the Division chose not to accept same; 2) he sent "a letter to your counsel showing him item for item the reason for the long delays were your Depts. errors not [his]"

(petitioner's brief on exception) further advising counsel that he was self-surrendering to Federal prison on August 12, 1994 for a 30-month sentence; 3) at the prison he has no access to law or tax regulations and, therefore, cannot answer questions pertaining to same; and 4) the New York State Sales Tax Audit Division was supplied with the resale certificates in question.

The Division, in reply, did not file a brief but instead relied on its letter brief to the Assistant Chief Administrative Law Judge dated October 7, 1994, further advising that the order of the Chief Administrative Law Judge fully addressed all relevant issues and should be affirmed in its entirety.

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

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

> "(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.
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> "(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.
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> "(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 petitioner failed to appear at the scheduled hearing for which he had received notice. In addition, petitioner failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and 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 Ave., 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 "[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" (see, Matter of Capp, Tax Appeals Tribunal, January 2, 1992; Matter of Franco, Tax Appeals Tribunal, September 14, 1989).

A review of the record below and the exception filed by petitioner shows a failure to present an acceptable excuse for not appearing at the scheduled hearing as well as evidence of a meritorious case for consideration by this Tribunal. In fact, petitioner's exception to this Tribunal fails to really address the issue before us, namely, why should the default order issued by the Chief Administrative Law Judge be vacated.

We, therefore, affirm the determination of the Chief Administrative Law Judge that petitioner has failed to present an acceptable excuse as well as establishing a meritorious case. The Chief Administrative Law Judge accurately and adequately addressed these issues and we affirm based on the rationale stated in the order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald Weiner, officer of Conlo Service Corp., is denied;

2. The order of the Chief Administrative Law Judge denying the application of Ronald Weiner, officer of Conlo Service Corp., to vacate the default determination rendered is sustained;

3. The order of the Chief Administrative Law Judge holding Ronald Weiner, officer of Conlo Service Corp. in default is affirmed;

4. The petition of Ronald Weiner, officer of Conlo Service Corp., is, in all respects, denied; and

5. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

DATED: Troy, New York
May 11, 1995

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

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