STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARCELLA STROHLI	:	DECISION DTA No. 812977
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law for the Period June 15, 1990.	:	

Petitioner Marcella Strohli, P.O. Box 398, Tallman, New York 10982, filed an exception to the order of the Chief Administrative Law Judge issued on December 7, 1995. Petitioner appeared by Stanley L. Simon, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Jenkins took no part in the consideration of this decision.

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 July 11, 1994, the Division of Tax Appeals received a petition from Marcella Strohli for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law. The petition challenges a determination of gains tax in the amount of $75,000.00 plus penalty and interest.

In her petition, petitioner makes the following allegations:

> "Marcella Strohli was holding the property on behalf of a joint venture with Sullivan & York, Inc. (the principals of Sullivan & York, Inc. being Juda Daskal, Schimche Goldberg, and Lazer Rubin). The joint venturers disagreed as to the continuingdevelopment or sale of the property. The parties agreed to divide the parcel. Each party had independent rights from the other with regard to their respective parcels. Each party independently issued separate options from the sale of the respective parcels. The options were not dependent upon each other (i.e., the optionee could have executed one (1) option but not the other). There was no 'plan' with regard to these transactions. Therefore, the sale of each parcel are [sic] separate and distinct transactions [sic], with consideration of less than $1,000,000.00.
>
> "Additionally, the calculations of the state do not take into consideration the cost of purchasing, holding (i.e., insurances and taxes) and/or developing (i.e., surveyors, attorneys and consultants) the properties."

The only attachment to the petition is a copy of the conciliation order (CMS No. 128764), dated April 15, 1994, denying petitioner's request and sustaining the notice. The cover letter accompanying the petition is from a Steven Grosser, Esq., of The Law Offices of Steven Grosser, P.O. Box 172, Nanuet, New York 10954-0172. No power of attorney from Mr. Grosser is in the Division of Tax Appeals file.

On July 21, 1994, petitioner was informed by a letter from Frank McMahon of the Petition, Intake, Review & Exception Unit of the Division of Tax Appeals that the Division of Tax Appeals had received the petition and, as it was deemed to be in proper form, the petition had been forwarded to the Law Bureau for preparation of an answer.

On September 15, 1994, the Division of Taxation ("Division"), by William F. Collins, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), filed an answer to the petition, denying petitioner's claims. In addition, the Division affirmatively stated that: (1) petitioner transferred 3.04 acres to Sullivan & York, Inc. in return for stock in the corporation, and that on the date of the transfer: (a) Sullivan & York entered into an option agreement with Kurdistan Properties, Inc. to sell the aforementioned 3.04 acres for $750,000.00, and (b) petitioner contracted with Kurdistan Properties to sell the contiguous 13.44 acres for $700,000.00; (2) both parcels were conveyed to Kurdistan Properties at the same closing on June 15, 1990 and petitioner was the beneficial

owner of both properties on that date; (3) aggregation of the two parcels was appropriate as they were contiguous, owned by the same beneficial owner, and were transferred to the same purchaser pursuant to a common scheme or plan; (4) despite repeated requests, petitioner has failed to furnish the necessary information on the cost basis in the real property, and as a result, a Statement of Proposed Audit Adjustment was issued to petitioner on October 20, 1992 based on 10 percent of petitioner's reported consideration; (5) a Notice of Determination (Notice No. L-006775424), dated December 4, 1992 was sent to petitioner; (6) a conciliation order (CMS # 128764) was issued on April 15, 1994 sustaining the notice; (7) the determination by the Division was proper; and (8) petitioner bears the burden of proving the determination was erroneous and/or improper. Finally, the Division requested that the petition be denied and the notice be sustained in full.

On November 15, 1994, Janet Snay, the Calendar Clerk for the Division of Tax Appeals sent a Calendar Call notice to petitioner and the Division informing them that the Division of Tax Appeals anticipated scheduling the hearing in this case during the months of March or April 1995 in Troy, New York, and that the parties would need to contact each other to set a mutually convenient date for the hearing during those months. Ms. Snay cautioned in her letter that the parties would need to notify the Division of Tax Appeals of the date and amount of time required for the hearing by returning the completed Calendar Call form no later than January 3, 1995. The letter also informed the parties that if either party opted not to select a date, the other party could request a specific date, and that if neither party responded, the Division of Tax Appeals would select the date.

On December 29, 1994, the Division of Tax Appeals received the completed Calendar Call form from the Division's representative, who requested the hearing date of April 14, 1995 and noted that a half day would be sufficient to hear the matter. At the bottom of Mr. Friedman's form, he made the following notation: "This case [DTA 812977] and DTA 812978 [the Sullivan & York case] involve the same parties. It probably would be more convenient for them to hold

the two hearings consecutively on the same day." The Division's representative did not indicate on the form whether or not the date chosen was mutually agreed upon by the parties, however, in his cover letter accompanying the form, Mr. Friedman wrote that "[i]t is my understanding that the parties have agreed on a mutually convenient date and duration for the hearings." A completed Calendar Call form was never received from petitioner.

On February 8, 1995, the Calendar Clerk for the Division of Tax Appeals received a letter dated February 1, 1995 from petitioner which stated the following:

> "I am in receipt of your correspondence regarding the date of a proposed hearing on the above referenced matter. Please note that I did not agree to the April 14, 1995 date, and would request, for various reasons, that the hearing be held during the month of July 1995. I also did not agree to have the hearing at the same time as the hearing for Sullivan & York, Inc. (I am not the same party as that corporation), and request that the hearings be held on separate dates.
>
> "Please advise me of the date.
>
> "Additionally, I hereby request any and/or all documents which the state has regarding this matter, a list of witnesses which the state will be calling, and all rules, regulations, procedures and laws which relate to this matter and which shall be relied upon by the state. Please have such documentation forwarded to me at least 60 days prior to the scheduled hearing date."

On February 10, 1995, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent petitioner the following letter in response:

> "You were advised in November to contact Herbert Friedman to set a hearing date in March or April, not July. It is obvious you failed to do that.
>
> "You had better contact Mr. Friedman immediately and clear up this confusion, otherwise I will schedule the hearing for April 14, 1995 as Mr. Friedman requested. His number is (518) 457-2070."

There was no further response from petitioner.

On March 6, 1995, Judge Ranalli issued to petitioner a Notice of Hearing, informing her that the hearing in her case was scheduled for Friday, April 14, 1995 at 9:15 A.M. The Notice of Hearing also informed petitioner that she would have the burden of proof under the Tax Law and

would have to establish, by sworn testimony of witnesses or by documentary or other evidence submitted at hearing, the facts necessary to show that there was no deficiency or that a refund was due. In addition, the Notice of Hearing contained, in bold print, the following statement: "An adjournment may be requested but will be granted only for good cause and only if the request is received in writing at least 15 days prior to the hearing date, and only to such time and place as the Division of Tax Appeals finds appropriate."

On April 14, 1995, at 9:50 A.M., Administrative Law Judge Carroll R. Jenkins called the matter for hearing. Neither petitioner nor her representative appeared. At the hearing, the Division's representative, in response to the presiding Administrative Law Judge's inquiry, stated that he believed petitioner was not represented by counsel, for while he had been contacted a couple of months ago by a Stephen Grosser, Esq., who claimed to be petitioner's representative, the Division's representative never received a power of attorney from Mr. Grosser, nor did he ever hear from Mr. Grosser (or petitioner) again. As noted previously, no power of attorney for Mr. Grosser has ever been submitted to the Division of Tax Appeals.

On June 22, 1995, Judge Jenkins issued a default determination against petitioner. A copy of this determination and a letter from Andrew F. Marchese, Chief Administrative Law Judge, was sent to petitioner on that same date. Judge Marchese's letter indicated that:

> "[p]ursuant to the Rules of Practice and Procedure, a default determination may be vacated upon written application to the supervising administrative law judge. The applicant must show an excuse for the default and proof of a meritorious case."

On October 16, 1995, the Calendar Clerk for the Division of Tax Appeals received a letter from petitioner (petitioner's application to vacate the default order), dated September 17, 1995, which contained the following paragraphs:

> "I am in receipt of a notification that a judgment was awarded against me.
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> "The state was advised that I could not appear at the hearing which was scheduled without my acknowledgment or consultation. I was

> unable to appear because of the Jewish holidays and my scheduled vacation out of the state.
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> "I was told that a new date would be set, and I would be advised.
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> "Please remove this judgment against me and schedule a hearing date (not during Jewish holidays) so that I can oppose this claim. Additionally, I do not wish my case to be heard at the same time the Sullivan & York case is being heard (I think this would be unfair to me and cloud my case)."

On October 18, 1995, Judge Ranalli wrote to the Division's representative informing him that by that time he should have received petitioner's application to vacate the default order, and that Mr. Friedman's response would be due by November 16, 1995.

On October 30, 1995, the Division submitted a timely response to petitioner's application to vacate the default order. In this response, the Division states that since petitioner has failed to meet either requirement necessary to vacate a default determination, i.e., petitioner has demonstrated neither an excuse for the default nor a meritorious case, the application to vacate the default determination must be denied.

OPINION

A default determination can be vacated if the petitioner can demonstrate both an excuse for the default and a meritorious case (20 NYCRR 3000.15[b][3]).

In the order issued below, the Chief Administrative Law Judge decided that petitioner's application to vacate the default determination issued against her 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, citing Matter of Erdman (Tax Appeals Tribunal, October 28, 1993) and Matter of Franco (Tax Appeals Tribunal, September 14, 1989) found that petitioner failed to demonstrate an excuse for the default. The Chief Administrative Law Judge found that petitioner failed to meet this first requirement because she did not:

> "(1) respond in a timely fashion to the Calendar Call, (2) offer a valid excuse in her untimely (February 8, 1995) letter requesting a

> new hearing date, (3) communicate with the Division about scheduling a new hearing date, (4) request an adjournment after the hearing notice was issued, and (5) appear at the hearing" (Determination, conclusion of law "C").

The Chief Administrative Law Judge noted that if petitioner had timely requested an adjournment and informed the Division of Tax Appeals of the conflict with the hearing date due to the Jewish holidays and her scheduled vacation, which excuses were mentioned for the first time in her application to vacate the default determination, an adjournment may have been granted.

The Chief Administrative Law Judge next found that petitioner made no attempt to demonstrate a meritorious case in her application to vacate the default determination, the second requirement that must be met in order to vacate such a determination (20 NYCRR 3000.15[b][3]).

On exception, petitioner argues that the transactions in question should not be aggregated because "[t]here is no evidence of a plan to sell the land by taxpayer with Sullivan & York, Inc." and there is no "evidence of controlling ownership or management by taxpayer of Sullivan and York, Inc." (Petitioner's brief in support, p. 3). In addition, petitioner has submitted an affidavit with her reply brief which was not submitted below.

In response, the Division argues that petitioner did not demonstrate a reasonable excuse for the default. The Division states that petitioner made unsupported claims in her application that was submitted after the default and these claims are directly contradicted by the evidence. The Division also argues that petitioner did not demonstrate a meritorious case and did not even address this issue in her application to vacate the default.

20 NYCRR 3000.15 provides, in pertinent part, as follows:

> "(a) Notice. After issue is joined (see, § 3000.4[c] 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.
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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 did not appear at the scheduled hearing for which she 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 3000.15(b)(2) (see, Matter of Kassim, Tax Appeals Tribunal, May 11, 1995; Matter of Weiner, Tax Appeals Tribunal, May 11, 1995; 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 3000.15(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 Kassim, supra; Matter of Weiner, supra; Matter of Morano's Jewelers of Fifth Ave., supra).

A review of the record below and the exception filed by petitioner shows that no reasonable excuse for her failure to appear at the hearing scheduled for April 14, 1995 was made. There was also a failure to present any evidence of a meritorious case for the Chief Administrative Law Judge's consideration. Therefore, we affirm the order of the Chief Administrative Law Judge refusing to vacate the default against petitioner.

On exception, petitioner has submitted an affidavit to this Tribunal in an attempt to demonstrate a meritorious case. As we have held before, we will not consider evidence offered with an exception to an order refusing to vacate a default determination if that evidence was not before the Chief Administrative Law Judge when considering the motion to vacate (see, Matter of DeFeo, Tax Appeals Tribunal, October 15, 1992; Matter of Suarez, Tax Appeals Tribunal, June 25, 1992). Therefore, we refuse to consider the new evidence introduced by petitioner with her exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Marcella Strohli is denied;

2. The order of the Chief Administrative Law Judge denying the application of Marcella Strohli to vacate the default determination rendered is sustained;

3. The determination of the Administrative Law Judge holding Marcella Strohli in default is affirmed; and

4. The petition of Marcella Strohli is denied.

DATED: Troy, New York
December 19, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner