STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
REMEMBER BASIL, LTD.	:	DECISION DTA No. 806906
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 June 1, 1985 through May 31, 1988.	:	

Petitioner Remember Basil Ltd., c/o Grace Clearsen, 144 Bond Street, Brooklyn, New York 11217, filed an exception to the order of the Chief Administrative Law Judge issued on September 1, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner submitted a brief in support of its exception. The Division of Taxation submitted a letter brief in opposition. Petitioner filed a reply brief on December 22, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUE

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

FINDINGS OF FACT

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

On March 19, 1992, the Division of Tax Appeals received a petition from Remember Basil, Ltd. for revision of a determination or for refund of sales and use taxes for the period June 1, 1985 through May 31, 1988. In the petition, petitioner argued that it was in the business

of furnishing food for parties. In addition to food, petitioner alleged that it provided equipment for parties, including, silverware, linens and flowers, as requested by its customers. Petitioner rented the items requested from third parties and then provided them to the customer. The customer is charged for the food and additional items requested and sales tax is chargedon the total bill. Petitioner does not pay tax on its rental of equipment from third parties, alleging that such rental is a purchase for resale.

The Division of Taxation ("Division") filed an answer dated May 20, 1992 stating that petitioner is engaged as an operator of a catering business making sales of food, services and tangible personal property subject to sales tax.

On October 1, 1992, the calendar clerk of the Division of Tax Appeals sent a letter to petitioner and its representative, Joseph Lapatin, Esq., advising them that the Division of Tax Appeals anticipated scheduling a hearing on the petition during the weeks of either February 3, 1993 or March 29, 1993, and that petitioner should, by November 2, 1992, inform the Division of Tax Appeals as to any preferences it had regarding the scheduling of the hearing.

By letter dated October 6, 1992, petitioner's representative, Mr. Lapatin, advised the Division of Tax Appeals that he preferred the week of March 29, 1993 for the hearing.

In accordance with Mr. Lapatin's request, on February 22, 1993, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioner and its representative, informing them that a hearing on the petition had been scheduled for Wednesday, March 31, 1993 at 9:15 A.M.

On March 12, 1993, Mr. Lapatin telephoned Judge Ranalli to advise that he had discussed the case with the auditors and that there would be a settlement of all or part of the case. Any legal issues remaining would be handled by submission of documents rather than by hearing. Judge Ranalli adjourned the hearing and, on March 16, 1993, sent a waiver of hearing form to Mr. Lapatin and advised him that, if the case were not fully settled, he was to sign the waiver form and return it.

On October 1, 1993, after over six months had elapsed with no further word on whether the case had been settled or would proceed by submission, the calendar clerk sent another letter to petitioner and Mr. Lapatin advising them that the Division of Tax Appeals anticipated scheduling a hearing on their case during the weeks of either February 14, 1994 or April 4, 1994, and that they should, by November 1, 1993, inform the Division of Tax Appeals as to any preferences they had regarding the scheduling of the hearing.

By letter dated October 11, 1993, Mr. Lapatin requested that the hearing be scheduled during the week of April 4, 1994. In accordance with Mr. Lapatin's request, on February 28, 1994, Judge Ranalli sent a Final Notice of Hearing to petitioner and Mr. Lapatin, informing them that a hearing had been scheduled for Tuesday, April 5, 1994 at 9:15 A.M.

On April 5, 1994 at 3:00 P.M., Administrative Law Judge Thomas Sacca called the matter for hearing. Neither petitioner, by any of its officers, nor its representative appeared. Kathleen Church, Esq., appeared for the Division. Ms. Church moved that a default order be issued to petitioner for its failure to appear at the hearing.

According to an affirmation submitted by Ms. Church, petitioner's vice president, Grace Clearson, aka Dounia Rathbone and Dounia Beckwith, called her on April 6, 1994 because Ms. Clearson thought the hearing was on April 7 and she had wanted another adjournment. Ms. Church informed Ms. Clearson that the hearing had taken place and that a default order would be issued and that petitioner could apply to have such order vacated. Petitioner's representative also contacted Ms. Church sometime in May inquiring about the "upcoming hearing" and she informed him that the hearing had been held in April.

There being no further communications from petitioner or Mr. Lapatin, Judge Sacca issued a default determination against petitioner on June 2, 1994.

On July 7, 1994, the Division of Tax Appeals received a letter from Grace Clearson applying to have the default order vacated. As an excuse for her failure to appear, Ms. Clearson alleged that both she and her accountant "had the wrong dates."

In support of a meritorious case, Mr. Clearson reasserted the arguments made in her original petition to the effect that the rentals were purchases for resale to petitioner's clients and that the costs of the rentals were passed through to the clients because the clients preferred to pay with one check, rather than separately renting equipment from several different suppliers. Petitioner also argues that since being apprised "of this application of this law we ceased including rentals in our bill and have since this time had clients pay directly for their equipment . . . ." Some of the services and items obtained for clients included music, flowers, coordination fees, valet services and ice carving. Petitioner alleges that in order to remain competitive it had to provide such services and equipment when requested. Petitioner also alleges that "[i]t has already been determined that linens are not a part of the taxable total as had been originally claimed", but offered no authority or elaboration on this statement.

On August 15, 1994, the Division filed a response in opposition to petitioner's application. The Division argues that both petitioner and its representative had notice that the hearing was scheduled for April 5, 1994 and, in fact, Mr. Lapatin requested that particular week. Ms. Church finds implausible the claim that both petitioner and its representative calendared the hearing for different erroneous dates, and that neither of them had any communication with the other at any time prior to the hearing.

As to the merits of petitioner's case, the Division alleges that Matter of D-M Restaurant Corp. (Tax Appeals Tribunal, April 18, 1991) governs this case with respect to tableware purchased by a caterer, and that, although the Tribunal found purchase of a linen service not to be a taxable event, purchase of linens would be subject to tax.

The Division argues that, with the exception of flowers, all of a caterer's purchases of non-food items are subject to tax.

OPINION

A default determination can be vacated if 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 it should be denied, the basis being that petitioner failed to demonstrate both a reasonable excuse for the default and a meritorious case.

The Chief Administrative Law Judge's order held Mr. Lapatin's belief that the hearing was in May to be completely lacking in credibility; under the circumstances presented, Ms. Clearson's allegation fails as a valid excuse; and "[b]oth petitioner and its representative failed in their duty to properly pursue this case, and the resulting default remains unexcused" (Determination, conclusion of law "A").

As to the requirement that a meritorious case be shown in order to have a default determination vacated, the Chief Administrative Law Judge held that since the vast majority of items used by petitioner would be subject to tax upon purchase or rental by petitioner and petitioner failed to show that the assessment was otherwise erroneous, petitioner, therefore, failed to demonstrate a meritorious case.

On exception, petitioner's vice president, Grace Clearson, argues: 1) it was not made clear to her that there was any urgency in this matter of a response since the case had been going on for over four years; 2) not being a lawyer or having funds to hire a lawyer, her response kept getting delayed; 3) if she had been informed at anytime that there was a deadline she would have responded; and 4) up until now she has not been given complete and accuracte information to enable her to respond within the required time.

Petitioner's vice-president, Grace Clearson, further argues that Remember Basil, Ltd. should never have been assessed sales taxes as the responsible parties are the rental companies, "[t]he state is not due any additional taxes because there has been no 'USE' that occurred by the party you are assessing" (Petitioner's Brief in Support, Point #2), and Remember Basil, Ltd., which has been closed since December of 1993, has no assets of any kind.

The Division, in reply, argues that petitioner is in error raising the issues presented as this exception should be limited to the question of vacating the default determination.

The Division relies on its brief filed below and argues: 1) petitioner has failed to meet its burden of proving an excusable default and a meritorious case; 2) petitioner's notice of exception should be denied; and 3) the notice should be sustained together with penalty and interest.

Petitioner, in reply, again argues that the sales in question were sales for resale and, therefore, not subject to this double taxation or "use tax" and, further: 1) off premises catering was a new industry where, for the first time ever, food, equipment, service, flowers, entertainment, etc. were packaged and taken off premises to a client's location; 2) "there is no way that we or our accountant could have known that this law would or could be applied in this manner to the transactions we made with our clients" (Petitioner's Reply Brief); 3) the amounts in question were a result of transfers into petitioner's checking account from its money market account and the bank records, finally made available, prove Remember Basil paid all required sales taxes for the assessment periods in question; and 4) based on what is presented, the exception should be granted and the case either re-opened or dropped 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.
>
> "(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 petitioner nor petitioner's representative appeared at the scheduled hearing for which they 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 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 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.

We, therefore, affirm the order 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 Remember Basil, Ltd. is denied;

2. The order of the Chief Administrative Law Judge denying the application of Remember Basil, Ltd. to vacate the default determination rendered is sustained;

3. The order of the Chief Administrative Law Judge holding Remember Basil, Ltd. in default is affirmed;

4. The petition of Remember Basil, Ltd. is, in all respects, denied; and

5. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 10, 1989 is sustained.

DATED: Troy, New York
June 15, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner