

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions :  
of :  
**EMERALD INTERNATIONAL HOLDINGS, LTD.** : DECISION  
for Revision of Determinations or for Refund of Sales and : DTA NOS. 827663  
Use Taxes under Articles 28 and 29 of the Tax Law for : AND 827664  
the Period December 1, 2011 through February 28, 2014. :  

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Petitioner, Emerald International Holdings, Ltd., filed an exception to the order of the Supervising Administrative Law Judge issued on January 25, 2018. Petitioner appeared by Otu Obot, its president. The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on April 3, 2018, the date that petitioner's letter reply brief was received.

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

***ISSUE***

Whether petitioner has presented adequate grounds to vacate a default determination.

***FINDINGS OF FACT***

We find the facts as determined by the Supervising Administrative Law Judge. Those facts appear below.

1. On or about June 1, 2016, petitioner, Emerald International Holdings, Ltd., filed separate petitions with the Division of Tax Appeals protesting notices of determination for sales and use taxes due from the Division of Taxation (Division) issued on February 27, 2015 and May 29, 2015, respectively. The basis for the subject notices was the Division's assertion that, pursuant to a sales tax audit, petitioner failed to maintain or provide adequate books and records for alcohol purchases. As a result, the Division performed an indirect audit, relying on third party purchase records, and determined that petitioner failed to pay the correct amount of tax for the audit period. The Division also asserted penalties under Tax Law § 1145 (a) (1) (i) for unpaid tax and Tax Law § 1145 (a) (1) (vi) for underreporting in excess of 25% of the amount required to be reported.

2. In its petitions, petitioner made numerous assertions assailing the procedures followed by the Division during its audit, the subsequent issuance of the subject notices, and in its conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). In particular, petitioner stated that the conciliation conferee acted in "bad faith" and was "disingenuous," that the second notice of determination was issued by the Division in retaliation for its dispute of the first notice, and that petitioner's actual purchases did not support the audit results.

3. On October 11, 2016, petitioner filed a motion for summary determination in both of its cases. Those motions were denied by Administrative Law Judge Kevin R. Law by an order dated January 26, 2017. The order stated that issues of fact existed that required a hearing.

4. On February 10, 2017, petitioner filed a motion to recuse Administrative Law Judge Law and to vacate his order of January 26, 2017 denying summary determination. Petitioner asserted that the basis for recusal of Administrative Law Judge Law was his demonstration of

bias in his order denying petitioner's motion for summary determination. The motion to recuse was denied by the Supervising Administrative Law Judge by order of March 16, 2017.

5. By letter dated March 21, 2017, Administrative Law Judge Law scheduled a prehearing conference call for petitioner and the Division for April 25, 2017. Administrative Law Judge Law expressly stated in that letter that the parties would select a date and location for the hearing. Petitioner responded by letter dated March 28, 2017, stating that, as the Administrative Law Judge was not recused as he should have been, it would not participate in any prehearing conference calls or hearings over which he presided.

6. On July 10, 2017, the calendar clerk of the Division of Tax Appeals sent two notices of hearing to petitioner and the Division advising them that a hearing in the above matters had been scheduled for Monday, August 14, 2017, at 10:30 A.M., at the offices of the Division of Tax Appeals, Agency Building #1, 2<sup>nd</sup> Floor, Albany, New York.<sup>1</sup>

7. On August 14, 2017, at 11:25 A.M., Administrative Law Judge Law commenced a hearing as scheduled in the *Matter of Emerald International Holdings, Ltd.* The Division appeared by its attorney. Petitioner did not appear at the hearing and a default was duly noted.

8. On September 14, 2017, Administrative Law Judge Law issued a default determination against petitioner, denying the petitions in this matter.

9. On September 21, 2017, petitioner filed an application to vacate the default determination. In the application, petitioner alleged that the "administrative law judge was duly notified in writing, that petitioner, will not attend the hearing scheduled for August 14, 2017." As further excuse for its failure to attend, petitioner asserted that the Administrative Law Judge

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<sup>1</sup> The notices of hearing were reissued to petitioner and the Division on August 1, 2017, in order to correct a typographical error in the caption concerning the period at issue. The date, time, and location of the hearing remained unchanged from the original notices, however.

was disqualified and that “attendance at the August 14, 2017 hearing would have been a waste of everybody’s time . . . .”

10. As to the merits of its case, petitioner, in its application, reiterated the same arguments raised in its petitions. In essence, petitioner asserted that throughout the audit and conciliation process, the Division refused to answer numerous questions regarding its use of third-party vendor information and the results of the audit. Moreover, petitioner asserted that the Division “backdated” the notice of determination. Petitioner did not provide any documentation or other proof concerning these assertions with its application to vacate.

11. In its opposition to petitioner’s application, the Division noted that an adjournment of the hearing was never requested and argued that petitioner made no attempt to provide a reasonable excuse for the default. Moreover, the Division added that petitioner’s unexcused failure to appear at the hearing required the issuance of a default determination. Finally, the Division maintained that petitioner’s substantive opposition consists of unsupported allegations, thereby failing to demonstrate a meritorious case.

***THE ORDER OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE***

The Supervising Administrative Law Judge first noted that, as petitioner failed to appear at the scheduled hearing in this matter, the Administrative Law Judge properly granted the Division’s motion for default. He next noted petitioner’s burden to show both an acceptable reason for not appearing at the hearing and a meritorious case. He found that petitioner’s conscious decision not to appear based upon its president’s dissatisfaction with the denial of his motion to recuse was not an acceptable excuse for his failure to appear at the hearing. He also found that petitioner failed to establish a meritorious case, noting that petitioner’s motion consisted of conclusory statements and lacks any evidence to meet its burden. The Supervising

Administrative Law Judge thus denied petitioner's application to vacate the default determination.

***ARGUMENTS ON EXCEPTION***

Petitioner urges this Tribunal to consider the entire history of this case in determining whether to excuse its failure to appear at the hearing on August 14, 2017. According to petitioner, such history includes a sales tax audit replete with errors and conducted in bad faith; a retaliatory issuance of a notice of determination; a refusal by the Division to respond to petitioner's questions regarding the audit; bad faith treatment of petitioner's request for conciliation conference at BCMS; an incorrect and improper order denying petitioner's motion for summary determination in the Division of Tax Appeals; and an incorrect and improper order denying petitioner's motion to recuse the Administrative Law Judge assigned to this matter.

Petitioner also asserts that, under the circumstances, this matter had been effectively submitted by the parties and that the Supervising Administrative Law Judge could have permitted or deemed this matter to be submitted under the rules of practice and procedure in lieu of a default.

Regarding the audit, petitioner continues to assert that the Division acted in bad faith; refused to respond to requests to explain various aspects of the audit; used an unreasonable audit method; and applied incorrect interest rates.

The Division asserts that the Supervising Administrative Law Judge properly determined that petitioner failed to meet its burden to show a reasonable excuse for the default and a meritorious case.

***OPINION***

We affirm the order of the Supervising Administrative Law Judge.

The Tax Appeals Tribunal Rules of Practice and Procedure provide that “[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 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” (20 NYCRR 3000.15 [b] [2]).

Petitioner did not appear at the scheduled hearing or obtain an adjournment. Accordingly, the Administrative Law Judge properly rendered a default determination against petitioner pursuant to 20 NYCRR 3000.15 (b) (2).

The Rules further provide that, “[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the [defaulting] party shows an excuse for the default and a meritorious case” (20 NYCRR 3000.15 [b] [3]).

Petitioner has not presented a valid excuse for its failure to appear at the hearing. Petitioner’s president was aware of the date, time, and place of the hearing and chose not to appear. Petitioner’s complaints about the history of this case, even if accurate, do not provide such an excuse or in any way justify petitioner’s failure to appear.

While frustrated by the Division’s actions in the conduct of its audit and thereafter, the scheduled hearing was petitioner’s opportunity to contest those actions. By not appearing at the hearing, petitioner passed on that opportunity. Additionally, while frustrated by the denial of its motions for summary determination and recusal, petitioner’s hearing default prevents us from addressing those denials. That is, although a denial of a motion for summary determination may not be appealed to this Tribunal (*see* 20 NYCRR 3000.9 [b] [2]), the movant does have an opportunity to present its case at a hearing and, if it does not prevail, to file an exception to the Tribunal for further review of its case. Additionally, although our rules do not permit an

interlocutory appeal of an order denying a motion to recuse an administrative law judge, such denial may be raised in an exception to a final determination on the merits (*see* 20 NYCRR 3000.8 [a] [4]). A party forfeits the chance to use these procedures, however, if a default determination is rendered. Under such circumstances, it is the order denying the motion to vacate that is the subject of the exception; hence, the only issue for us in the present matter is whether the default determination should be vacated.

We reject petitioner's contention that the Supervising Administrative Law Judge should have deemed the present matter to be submitted and thereby reverse the default. Our rules require that the parties consent in writing in order to submit a matter without a hearing. The parties did not so consent in the present matter.

While petitioner's failure to demonstrate a valid excuse for its default is sufficient to require the denial of its exception, we nonetheless note our agreement with the Supervising Administrative Law Judge's conclusion that petitioner has not shown a meritorious case. For purposes of vacating a default determination, "petitioner must make a prima facie showing of legal merit, and may not rely on conclusory statements unsupported by the facts" (*Matter of Gordon*, Tax Appeals Tribunal, January 29, 2015). We agree with the Supervising Administrative Law Judge's finding that "petitioner's motion to vacate consists of conclusory statements and lacks any evidence whatsoever to support its underlying case or meet its burden on the substantive issues."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Emerald International Holdings, Ltd. is denied; and
2. The order of the Supervising Administrative Law Judge denying petitioner's application to vacate the default determination is affirmed.

DATED: Albany, New York  
October 3, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner