

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EDWARD GREENAN	:	DECISION
	:	DTA No. 815312
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1978.	:	

Petitioner Edward Greenan, 141 Kneeland Avenue, Yonkers, New York 10705-2711, filed an exception to the order of the Chief Administrative Law Judge issued on January 16, 1997. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner has shown an excuse for his default and a meritorious case thereby justifying a vacatur of the Default Order issued against him by the former New York State Tax Commission.

FINDINGS OF FACT

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

Sometime prior to May 1981, petitioner, Edward Greenan, filed a petition with the former State Tax Commission (hereinafter "State Tax Commission") for a hearing for redetermination of a deficiency or for refund of personal income tax for the year 1978. Pursuant to the rules of practice then in effect the former Tax Appeals Bureau determined that a conference should be held to attempt to resolve the case. On May 1, 1981, Conferee Robert Healey sent a conference

notice to petitioner advising him that a prehearing conference on his case would be held on June 21, 1981. The conferee later discovered that the notice contained an incorrect date inasmuch as June 21, 1981 was a Sunday. Accordingly, Mr. Healey sent another notice to petitioner, dated July 28, 1981, advising that the conference would be held on Tuesday, August 18, 1981. This notice was sent to petitioner at 2837 Valentine Avenue, Bronx, New York 10452.

On the morning of the scheduled conference, petitioner telephoned Mr. Healey seeking a postponement of the conference. Mr. Healey advised petitioner that he would grant his request conditioned upon petitioner's immediately submitting a written request for a postponement. As of November 23, 1981, petitioner had not filed the written request and had taken no further action with respect to his case. Accordingly, Mr. Healey sent a memorandum to the State Tax Commission recommending that a Default Order be issued denying the petition.

There being no further communication from petitioner, the State Tax Commission issued a Default Order on March 5, 1982. The order was mailed by certified mail to petitioner at the 2837 Valentine Avenue, Bronx, New York address. The mailing was not returned by the Postal Service.

On November 22, 1985, Thomas Mahoney of the Division of Taxation's Accounts Receivable Verification Unit sent petitioner and his wife a letter advising that \$5,305.26 was then due on their 1978 liability. This letter was addressed to petitioner at 141 Kneeland Avenue, Yonkers, New York 10705, petitioner's current address. There is no indication in the file that petitioner ever responded to this letter. The next correspondence on petitioner's liability was apparently sent by him sometime in 1992. In response to this correspondence, the Division of Taxation ("Division") sent petitioner a Notice of Assessment Resolution which stated in part that petitioner was "considered a full year resident of New York State for 1978. New York residents are taxable on all income from all sources." Eventually petitioner paid the tax due, and on October 18, 1994 he filed a claim for refund in the amount of \$4,179.82, plus interest. On February 8, 1995, the Division denied petitioner's claim for refund based on his

failure to appear at the conference and the issuance by the State Tax Commission of the Default Order.

Eventually petitioner filed a petition with the Division of Tax Appeals in September 1996. At that time, the Division of Tax Appeals advised petitioner that since he had previously filed a petition on this same liability with the State Tax Commission, his only avenue for proceeding was to file an application to vacate the default. He was also advised that in order for the default to be vacated he would have to demonstrate an excuse for his failure to appear and show that he had a meritorious case.

Both petitioner and the Division filed numerous documents detailing the communications between the two of them during the years after the default. These documents, along with State Tax Commission documents now in the custody of the Division of Tax Appeals, were used to compile the chronology of events contained in the findings of fact above.

Petitioner claims that he was a resident of the State of Alaska during the year 1978. In support of this claim he filed an Alaska Department of Labor certification for the year 1976 indicating that he met the requirements for certification as an Alaskan resident. Petitioner also submitted a letter from the Alaska Division of Elections indicating that petitioner was originally registered to vote in Alaska in July 1975 and was removed from the active voter list in June 1980. He re-registered in March 1983 and was removed again in May 1986. He has not re-registered.

The Division submitted a copy of the New York State Income Tax Resident Return filed by petitioner and his wife for 1978. The return was filed in April 1979 and the home address indicated 2837 Valentine Avenue, Bronx, New York. Petitioner claimed on the return that all of his income as well as interest income was "earned while resident of Alaska" The only income he attributed to New York State was his wife's income. Attached to the return were several wage and tax statements all of which indicate that his address was Bronx, New York.

Petitioner offered no excuse for his failure to appear at the conference in 1981. Nor did he explain why he failed to submit a written request for a postponement of the conference as the

conferee had requested. There was also no explanation for his failure to respond to the Default Order issued by the State Tax Commission in 1982.

ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge recited the regulation of the Division of Tax Appeals at 20 NYCRR 3000.15(b)(3) which states that a default determination may be vacated where the party shows an excuse for the default and a meritorious case. The Chief Administrative Law Judge found that petitioner did not meet either of the criteria. In the first instance, he found that no excuse was given for petitioner's failure to appear at the conference in 1981 and then failing to submit a written request for a postponement after requesting one by telephone, as directed by the conferee. Further, the Chief Administrative Law Judge found that petitioner did not offer an excuse for his failure to appear at any time in these proceedings and, also without reason, waited 10 years after receiving the Default Order from the State Tax Commission before attempting to respond to it. In addition, the Chief Administrative Law Judge found that petitioner failed to show that he had a meritorious case. From the record before him, the Chief Administrative Law Judge determined that the issue was one of domicile, never raised by petitioner. The Chief Administrative Law Judge held that this flaw may not have been fatal, but petitioner's failure to establish an excuse for his failure to appear rendered the establishment of a meritorious case academic.

ARGUMENTS ON EXCEPTION

Petitioner contends that he never received the letter of Mr. Healey, the conferee, scheduling the conference for August 18, 1981 nor that he made the telephone call to Mr. Healey requesting an adjournment. Petitioner denies receiving the Default Order of the State Tax Commission, sent by certified mail on March 5, 1982. Petitioner argues that he was a resident of Alaska at the time and the address used by the Division and the State Tax Commission was not his. Petitioner alleges that he informed the Division of his change of address by registered mail sometime after he went to Alaska in 1975.

Petitioner maintains that he became an Alaska resident in June 1975 and that his tax preparer for the tax year 1978 must have lost his Alaska address and entered his Valentine Avenue, Bronx address by mistake. Petitioner stated that his spouse became an Alaska resident in 1976. Further, petitioner avers that he has raised the issue of domicile by claiming moving expenses on his 1975 return and contends that company records support his move as well.

Petitioner asserts that he never had a New York residence; rather, he and his spouse stayed with friends. Petitioner believes that since all his earnings in 1976 and 1977 were in Alaska, he established an intent to remain there. Any acts after 1978, the year in issue, petitioner believes to be irrelevant.

The Division contends that petitioner has established neither an excuse for his default nor a meritorious case, for substantially the same reasons set forth in the order of the Chief Administrative Law Judge.

OPINION

We affirm the order of the Chief Administrative Law Judge. Firstly, and fatal to petitioner's case, he has not established a valid reason for his default. Although petitioner contends that he was in Alaska and did not know of the conference on August 18, 1980, this belies the facts in the record. A Statement of Audit Adjustment was issued on or about March 31, 1980 and petitioner responded by letter to the Tax Compliance Division on July 23, 1980 indicating his disagreement with the notice. The envelope containing the letter from petitioner bears a postmark dated June 23, 1980 and indicated a return address of Valentine Avenue in the Bronx, New York. This is the same address indicated on petitioner's 1978 New York State Resident Income Tax Return, filed on or about April 16, 1979. The wage statements attached to the return indicate the same Bronx address for petitioner¹ for the year 1978 and the lone wage statement for his wife indicated she worked in New York State during 1978, despite petitioner's

¹Of particular note, and weighing heavily against petitioner, is the wage statement for petitioner for work in Alaska in 1978 for the H. C. Price Co. which was also directed to the Valentine Avenue, Bronx address and the 1978 statement from the Construction Workers Welfare Fund which also listed the Bronx address for petitioner.

claim that they had changed their domicile to Alaska in 1975 (for him) and 1976 (for his spouse).

The Notice of Deficiency, dated July 9, 1980, was sent to the Valentine Avenue, Bronx address and was received by petitioner. Tax Law § 681(a) requires that a Notice of Deficiency be mailed to the taxpayer's last known address, defined by Tax Law § 691(b) as the address listed on the last return filed by him, unless the taxpayer notifies the Division of a change of address. There is no evidence in the record that petitioner so notified the State Tax Commission despite his claims to the contrary, and his repeated use of the Valentine Avenue, Bronx address indicated he never informed the Division otherwise. Since petitioner requested a conference, it is a given that he petitioned the original Notice of Deficiency. It is incomprehensible that petitioner began a proceeding to challenge an assessment using one address and then failed to notify the State Tax Commission that he had changed his address, but such is the case herein.

Further, the notes of Conferee Healey indicate that a telephone call was received from petitioner on the day of the conference, and that petitioner was directed to put his request for an adjournment in writing. Petitioner failed to comply. On November 24, 1981, the conferee documented the entire case in a Memorandum to the State Tax Commission, indicating the telephone call from petitioner and the subsequent default. The State Tax Commission issued the Default Order on March 5, 1982, by certified mail, directed to the same Bronx address.

The narrow issue before us is whether the Default Order issued by the State Tax Commission should be vacated. In order for a Default Order to be vacated, 20 NYCRR 3000.15(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 Capp*, Tax Appeals Tribunal, January 2, 1992). As stated above, the record herein shows a failure to present an acceptable excuse for not appearing at the scheduled conference in August of 1981 and, therefore, petitioner's application to vacate the Default Order must be denied (*Matter of Weiner*, Tax Appeals Tribunal, May 11, 1995). Every indication from the evidence reinforces the Division's and the State Tax Commission's

decisions to use the Valentine Avenue, Bronx address. With respect to the second mandatory requirement of the regulation, that there be a meritorious case, we agree with the Chief Administrative Law Judge that even though petitioner has submitted documentary evidence in support of his claim that he changed his domicile, the evidence is not conclusive. Although this may not have been fatal to his application to vacate the Default Order, his failure to meet the first requirement of the regulation was.

With respect to the materials submitted on appeal from the order of the Chief Administrative Law Judge, we must remind petitioner that it has long been our practice not to accept any new evidence on appeal (*see, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991 [wherein we stated that to maintain a fair and efficient hearing system, it is imperative that the hearing process be both defined and final and that accepting evidence after the hearing record is closed contravenes this aim]). Therefore, the documents attached to the brief on appeal, to the extent they were not submitted to the Chief Administrative Law Judge below, were not considered by us in rendering this decision (*see, Matter of Friendly Motors*, Tax Appeals Tribunal, March 20, 1997).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edward Greenan is denied;
2. The order of the Chief Administrative Law Judge denying the application of Edward Greenan to vacate the Default Order of the State Tax Commission is sustained;

3. The petition of Edward Greenan is, in all respects, denied; and
4. The denial of the claim for refund of personal income taxes for the year 1978, dated February 8, 1995, is sustained.

DATED: Troy, New York
November 6, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner