STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HAZRAT HOTAKI	:	DECISION DTA NO. 820405
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, 2001 through August 31, 2003.	:	

Petitioner Hazrat Hotaki, 3328 Oceanside Road, Oceanside, New York 11572, filed an exception to the order of the Chief Administrative Law Judge issued on March 16, 2006. Petitioner appeared by Inayat I. Shaikh, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Jennifer A. Murphy, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether the Chief Administrative Law Judge properly denied petitioner's motion to reopen a default determination entered against him.

FINDINGS OF FACT

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

For the period here at issue, petitioner operated a mobile food vending business ("pushcart") located on the southeast corner of 72nd Street and Amsterdam Avenue in Manhattan. In January of 2004, the Division of Taxation ("Division") commenced an audit of petitioner's business. The Division determined that it was necessary to estimate petitioner's taxable sales due to a lack of records to document his sales. As a result of the field audit, the Division issued a Notice of Determination assessing tax of $7,899.87 plus penalty and interest.

Petitioner filed a petition protesting this assessment on February 22, 2005. In his petition, petitioner argued that the Division's estimate of his taxable sales was incorrect and that he held a full-time job which prevented him from working full-time with his pushcart.

On April 20, 2005, the Division of Taxation filed its answer, in which it asserted that petitioner was required to maintain complete books and records and had failed to do so. The Division also asserted that the sales tax liability was based on petitioner's being a part-time pushcart vendor.

On May 17, 2005, the Division of Tax Appeals mailed to petitioner and to the Division of Taxation a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing. A response from the Division of Taxation selected the date of September 29, 2005 and the location of Troy, New York. The Division's response also indicated that Ms. Murphy had been unable to get in touch with petitioner's representative. Petitioner and his representative did not respond to the Notice to Schedule Hearing. On August 22, 2005, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on September 29, 2005 at the offices of the Division of Tax Appeals in Troy, New York.

On September 9, 2005, petitioner's representative indicated in a telephone conversation with the calendar clerk of the Division of Tax Appeals that he was having knee replacement surgery and, in addition, that he wished to have the instant case heard as a small claims case. However, although petitioner's representative promised to submit his request for small claims treatment in writing, no such written request was ever received by the Division of Tax Appeals. Petitioner's representative never submitted a written request to adjourn the scheduled hearing. The Division of Tax Appeals received a telephone call from Mr. Taj Akbar, petitioner's accountant requesting an adjournment of the September 29, 2005 hearing due to Mr. Shaikh's knee surgery. Mr. Akbar is not authorized to represent petitioner before the Division of Tax Appeals and, therefore, is not authorized to make a request for an adjournment of the scheduled hearing. In addition, regulation section 3000.15(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal requires that any request for adjournment of a hearing be submitted in writing at least 15 days in advance of the scheduled hearing. No such request has ever been received by the Division of Tax Appeals.

On September 29, 2005 at 10:34 A.M., Administrative Law Judge Dennis Galliher called the ***Matter of Hazrat Hotaki***, involving the petition here at issue. Present was Jennifer A. Murphy, Esq., as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. Ms. Murphy moved that petitioner be held in default. On October 24, 2005, Administrative Law Judge Galliher issued a determination finding petitioner in default.

On November 28, 2005, petitioner filed an application to vacate the October 24, 2005 default determination. In his application, petitioner's representative explained that he was

unable to appear at the hearing because he had undergone knee replacement surgery on September 13, 2005 and was in the hospital from September 13, 2005 through September 30, 2005. Petitioner's representative asserted that he had conferred with petitioner and his accountant and had concluded that petitioner had a meritorious case. Petitioner's representative did not explain the basis for his conclusion.

On December 23, 2005, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default determination. The Division pointed out that petitioner chose not to appear at hearing even after the Division of Taxation and the Division of Tax Appeals had explained fully how petitioner should go about obtaining an adjournment or a change of venue to small claims.

Moreover, the Division asserted that petitioner failed to keep adequate records even though he knew he was required to do so. It is the Division's opinion that it is improbable that petitioner will now be able to produce records of sales which would prove the assessment incorrect.

THE ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge found that the record established that petitioner did not appear at the scheduled hearing nor did he obtain an adjournment and that, accordingly, the Administrative Law Judge properly granted the Division of Taxation's motion for a default pursuant to 20 NYCRR 3000.15(b)(2) (***see***, ***Matter of Zavalla***, Tax Appeals Tribunal, August 31, 1995). The Chief Administrative Law Judge then noted that once a default order has been issued, petitioner also was required to establish that he had a meritorious case. The Chief Administrative Law Judge stated that petitioner failed to keep proper records of sales for his

pushcart business and the only argument made by petitioner was his statement that the assessment was excessive. His assertion without more clearly falls short of demonstrating that he had a meritorious case. Therefore, the Chief Administrative Law Judge denied the request to vacate the default determination.

ARGUMENTS ON EXCEPTION

In his exception, petitioner states that his representative had contacted the attorney for the Division of Taxation and explained the medical problems that had befallen his representative. Furthermore, petitioner notes that his representative contacted the Division of Taxation's attorney to request that the location of the hearing be changed from Troy to New York City since petitioner, his representative, his accountant and his witnesses were all based in New York City. Petitioner urges that this establishes that he had reasonable cause for failure to appear at the scheduled hearing in Troy. Petitioner explains that his attorney is a solo practitioner and, as such, did not have access to a computer in order to put his adjournment request in writing. Therefore, given the circumstances, petitioner argues that the written requirement to request an adjournment should have been waived in this case.

With respect to establishing a meritorious case, petitioner argues that he submitted an affidavit from his accountant which averred that the amount of the assessment was incorrect. Petitioner claims that since his accountant is in a position of knowing petitioner's true financial picture, that the assertion set forth in the affidavit clearly met the standard of establishing a meritorious case.

In opposition, the Division of Taxation argues that petitioner's attorney was instructed several times what procedure was required in order to obtain an adjournment and that petitioner

never made an adjournment request in writing at least 15 days prior to the scheduled hearing date pursuant to 20 NYCRR 3000.15. The Division of Taxation states that petitioner's initial objection to the hearing date occurred as early as August 12, 2005 which was weeks before petitioner was hospitalized and allegedly unable to access the resources to write a letter.

Additionally, the Division of Taxation points out that, in any event, petitioner has not demonstrated a meritorious case in this matter. The Division of Taxation states that no source records were presented on audit and petitioner has not presented any evidence that any part of the assessment was incorrect. The Division of Taxation asserts that the affidavit is wholly inadequate to meet petitioner's burden of proof in this case.

OPINION

We affirm the order of the Chief Administrative Law Judge.

The Rules of Practice of the Tax Appeals Tribunal provide that where a party fails to appear at a scheduled hearing, and an adjournment has not been granted, the Administrative Law Judge shall render a default determination against the party failing to appear (***see***, 20 NYCRR 3000.15[b][2]). These Rules also provide 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" (20 NYCRR 3000.15[b][3]; ***see also***, ***Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Ave.***, Tax Appeals Tribunal, May 4, 1989). In this case, the Chief Administrative Law Judge has correctly concluded that petitioner presented neither an acceptable excuse for defaulting in appearance nor a meritorious case. The Rules specifically set forth the procedure for obtaining an adjournment and they state that a written request must be made to the Supervising Administrative Law Judge. Petitioner's attempt

at blaming the Division of Taxation's attorney is misplaced. Another party to the proceeding is not authorized to grant adjournments or a change in venue. Petitioner was specifically instructed on how to proceed and failed to follow the instructions.

Furthermore, mere conclusory statements not supported by the facts will not suffice to prove a meritorious case (***see***, ***Matter of Grabowski***, Tax Appeals Tribunal, September 20, 2001; ***Matter of Morano's Jewelers of Fifth Ave***., ***supra***). We find that the Chief Administrative Law Judge completely addressed the issues presented to him and correctly applied the Tax Law and relevant case law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the order in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hazrat Hotaki is denied;

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

3. The order of the Administrative Law Judge holding Hazrat Hotaki in default is affirmed; and

4. The petition of Hazrat Hotaki is denied.

DATED: Troy, New York
December 14, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner