

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JEROME M. CAPP	:	DECISION
	:	DTA No. 806529
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Year 1983	:	

Petitioner Jerome M. Capp, 202-02 43rd Avenue, Bayside, New York 11361 filed an exception to the order of the Administrative Law Judge issued on July 3, 1991 with respect to his petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1983. Petitioner did not appear. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter.

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

ISSUE

Whether adequate grounds were presented by petitioner to vacate a default order.

FINDINGS OF FACT

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

On September 29, 1989, the calendar clerk of the Division of Tax Appeals sent a letter to petitioner, Jerome M. Capp, at 202-02 43rd Avenue, Bayside, New York 11361, advising him that the Division of Tax Appeals anticipated scheduling a hearing on his petition during either the week of February 5, 1990 or March 19, 1990. On October 23, 1989, petitioner returned this letter indicating he preferred that the hearing be scheduled on a Friday and that the week of February 5, 1990 was inconvenient.

On February 12, 1990, a Notice of Hearing, signed by Dennis M. Galliher, Administrative Law Judge, was sent to petitioner, at his Bayside address, advising him that a hearing was scheduled for Friday, March 23, 1990 at 10:30 A.M. in New York City.

On March 23, 1990 at 11:15 A.M., Brian L. Friedman, Administrative Law Judge, called the instant matter for hearing. Petitioner did not appear and had not previously contacted Judge Friedman or any employee of the Division of Tax Appeals with an explanation. Lawrence Newman, Esq., the representative for the Division of Taxation, appeared at the hearing and stated that he also had not had any communications with petitioner. Mr. Newman made a motion for a default order to be issued against petitioner.

On March 28, 1990, Judge Galliher received a letter from petitioner, stating that he did not appear at the hearing on March 23, 1990 because he had oral surgery on March 22, and due to complications the surgery had to be completed on March 23, the date of the hearing. Enclosed with the letter were a statement from petitioner's doctor and copies of his prescription, all dated March 22, 1990.

On June 11, 1990, the Division of Tax Appeals received a second letter from petitioner, which elaborated upon his reason for not appearing at the hearing. Copies of the first letter and its contents were enclosed with the second letter.

On June 26, 1990, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a letter to petitioner explaining that due to the oral surgery a default order would not be issued

and that the hearing would be rescheduled for Monday, September 10, 1990 at 1:15 P.M. in New York City.

On July 30, 1990, Judge Ranalli received a letter from petitioner requesting that his hearing be rescheduled from Monday, September 10, 1990 to either Wednesday, Thursday, or Friday, September 12-14, 1990 because of a personal conflict. Judge Ranalli forwarded this letter to Robert F. Mulligan, Administrative Law Judge, since the hearing calendar had already been prepared and Judge Mulligan had been assigned to the case.

On August 6, 1990, a Final Notice of Hearing, signed by Judge Mulligan, was sent to petitioner, at his Bayside address, advising him that a hearing was scheduled for Monday, September 10, 1990 at 1:15 P.M. in New York City.

On August 8, 1990, Judge Mulligan sent a letter to petitioner stating that he could not assign a new hearing date at that time, but that petitioner should keep himself available for a hearing on September 12-14, 1990. A new date for hearing of September 13, 1990 came available and the case was rescheduled.

On September 13, 1990 at 3:20 P.M., Frank W. Barrie, Administrative Law Judge, called the instant matter for hearing. Petitioner did not appear and had not previously contacted the Division of Tax Appeals. Mr. Newman appeared and made a motion for a default order to be issued against petitioner.

On November 23, 1990, the default determination was issued to petitioner.

On December 24, 1990, the Division of Tax Appeals received a request from petitioner to vacate the default order.

On January 25, 1991, the request to vacate the default order was granted and the matter was rescheduled for a hearing on Tuesday, March 19, 1991 at 1:15 P.M. The Order stated that petitioner had not been properly notified about the hearing rescheduled for September 13, 1990.

On February 11, 1991, a Final Notice of Hearing, signed by Arthur S. Bray, Administrative Law Judge, was sent to petitioner at his Bayside address, advising him that a hearing was scheduled for Tuesday, March 19, 1991 at 1:15 P.M. in New York City.

On March 19, 1991 at 2:15 P.M., Judge Mulligan called the instant matter for hearing. Petitioner did not appear and had not previously contacted Judge Mulligan or any employee of the Division of Tax Appeals with an explanation. Mr. Newman again appeared and made a motion for a default order to be issued against petitioner.

On May 9, 1991, the default determination was issued to petitioner.

On June 10, 1991, the Division of Tax Appeals received a request from petitioner to vacate the default order. In his request, petitioner maintained that "it was inappropriate to schedule another hearing for a later date" (referring to the March 19, 1991 hearing), when petitioner's absence at the September 13, 1990 hearing was not due to his fault.

OPINION

In the order issued below, the Administrative Law Judge decided that petitioner's application to vacate the default determination issued against him should be denied. The basis was that petitioner did not show an excuse for the default or a meritorious case.

On exception, petitioner disagrees with certain findings relating to the September 13, 1990 hearing date and questions whether the subsequent hearing date of March 19, 1991 had a valid basis. Petitioner requests that the Tribunal establish: 1) whether a bona fide hearing was set for September 13, 1990 and whether he was improperly notified or not notified at all; 2) the time and manner in which the Division of Taxation (hereinafter the "Division") was notified of such hearing, if, indeed it was; 3) whether the manner implies prejudicial and/or iniquitous behavior in the relationship and communications between the Division of Tax Appeals and the Division and, if so, whether this should have precluded the setting of any subsequent hearing; and 4) if such hearing lacked a bona fide basis whether petitioner's excuse for not attending should be deemed inherently valid.

In response, the Division, while not submitting a formal memorandum of law, adopted the language and substance of the decision of the Administrative Law Judge in support of its own pleadings and requested that petitioner's exception be denied and the determination of the Administrative Law Judge be affirmed. The Division further argues that the exception itself was untimely filed and, therefore, apparently this Tribunal lacks jurisdiction to consider the exception.

We affirm the denial by the Administrative Law Judge of petitioner's application to vacate the default determination issued by the Administrative Law Judge.

20 NYCRR 3000.10 provides, in pertinent part, as follows:

"(a) Notice. After issue is joined (see, § 3000.4[b] of this Part), the administrative law judge unit shall schedule the controversy for a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.

"(b) Adjournment, default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the administrative law judge shall render a default determination against the dilatory party.

"(2) In 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." (Emphasis added.)

The record before us clearly indicates that petitioner did not appear at the scheduled hearing for which he had received notice. In addition, petitioner failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and that the Administrative Law Judge properly rendered a default determination pursuant to 20 NYCRR 3000.10(b)(2) (see, Matter of Klempner, Tax Appeals Tribunal, March 14, 1991; Matter of Morano's Jewelers, Tax Appeals Tribunal, May 4, 1989).

The issue before us now is whether such default determination should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.10(b)(3) provides 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 (see, Matter of Franco, Tax Appeals Tribunal, September 14, 1989; Matter of Kow, Tax Appeals Tribunal, December 15, 1988).

A review of the record below and the exception filed by petitioner shows a failure by him to present any excuse for his failure to appear and any evidence of a meritorious case for consideration by the Tribunal. Petitioner, in filing his Notice of Exception, attempts to cloud the issue before us by using the September 13, 1990 hearing as a basis for excusing his non-attendance at the March 19, 1991 scheduled hearing. On January 25, 1991, petitioner was notified that his request to vacate the default order relating to the September 13, 1990 hearing was granted and in the same order, Order DTA #806529, petitioner was notified that the matter was scheduled for hearing on Tuesday, March 19, 1991 at 1:15 P.M. (emphasis added). Petitioner has offered no excuse for his failure to appear at said hearing and, further, has failed to substantiate a meritorious case.

The Division's argument that the exception was not timely filed is disingenuous at best. A default order was issued by the Administrative Law Judge on May 9, 1991. In accordance with 20 NYCRR 3000.8(d)(3), petitioner applied to the Supervising Administrative Law Judge for an order vacating the default. On July 3, 1991, the Supervising Administrative Law Judge issued an order denying such application. Petitioner timely filed an exception to this second order, which is clearly the correct procedure to follow pursuant to the Rules of Practice and Procedure before the Division of Tax Appeals.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Jerome M. Capp is denied;

2. The order of the Administrative Law Judge denying the application of petitioner Jerome M. Capp to vacate the default determination rendered is sustained;

3. The order of the Administrative Law Judge holding petitioner Jerome M. Capp in default is affirmed;

4. The petition of Jerome M. Capp is, in all respects, denied; and

5. The Notice of Deficiency is sustained.

DATED: Troy, New York
January 2, 1992

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner