

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HARVEY ERDMAN, OFFICER OF : **DECISION**
PECK & HILLS FURNITURE CO., INC. : **DTA No. 808858**
: :
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, 1986 through November 30, 1988. :
:

Petitioner Harvey Erdman, Officer of Peck & Hills Furniture Co., Inc., 18 Crossbrook Road, Livingston, New Jersey 07039, filed an exception to the order of the Administrative Law Judge issued on February 11, 1993. Petitioner appeared by A. Mitchell Greene, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Petitioner did not file a brief in support of his exception, but did file a reply brief after receipt of a copy of the letter brief submitted in lieu of a formal brief by the Division of Taxation. The reply brief was received on April 28, 1993 and 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 October 26, 1990, the Division of Tax Appeals received a petition from Harvey Erdman for revision of a determination or for refund of sales and use taxes. In the petition,

petitioner argued that he "was not a responsible officer who should be assessed personally for the . . . assessments of Peck & Hill Furniture Co., Inc." He maintained he had no authority to bind the corporation and was "only a manager."

On January 3, 1991, the Division of Taxation ("Division") filed an answer to the petition, either denying or alleging a lack of knowledge or information of petitioner's claims. The Division affirmatively stated that petitioner was a signatory on the corporate checking account and, in fact, signed checks, tax returns and a Deferred Payment Agreement with the Division.

On June 10, 1992, a letter was sent to petitioner and his representative, A. Mitchell Greene, Esq., advising them that the Division of Tax Appeals anticipated scheduling a hearing on the petition during the weeks of October 19, 1992 or November 30, 1992. Neither petitioner nor his representative responded to this letter and the letter was not returned by the Postal Service.

On September 14, 1992, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioner and Mr. Greene indicating that a hearing on the petition had been scheduled for Friday, October 23, 1992 at 1:15 P.M.

On September 14, 1992, a letter was sent along with the hearing notice advising petitioner and his representative that the only issue to be addressed at the hearing was a jurisdictional question concerning the timeliness of the petition filed. On September 21, 1992, Carroll R. Jenkins, Senior Attorney, the Division's representative, wrote to Judge Ranalli advising that he was unaware of any jurisdictional issue in this matter. On September 22, 1992, Judge Ranalli replied to Mr. Jenkins, advising that the letter on the jurisdictional issue was sent by mistake and that, in fact, a letter requesting a power of attorney from Mr. Greene should have been sent, as Mr. Greene had yet to file one. Mr. Greene was sent copies of both the September 21 and September 22 letters. No mention was made in the letter from Judge Ranalli of any postponement, cancellation or other change to the hearing date of October 23, 1992.

In his application to vacate the default order, Mr. Greene enclosed a copy of a letter dated

September 29, 1992, addressed to Judge Ranalli, stating, "since the timeliness issue now has been resolved, I respectfully request that the hearing scheduled for October 23, 1992 be adjourned as I am actively engaged on trial in [bankruptcy court]." There is no record of this letter having been received by anyone in the Division of Tax Appeals or by the Division of Taxation's representative, Mr. Jenkins. Accordingly, no reply was made by Judge Ranalli. Neither petitioner nor Mr. Greene had any further communications with the Division of Tax Appeals.

On October 23, 1993 at 2:10 P.M. Administrative Law Judge Timothy J. Alston called the matter for hearing. Neither petitioner nor his representative appeared. Mr. Jenkins appeared for the Division and moved that a default order be issued to petitioner for his failure to appear.

There being no further communications from petitioner or his representative, Judge Alston issued a default order against him on December 3, 1992.

On December 11, 1992, the Division of Tax Appeals received petitioner's application to vacate the default order. In the application petitioner's representative alleges that he "was confused as to whether the hearing scheduled for October 23, 1992 was going to go forward" due to the letters exchanged between Mr. Jenkins and Judge Ranalli on September 21 and 22, 1992, respectively. He also alleges that he requested an adjournment due to his engagement in bankruptcy court.

With respect to the merits of petitioner's case Mr. Greene, in his application, alleges that petitioner had no authority to bind the corporation since he was not an officer, and that all documents signed by petitioner were in his capacity as manager, not as an officer.

In response to petitioner's application, the Division enclosed numerous documents signed by petitioner over the title of "manager" or "general manager." Among the documents are 11 sales tax returns, 4 withholding tax returns and several checks to the Division in payment of various taxes. The Division also included a Deferred Payment Agreement entered into between the Division and petitioner on behalf of Peck & Hills Furniture Co., Inc., on September 3, 1987. Petitioner was also named, along with two officers, as a signatory on the corporate checking

account by corporate resolution dated March 9, 1987.

OPINION

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 was that petitioner showed neither an excuse for the default nor a meritorious case.

On exception, petitioner argues that: "[t]he failure to appear at the October 23, 1992 hearing proffers a reasonable excuse; A meritorious defense exists, and; Petitioner deserves his day in court."

In lieu of a formal brief, the Division filed a letter brief in opposition to petitioner's exception and in support of the Administrative Law Judge's Default Determination as well as the order denying petitioner's Motion to Vacate the Default Determination. The Division argues that petitioner's exception in this matter was not timely filed and should be dismissed and in order to prevail on his Motion to Vacate the Default Determination, petitioner was required to show both a valid excuse for his default and a meritorious case; petitioner did neither.

In his reply brief, petitioner makes the same legal argument he made below. In answer to the Division's timeliness issue, petitioner argues that he complied with section 3000.11 of the Tax Appeals Tribunal's Rules of Practice and Procedure relating to the timely filing of his petition.

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 petitioner did not 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 that the Administrative Law Judge properly rendered a default determination pursuant to 20 NYCRR 3000.10(b)(2) (see, Matter of Thompson, Tax Appeals Tribunal, January 28, 1993; Matter of DeFeo, Tax Appeals Tribunal, October 15, 1992).

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 Franco, Tax Appeals Tribunal, September 14, 1989; Matter of Morano's Jewelers of Fifth Ave., Tax Appeals Tribunal, May 4, 1989).

A review of the record below and the exception filed by petitioner shows a failure by him to present an acceptable excuse for his failure to appear at the October 23, 1992 hearing and a further failure to present any evidence of a meritorious case for consideration by the Chief Administrative Law Judge. Therefore, we affirm the order of the Chief Administrative Law Judge refusing to vacate the default against petitioner.

We must also address the Division's argument that the filing of an application to vacate the default does not automatically extend the time for filing an exception and, further, since petitioner filed his exception well beyond the thirty-day time period, said petition should be dismissed as untimely.

We disagree. In a previous case where the Division advanced the same argument, we stated:

"[t]he Division's argument that the exception was not timely filed is disingenuous at best. A default order was issued by the Administrative Law Judge on May 9, 1991. In accordance with 20 NYCRR 3000.8(d)(3), petitioner applied to the Supervising Administrative Law Judge for an order vacating the default. On July 3, 1991, the Supervising Administrative Law Judge issued an order denying such application. Petitioner timely filed an exception to this second order, which is clearly the correct procedure to follow pursuant to the Rules of Practice and Procedure before the Division of Tax Appeals" (Matter of Capp, Tax Appeals Tribunal, January 2, 1992).

Furthermore, if petitioner were required to file an exception with the Tribunal to a default order issued by an Administrative Law Judge, it would contain basically the same information required to be filed with the supervising Administrative Law Judge under 20 NYCRR 3000.10(b)(3). Additionally, if this were the case, then there would be no need for 20 NYCRR 3000.10(b)(3), which regulation establishes a procedure to vacate a default determination (see, Matter of Morano's Jewelers of Fifth Ave., supra). Therefore, we reject the Division's argument that the petition should be dismissed as untimely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Harvey Erdman, Officer of Peck & Hills Furniture Co., Inc., is denied;
2. The order of the Chief Administrative Law Judge denying the application of petitioner Harvey Erdman, Officer of Peck & Hills Furniture Co., Inc., to vacate the default determination rendered is sustained;
3. The order of the Administrative Law Judge holding petitioner Harvey Erdman, Officer of Peck & Hills Furniture Co., Inc., in default is affirmed;
4. The petition of Harvey Erdman, Officer of Peck & Hills Furniture Co., Inc., is in all respects denied; and

5. The Notice of Determination is sustained.

DATED: Troy, New York
October 28, 1993

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner