

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALAN STERN, OFFICER OF THE COVER UP CLOTHING SERVICES, INC.	:	DECISION DTA No. 808224
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 September 1, 1985 through November 30, 1987.	:	

Petitioner Alan Stern, Officer of the Cover Up Clothing Services, Inc., 48 Autumnview, Williamsville, New York 14221 filed an exception to the order of the Chief Administrative Law Judge issued on June 13, 1991 with respect to his written application pursuant to 20 NYCRR 3000.10(b)(3) to vacate the default determination issued by Administrative Law Judge Timothy J. Alston on April 11, 1991. Petitioner appeared by Donald L. Summer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief.

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

ISSUE

Whether the Chief Administrative Law Judge properly refused to vacate the default determination issued against petitioner.

FINDINGS OF FACT

We find the following facts.

On January 31, 1991, the Division of Tax Appeals received a letter from petitioner's representative by facsimile transmission. The letter stated that its purpose was to confirm that an

employee of the Division of Tax Appeals had granted petitioner an adjournment of his hearing, due to the illness of petitioner. Also included in the facsimile transmission was a copy of a memorandum signed by Donald E. Miller, M.D. This memorandum, dated January 21, 1991, stated as follows:

"To Whom it may Concern:

Alan Stern was recently hospitalized for multiple symptoms in Buffalo General Hospital CCU all of which ultimately seemed to be stress related. It would be detrimental to his emotional and physical well being to be exposed to any further undue stress at the present time."

Notwithstanding the above communication, petitioner's representative appeared at the scheduled hearing on February 6, 1991, but was unable to proceed at the hearing, apparently, in part, due to the ill health of petitioner. On the record, the Administrative Law Judge stated that he would render a default determination against petitioner, unless petitioner submitted within three weeks, by February 27, written verification from petitioner's physician that attending the hearing would be detrimental to petitioner's health.

Apparently, the Administrative Law Judge desired something more specific from petitioner's physician than had already been submitted although we have no way of ascertaining exactly what was requested since it is not described in the record. The only information about this request is contained in the statement on the record of petitioner's representative that "I will endeavor to obtain a letter that is more clearly specific from [petitioner's] physician by February 27 . . ." (Tr., p. 4).

On April 11, 1991, the Administrative Law Judge issued a default determination that stated:

"[n]otice of said hearing was given to petitioner(s) and the representative of petitioner(s). Petitioner(s) did not appear, and a default has been duly noted.

"Now, on motion of the attorney for the Division of Taxation,

"IT IS ORDERED that the petition of Alan Stern, Officer of the Cover Up Clothing Services, Inc., be and the same is hereby denied."

The record before us does not indicate that the Division made a motion to default petitioner.

On April 16, 1991, petitioner's representative requested that the default be vacated because petitioner did not receive notice of the February 6, 1991 hearing.

On June 13, 1991, the Chief Administrative Law Judge issued an order denying petitioner's request to vacate the default order, on the grounds that petitioner had failed to submit any evidence of an excuse for the default and had failed to submit evidence of a meritorious case, as required by 20 NYCRR 3000.10(b)(3).

OPINION

We remand this matter to the Chief Administrative Law Judge for a new order which fully sets forth the facts of this matter and the rationale for his order.

In this case petitioner's representative appeared at the scheduled hearing, but was apparently unable to proceed. The Administrative Law Judge advised petitioner's representative that he would issue a default unless petitioner provided some more specific statement from his physician concerning his inability to attend the hearing. The record does not indicate exactly what the Administrative Law Judge requested, but apparently petitioner provided nothing further. The facts leading up to petitioner's apparently mistaken belief that he was initially granted an adjournment and the events that led to the appearance of petitioner's representative at the hearing, notwithstanding his understanding that the matter had been adjourned, are also unclear.

Neither the determination of the Administrative Law Judge nor the order of the Chief Administrative Law Judge contain any of the specific facts relating to this matter. Without the facts and an explanation of why these facts lead to the conclusion that the default determination of the Administrative Law Judge should be upheld, we have no basis to review the Chief Administrative Law Judge's action in refusing to vacate the default.

For these reasons, we remand this matter to the Chief Administrative Law Judge to reconsider and reissue his order. This order should fully describe the pertinent facts and rationale for its conclusion and must be issued within 30 days from the date of this decision. If the order is not issued within this period, the default is vacated and the matter must be rescheduled for hearing.

Accordingly, is is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Chief Administrative Law Judge for further consideration consistent with this decision.

DATED: Troy, New York
December 27, 1991

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

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

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