

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
	:	
of	:	
	:	
WSTB CORP.	:	ORDER
	:	DTA NOS. 829598
	:	AND 829834
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period March 1, 2015 through November	:	
30, 2017.	:	

Petitioner, WSTB Corp., filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2015 through November 30, 2017.

A consolidated hearing was scheduled before Administrative Law Judge Nicholas A. Behuniak, in New York, New York, on October 15, 2021, at 10:30 a.m. Notice of hearing was provided to the parties. The Division of Taxation appeared by its representative, Amanda Hiller, Esq. (Mary Humphrey, Esq. of counsel). Petitioner was represented by Buxbaum Sales Tax Consulting LLC (Michael Buxbaum, CPA). At the time of the hearing, both Mr. Buxbaum and Tony Lam, petitioner's president, refused to complete the Division of Tax Appeals' COVID-19 health screening report and, thus, were unable to enter the hearing room. As a result, petitioner did not appear, and a default determination was duly issued on January 13, 2022. Petitioner, appearing by Tony Lam, its president, has made a written application, dated March 7, 2022, that the default determination be vacated. The Division of Taxation, by Amanda Hiller, Esq. (Mary

Humphrey, Esq., of counsel), submitted its written opposition on May 2, 2022.¹ The 90-day period for rendering this order began on May 13, 2022. Upon a review of the entire case file in this matter, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, issues the following order.

ISSUE

Whether the default determination in this matter should be vacated.

FINDINGS OF FACT

1. On September 27, 2019, petitioner, WSTB Corp., filed a petition with the Division of Tax Appeals challenging a notice of determination, notice number L-049240280, dated December 7, 2018, which asserted penalties in the amount of \$106,000.00 for the period March 1, 2015 through November 30, 2017 under article 28 of the Tax Law. The petition was signed by petitioner's then-representative, Michael Buxbaum, CPA. That matter was assigned DTA number 829598.

2. On January 23, 2020, petitioner filed a petition with the Division of Tax Appeals challenging a notice of determination, notice number L-049482545, dated February 13, 2019, which asserted sales and use taxes due in the amount of \$57,839.20, plus penalty and interest, for the period March 1, 2015 through November 30, 2017. The petition was signed by petitioner's then-representative, Mr. Buxbaum. That matter was assigned DTA number 829834. By agreement of the parties, matters numbers 829598 and 829834 were consolidated.

3. In response to the COVID-19 pandemic, parties appearing before the Division of Tax Appeals have been offered the opportunity to proceed by a Cisco Webex "virtual" hearing. In addition, they have been offered in-person hearings subject to certain COVID screening

¹ Petitioner failed to provide the Division of Taxation with a copy of its application. The Division of Taxation was provided a copy on April 13, 2022 and, therefore, its deadline for a response was May 13, 2022.

requirements in an attempt to provide a safe environment for the attendees. Petitioner was offered the opportunity for a virtual hearing but chose to appear in-person instead. Thus, at petitioner's request, an in-person hearing in this matter was scheduled to be conducted on June 21, 2021, in Albany, New York. On May 18, 2021, the Division of Tax Appeals issued the notice of hearing pursuant to 20 NYCRR 3000.15 (a) informing the parties of the location and starting time of the June 21, 2021 hearing. Copies of the New York State Division of Tax Appeals Hearing Attendance Instructions, form TA-737 COVID-19 (hearing attendance instructions), and the New York State Division of Tax Appeals COVID-19 Health Screening Report Hearings, form TA-736 COVID-19 (health screening report) were sent with the hearing notice. The hearing attendance instructions explain that all attendees to in-person hearings will be required to complete the included health screening report before entering the hearing room.

4. In order to protect participants, the Division of Tax Appeals requires each non-employee at an in-person hearing to submit to a COVID-19 screening before being permitted entrance to the hearing room. To complete the health screening report, the non-employee attendee must provide (handwrite) his or her name, the date and the time on the lines listed for the same at the top of the form, and answer (check) either "Yes" or "No" to the following questions:

"1. Are you experiencing any symptoms consistent with COVID-19, including: new or worsening cough, shortness of breath, troubled breathing, muscle pain, headache, or sore throat; chills; new loss of taste or smell; fatigue; congestion or runny nose; nausea or vomiting; or diarrhea?

Yes: ____ No: ____

2. Have you had any known close contact with a person confirmed or suspected to have COVID-19 in the past 10 days?

Yes: ____ No: ____

Yes, but I am fully vaccinated or I have recovered from COVID-19 within the last 3 months and have not developed any symptoms following the close contact: ____

3. Have you tested positive for COVID-19 through a diagnostic test in the past 10 days?

Yes: ____ No: ____”

The following statement appeared at the bottom of the health screening report:

“If the answer to any question is “Yes,” you cannot enter the DTA hearing space and you should immediately return home, remotely notify your employer, and contact a health care provider for medical advice and assistance, as well as to arrange testing for COVID-19.”

5. In May of 2021, petitioner’s president, Mr. Lam, contacted the Division of Tax Appeals to inform it that petitioner had revoked the power of attorney for Mr. Buxbaum and that Mr. Lam would represent petitioner in this matter.

6. During a pre-hearing conference with the administrative law judge on June 9, 2021, the parties requested an adjournment of the June 21, 2021 hearing because, in significant part, petitioner had revoked its power of attorney and was now proceeding through Mr. Lam. That adjournment request was granted.

7. During a pre-hearing conference call on June 19, 2021, Mr. Lam reiterated that Mr. Buxbaum had been removed as petitioner’s representative. Mr. Lam also explained that petitioner wanted an in-person hearing in New York City. Petitioner was again offered the opportunity to proceed by virtual hearing, thereby avoiding any health screening process or other concerns with the COVID protocol; however, petitioner reiterated its strong desire to proceed with an in-person hearing with the understanding of the need to comply with Division of Tax Appeals’ health screening process. Hence, the parties agreed to have an in-person hearing in New York City to be held on October 15, 2021.

8. On August 30, 2021, the Division of Tax Appeals again sent copies of the hearing attendance instructions and the health screening report electronically to both parties.

9. On September 7, 2021, the Division of Tax Appeals sent the notice of hearing informing the parties that a hearing would be held on Friday, October 15, 2021, at 10:30 a.m., at 90 Church Street, New York, New York. Copies of the hearing attendance instructions and health screening report were sent with the notice of hearing.

10. On October 13, 2021, petitioner filed a New York State Division of Tax Appeals Power of Attorney form TA-105 reappointing Mr. Buxbaum as its representative.

11. On October 13, 2021, by electronic correspondence, the administrative law judge confirmed to the parties that Mr. Buxbaum had been reappointed as petitioner's representative. In the same correspondence, the parties were sent an additional copy of the hearing attendance instructions and health screening report.

12. At 10:34 a.m. on October 15, 2021, Administrative Law Judge Nicholas Behuniak called to order the hearing in the Matter of WSTB Corp., DTA numbers 829598 and 829834. The attendees already in the hearing room, including Mary Humphrey, Esq., on behalf of the Division, had signed the sign-in attendance sheet with contact information (outside contact log) and completed health screening reports described in finding of fact 4. Neither petitioner nor petitioner's representative, however, had arrived at the time the hearing was first called to order. At that point, the administrative law judge ordered a recess to allow petitioner additional time to appear. After returning on the record, the administrative law judge noted that Mr. Lam and Mr. Buxbaum had arrived at approximately 10:40 a.m. and signed the outside contact log; however, both refused to complete a health screening report, as they had previously been informed they would be required to do. Therefore, they could not enter the hearing room. During the recess,

the administrative law judge explained to Mr. Lam and Mr. Buxbaum that their refusal to complete the health screening report would prohibit them from entering the hearing room and appearing for petitioner, which could result in a default in this matter. Nevertheless, Mr. Lam and Mr. Buxbaum continued to refuse to complete the screening process. The administrative law judge provided Mr. Lam and Mr. Buxbaum approximately 30 minutes to consider the ramifications of their refusals. After that time, Mr. Lam and Mr. Buxbaum were again approached outside of the hearing room by the administrative law judge and cautioned about the possible ramifications of their refusal to complete the health screening report, including a default of the matter. Nevertheless, both Mr. Lam and Mr. Buxbaum again refused to complete the report. At 11:15 a.m., the administrative law judge went back into the hearing room and noted the above interactions on the hearing record. Neither Messrs. Buxbaum nor Lam were in the hearing room. Consequently, the representative of the Division moved that petitioner be held in default.

13. At no point did petitioner seek an adjournment of the October 15, 2021 hearing or a conversion of the hearing from an in-person hearing to a CISCO Webex virtual hearing, thereby removing the need for completion of the health screening process.

14. On January 13, 2022, Administrative Law Judge Behuniak granted the Division's motion and issued a default determination against petitioner, denying the petition in this matter.

15. Petitioner's application to vacate the default determination, signed by Mr. Lam, was received by the Division of Tax Appeals on March 9, 2022. In the unsworn, two-page letter application, Mr. Lam stated that petitioner has a meritorious case due to the "erroneous estimated workpapers . . . which do not reasonably reflect any [s]ales tax due." He added that the workpapers do not consider all of petitioner's information for the entire audit period. Further,

Mr. Lam did not offer any facts or evidence to support an excuse for the default but, instead, relied upon quoting a portion of the Tax Appeals Tribunal’s decision in *Matter of Morano’s Jewelers of Fifth Ave.* (Tax Appeals Tribunal, May 4, 1989), for the proposition that “adjudication of a case on the merits is preferred to a default, especially where the default has not caused undue delay or prejudice to the opposing party.” Petitioner’s application did not include an affidavit or evidence of any kind in support of its position.

16. Petitioner’s application indicated that a carbon copy was provided to the Division’s representative. It did not, however, attach any proof of service.

17. On March 25, 2022, Mr. Buxbaum informed DTA by letter that he was no longer representing petitioner.

18. In its opposition to the instant application, the Division first states that petitioner failed to provide it with a copy of the application in violation of 20 NYCRR 3000.16 (b).² Further, the Division argues that petitioner failed to allege, much less provide a reasonable excuse for the default. It points out that petitioner could have requested an adjournment and had an option for a virtual hearing, but eschewed both, thereby making the current application disingenuous. The Division adds that petitioner failed to demonstrate a meritorious case.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules), “[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]). The Rules further provide that, “[u]pon

² The provisions for vacating a default determination are found at 20 NYCRR 3000.15 (b) (3).

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]).

B. Tax Law § 2010 and 20 NYCRR 3000.15 (c) authorize the administrative law judge to conduct and regulate the course of hearings before the Division of Tax Appeals. Due to the COVID-19 pandemic, a screening procedure was provided in an attempt to protect the safety of the attendees in the hearing room. This simple procedure was required at all in-person hearings before the Division of Tax Appeals and all parties were clearly informed, in writing, of this requirement prior to the hearing. Petitioner’s principal and its representative, with full prior knowledge of this requirement, selected an in-person hearing but willfully refused to comply with the safety protocol upon arrival, thereby preventing petitioner from appearing at the hearing. Significantly, petitioner did not request an adjournment upon its refusal to comply. Thus, as petitioner did not appear at the scheduled hearing or obtain an adjournment, the administrative law judge correctly rendered a default determination pursuant to 20 NYCRR 3000.15 (b) (2) (*see Matter Emerald International Holdings, Ltd.*, Tax Appeals Tribunal, October 3, 2018; *Matter of Hotaki*, Tax Appeals Tribunal, December 14, 2006).

C. Once the default determination was issued, it was incumbent upon petitioner to show an acceptable excuse for not attending the hearing and that it had a meritorious case (20 NYCRR 3000.15 [b] [3]; *see Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006; *Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995). Petitioner solely offered the unsworn letter of its president in support of its application. That letter, without more, simply does not meet petitioner’s burden.

The record shows that petitioner was properly provided notice of the in-person hearing that it expressly requested. Petitioner was also previously informed, in writing, of the requirements for attending that hearing. Petitioner's application, however, lacks any excuse whatsoever for Messrs. Buxbaum's and Lam's refusal to cooperate with the safety screening process. Indeed, petitioner offers no facts in support of its failure to comply. While it is agreed that adjudication on the merits is preferred to a default, petitioner had numerous opportunities to avoid the instant situation, such as requesting an adjournment or virtual hearing. Instead, petitioner's intentional refusal to cooperate prevented a properly noticed hearing from occurring. Such willfully egregious or deliberate conduct has served as the standard to deny relief from a default (*see S.E.C. v McNulty*, 137 F3d 732 [2d Cir 1998]; *see also Emerald International Holdings, Ltd.*). In sum, petitioner has not demonstrated an acceptable excuse for its default.

D. Furthermore, petitioner has not established a meritorious case. "In order to meet the meritorious case criterion for vacatur, 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). Petitioner's application only consists of an unverified conclusory statement and lacks evidence in support of the substance of its case. As a result, petitioner's application fails on this prong as well.

E. The application of petitioner, WSTB Corp., to vacate the default determination of January 13, 2022, is denied.

DATED: Albany, New York
August 4, 2022

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE