

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>THEODORE ELIADES</b>	:	ORDER
		DTA NO. 822912
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 November 27, 2007.	:	

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Petitioner, Theodore Eliades, filed a petition 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 November 27, 2007.

A hearing was scheduled before Presiding Officer Barbara Russo at the offices of the Division of Taxation, Manhattan District Office, 1740 Broadway, New York, New York 10019, on Friday, June 11, 2010 at 9:30 A.M. Petitioner failed to appear and a default determination was duly issued on June 22, 2010. Petitioner has made a written request date June 26, 2010 that the default determination be vacated. The Division of Taxation has filed a response dated July 20, 2010 in opposition to petitioner's application.

Petitioner appeared pro se. The Division of Taxation (the Division) appeared by Daniel Smirlock, Esq. (Justine Clarke Caplan, Esq.).

Upon a review of the entire case file in this matter as well as the arguments presented in favor of and against vacatur of the default determination, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. On November 27, 2007, petitioner, a 76-year old disabled Korean War veteran, purchased a 2004 Ford Taurus automobile at an auction in Albany, New York. Petitioner paid New York State sales tax in the amount of \$360.00. Petitioner transported the automobile to North Carolina, where he registered it on March 5, 2008 and was charged an additional \$142.00 in tax by the State of North Carolina. On March 11, 2008, petitioner filed a claim for refund of the sales tax paid to New York State. Petitioner's claim for refund was denied, and after the denial was sustained by a BCMS conciliation order, petitioner appealed the denial to the Division of Tax Appeals.

2. The calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing dated May 2, 2010 to petitioner advising him that a hearing was scheduled for Friday, June 11, 2010 at 9:30 A.M. in the Division of Taxation's Manhattan District Office at 1740 Broadway, New York, New York 10019. The notice was sent to an address in Bayside, New York, which is the address the petitioner provided on his petition.

3. On June 11, 2010, at 9:30 A.M., Presiding Officer Barbara Russo commenced a hearing in the ***Matter of Theodore Eliades*** involving the petition here at issue. Petitioner did not appear at the hearing and a default was duly noted. On June 22, 2010, Presiding Officer Russo issued a determination finding petitioner in default.

4. On June 28, 2010, petitioner filed an application to vacate the default determination. Petitioner asserted that he had never received the notice of hearing sent on May 2, 2010. On the merits, the petitioner objected to paying sales tax to two states on the purchase of the same automobile.

5. The Division of Taxation by its letter of July 20, 2010 objected to petitioner's application to vacate the default. The Division had assumed that petitioner was a resident of New York State based upon the return address used by petitioner on his refund request and request for conciliation. In addition, the Division assumed that petitioner had taken possession of the automobile in New York State because the bill of sale did not provide for transport of the vehicle.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "[i]n the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer 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." (20 NYCRR 3000.13[d][2].) The rules further 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 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.13[d][3]; (*Matter of Zavalla*; *Matter of Morano's Jewelers of Fifth Avenue*).

C. Petitioner has established a valid excuse for his failure to appear at the hearing.

Petitioner asserted that he did not receive the hearing notice sent by the Division of Tax Appeals to his Bayside, New York, address. This explanation is plausible since it appears that petitioner maintained a residence in North Carolina and may well have been at that residence at the time the notice was mailed. Accordingly, petitioner has met the first criterion to have the default order vacated.

D. Petitioner has also established a meritorious case. Section 1117(a) of the Tax Law provides in part:

Receipts from any sale of a motor vehicle or vessel shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five of this article, despite the taking of physical possession by the purchaser within this state, provided that:

(1) the purchaser, at the time of taking delivery

- (i) is a nonresident of this state,
- (ii) has no permanent place of abode in this state, and
- (iii) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle or vessel will be used in this state;

(2)(i) the vendor of such motor vehicle does not issue to such purchaser with respect to such motor vehicle either a temporary certificate of registration pursuant to subdivision seven of section four hundred twenty of the vehicle and traffic law or a temporary registration pursuant to section four hundred twenty-a of the vehicle and traffic law, or other like certificate or registration; or

(ii) The vendor of such vessel does not assign to such vessel a New York registration number or issue to such purchaser with respect to such vessel a temporary registration pursuant to section twenty-two hundred fifty-five of the vehicle and traffic law, or other like registration or temporary certificate of registration;

(3) the purchaser does not register such motor vehicle or vessel, as the case may be, in this state prior to registering such motor vehicle or vessel in another state or jurisdiction; and

(4) prior to taking delivery such purchaser furnishes to such vendor any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require to ensure proper administration of the tax imposed under subdivision (a) of section eleven hundred five of this article.

E. There is no evidence in the record regarding petitioner's state of residence at the time he took possession of the automobile. The Division has stated that it presumed that petitioner was a resident of New York State because of the return address on his envelope when he filed his claim for refund. Similarly, there is no evidence regarding his place of abode or his employment, trade, business or profession, if any. It does not appear that the vehicle was registered in this state, although even that is not clear. It appears as likely that petitioner does not owe the tax as it is that he owes it. Petitioner should be given the opportunity to prove that he is entitled to the refund that he has claimed.

F. It is ordered that the request to vacate the default order be, and it is hereby, granted and the Default Determination issued June 22, 2010 is vacated. This matter will be rescheduled for hearing as soon as circumstances may permit.

DATED: Troy, New York  
September 23, 2010

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE