STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of ALAN STERN, OFFICER OF THE COVER UP CLOTHING SERVICES, INC. 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.	:	ORDER DTA# 808224

A Default Order having been mailed to petitioner on April 11, 1991; and

Petitioner having made a request by written application that the default determination be vacated; and

An Order denying such application having been mailed to petitioner on June 13, 1991; and

Following an exception taken to such Order, the Tax Appeals Tribunal having ordered a remand of the matter to the Chief Administrative Law Judge for further consideration; and

The following facts having been established by the pleadings and other information submitted:

On October 1, 1990, the calendar clerk of the Division of Tax Appeals sent a letter to petitioner, Alan Stern, and his representative, Donald L. Summer, Esq., advising them that the Division of Tax Appeals anticipated scheduling a hearing on the petition during either the week of January 7, 1991 or February 4, 1991. On October 9, 1990 Mr. Summer returned the letter indicating he preferred Wednesday during the week of February 4, 1991.

On December 31, 1990, a Notice of Hearing, signed by Timothy J. Alston, Administrative Law Judge, was sent to petitioner and his representative advising them that a hearing was scheduled for Wednesday, February 6, 1991 at 9:15 A.M. in Buffalo, New York,

On January 31, 1991, Mr. Summer, rather than contacting Judge Alston, telephoned the

receptionist of the Division of Tax Appeals and attempted to obtain an adjournment of the February 6 hearing. He followed the call up with a letter to the receptionist transmitted by fax on February 1, 1991, with a copy by regular mail received by the Division of Tax Appeals on February 20, 1991. In his letter, Mr. Summer assumed that an adjournment had been granted, although he had yet to contact Judge Alston with his request. Attached to the letter was a note from Donald E. Miller, M.D., dated January 21, 1991, stating that petitioner had recently been hospitalized for symptoms which "seemed to be stress related" and that it "would be detrimental to his emotional and physical well being to be exposed to any further undue stress at the present time." The note was addressed to "To Whom it May Concern" rather than to any individual in the Division of Tax Appeals. It failed to indicate whether attendance at a tax hearing would constitute "undue stress" which would be detrimental to petitioner's emotional and physical well being.

The receptionist referred the letter to Judge Alston, who called Mr. Summer on February 1, 1991. Judge Alston did not grant an adjournment at that time but advised Mr. Summer that, if one were granted, the hearing would have to be rescheduled in Troy. Mr. Summer advised Judge Alston that he would check with petitioner to see if he would be willing to appear as scheduled on February 6, 1991. Mr. Summer did not call Judge Alston with petitioner's response. On February 4, 1991, Judge Alston telephoned Mr. Summer's office and left a message to call. Mr. Summer did not return this call.

At the hearing of February 6, 1991, Mr. Summer appeared without petitioner and advised that he was not prepared to proceed. He continued to protest that the receptionist had granted him an adjournment despite his telephone conversation with Judge Alston on February 1, 1991 when he was advised that Judge Alston had not granted an adjournment. Judge Alston advised the parties at the hearing that Mr. Summer would be allowed three weeks, until February 27, 1991, to submit a written verification from petitioner's doctor "to the effect that attending a tax hearing at about this time would be detrimental to his health". Otherwise, Judge Alston advised, a default order would be issued.

Mr. Summer never complied with Judge Alston's directive and, on April 11, 1991, a default determination was rendered.

On April 16, 1991 Mr. Summer wrote to the Chief Administrative Law Judge requesting that the default be vacated. The only reason given in the letter was that "[u]fortunately, we did not receive notice of the February 6, 1991 hearing referred to [in the default determination]." Attached to the letter was a copy of the hearing notice Mr. Summer claims not to have received. No further explanations or excuses were offered.

On April 23, 1991, the Assistant Chief Administrative Law Judge wrote to Mr. Summer and advised him that in order to vacate a default order he must show an excuse for the default and proof of a meritorious case, and further that a "bare allegation that you did not receive the hearing notice does neither." Mr. Summer was given an additional 30 days to provide a more detailed explanation of his excuse and an explanation of his meritorious case. Mr. Summer provided nothing further in the way of showing an excuse and a meritorious case, and on June 13, 1991 the Chief Administrative Law Judge issued an order denying the request to vacate the default order.

Petitioner filed an exception to the denial order and, on December 27, 1991, the Tax Appeals Tribunal issued a decision remanding the matter for an order fully describing "the pertinent facts and rationale" for the denial order; and

It appearing to the Chief Administrative Law Judge from a review of such information as was submitted that neither a reasonable excuse nor a meritorious case has been shown for the following reasons:

(1) Mr. Summer has offered various reasons for his failure to proceed at the hearing on February 6, 1991. First, he maintained that the Division of Tax Appeals receptionist granted him an adjournment. I would characterize Mr. Summer's assertion as less than candid. He has put forth no reason why he thought a receptionist would be authorized to grant adjournments and there is no evidence that she did so in this case, or that she misled Mr. Summer into believing she had granted his request. The hearing notice was signed by Judge Alston and

Mr. Summer should have contacted him with his request. At any rate, even if Mr. Summer was confused, Judge Alston telephoned him immediately and advised him that no adjournment had been granted. Judge Alston also advised Mr. Summer that if an adjournment were granted, the hearing would be held in Troy. Mr Summer indicated to Judge Alston that he would need to check with his client to see if he could attend the scheduled hearing or would prefer to come to Troy. Mr. Summer never followed up on this conversation and appeared at the hearing on February 6, 1991. Clearly, the record indicates that Mr. Summer knew or should have known that the hearing had not been adjourned. Thus, this excuse has no merit.

(2) Second, Mr. Summer maintains that petitioner's health prevented an appearance. With respect to this excuse Judge Alston allowed Mr. Summer three weeks to produce a doctor's verification to show that petitioner's appearance at a tax hearing would be detrimental to his health. Mr. Summer did nothing. Again, at a later date, Assistant Chief Judge Ranalli allowed Mr. Summer 30 days to produce evidence of an excuse. Again, Mr. Summer did nothing. No indication from a doctor that attendance at a hearing would be detrimental to petitioner's health was provided to either Judge Alston or Judge Ranalli. This excuse, therefore, has no merit.

(3) The final excuse offered by Mr. Summer was that given in his letter of April 16, 1991 stating that he did not receive the notice of the February 6, 1991 hearing. This statement is totally inaccurate and unfounded inasmuch as Mr. Summer obviously had to have received the hearing notice in order to call on January 31, 1991 seeking an adjournment. Moreover, a copy of the very notice he claims not to have received was attached to his letter of April 16, 1991. Thus, this excuse has no merit.

(4) 20 NYCRR 3000.10(b)(3) also requires that a meritorious case be shown in order to have a default determination vacated. At no time has petitioner produced any evidence of a meritorious case in spite of having been advised that such was required and even having been granted additional time to produce such evidence. Petitioner has thus failed to meet either requirement of 20 NYCRR 3000.10(b)(3); therefore,

It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued April 11, 1991 is sustained.

DATED: Troy, New York

CHIEF ADMINISTRATIVE LAW JUDGE