STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROYDELL CAMPBELL	:	DECISION DTA NO. 815695
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 Years 1984, 1986 and 1988.	:	

Petitioner Roydell Campbell, P.O. Box 35, Co-op City Station, Bronx, New York 10475, filed an exception to the order of the Administrative Law Judge issued on December 31, 1998. Petitioner appeared *pro se.* The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. A default order for failure to appear at the scheduled hearing was mailed to petitioner on June 18, 1998, and petitioner made a request by written application to the Division of Tax Appeals that the default determination be vacated. This matter comes before us from a denial of that application.

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 except for findings of fact "1," "6," "12" and "13" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> On March 3, 1997, the Division of Tax Appeals received a petition from Roydell Campbell. Petitioner is employed as an engineer with the City of New York. In the petition, petitioner argued that his employer underwithheld the proper amount of income tax from his wages during the period in issue. He contended that he relied on his employer to withhold the proper amount of tax, and he had no way of knowing that the correct amount was not being withheld.[1]

On November 13, 1997, the Division of Taxation ("Division") filed an answer to the petition, denying petitioner's claims and stating that notices of deficiency were issued to petitioner for each of the years 1984, 1986 and 1988 based on petitioner's failure to file a New York State and City income tax return for each of those years. The answer also stated that adjustments were made by the Division to each of the deficiencies in issue to account for taxes withheld by petitioner's employer. The Division also argued that it is the individual taxpayer's duty to file timely returns and pay the tax due thereon, and this duty is independent of the employer's duty to withhold the proper amount of tax.

On January 15, 1998, the calendar clerk of the Division of Tax Appeals sent a notice to schedule hearing to petitioner and the Division's attorney, Andrew S. Haber, Esq., directing them

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[1]We modified finding of fact "1" of the Administrative Law Judge's determination by adding the second sentence in order to clarify the nature of petitioner's employment.

to set a mutually convenient date for a hearing during the months of May or June 1998. The calendar clerk was to be advised of the date by February 24, 1998.

The Division responded on February 20, 1998 with a request that the hearing be held on May 19, 1998 in Troy, New York. In a letter accompanying the request, the Division's attorney, Mr. Haber, advised that there had been no agreement with petitioner on a hearing date because he had been unable to reach petitioner by telephone. Petitioner was copied on the letter and request for a May 19, 1998 hearing date. Petitioner did not respond in any way to the notice to schedule a hearing, and the hearing date was set as requested by the Division.

On April 13, 1998, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioner informing him that a hearing on his petition had been scheduled for Tuesday, May 19, 1998 at 9:15 A.M. in Troy, New York.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> Petitioner's wife died on January 22, 1998. On April 26, 1998, petitioner sent two letters to the Division of Tax Appeals. One letter was addressed to the calendar clerk and requested a prehearing conference in the fall of 1998. Petitioner maintained that he had not responded previously due to the death of his wife in January and to his preoccupation with an action in New York State Supreme Court. He also claimed that the Division's attorney had never contacted him. The second letter was addressed to Assistant Chief Administrative Law Judge Ranalli. In that letter, petitioner requested an adjournment of the hearing set for May 19, 1998. In addition to repeating the information about the death of his wife and his Supreme Court action, petitioner stated that he needed an

> adjournment so that he could have additional time to do legal research on his case.[2]

On April 30, 1998, Judge Ranalli responded to both letters, denying petitioner's request for a prehearing conference and his request for an adjournment. In his letter, Judge Ranalli pointed out that it was too late for a prehearing conference as such a conference should have been scheduled back in February and held no later than 30 days prior to the scheduled hearing. Judge Ranalli also pointed out that, although Mr. Haber did not contact petitioner to set a hearing date, it was equally petitioner's responsibility to attempt to contact Mr. Haber or at least to contact the Division of Tax Appeals to express his preference for a specific hearing date and location. Judge Ranalli also explained that petitioner had previously appeared at a conference where he had presented his case and there did not appear to be the need to delay the hearing any longer for petitioner to do more legal research. Judge Ranalli made clear to petitioner that he would be given the opportunity to file two posthearing briefs so there would be ample time to do any additional legal research petitioner found necessary.

On the night before the hearing the Division of Tax Appeals received a fax from petitioner again requesting an adjournment of the hearing for essentially the same reasons as in his previous letters. He also contended that his physical condition made it difficult to attend the hearing. Because of the late hour and date, there was no time to contact petitioner prior to the hearing the next morning.

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[2]We modified finding of fact "6" of the Administrative Law Judge's determination by adding the first sentence to indicate the date on which petitioner's wife had died.

On May 19, 1998, at 9:15 A.M., Administrative Law Judge Catherine M. Bennett called the matter for hearing. Petitioner did not appear. Mr. Haber appeared for the Division and moved that a default order be issued to petitioner for his failure to appear.

On June 3, 1998, petitioner sent a request for a new hearing date, again setting forth his reasons for his inability to attend the original hearing scheduled for May 19, 1998. On June 5, 1998, Judge Ranalli responded by advising that, as a result of his failure to appear at the hearing on May 19, 1998, the Division made a motion for default and that a default order would be issued shortly. Petitioner was advised that at that time he could file a formal application to vacate the default order.

On June 18, 1998, Judge Bennett issued a default determination against petitioner.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> On July 17, 1998, petitioner filed an application to vacate the default determination, with additional papers filed on September 7, 1998. Petitioner also filed a motion for default judgment against the Division on July 17, 1998. The Division filed a response to the application on September 9, 1998, and petitioner filed a final response on October 29, 1998.
>
> In addition, petitioner filed a "Motion for Summary Judgement" dated November 10, 1998.[3]

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> Petitioner's application to vacate the default contained a large number of documents in support of his claim. In the

[3]We modified finding of fact "12" of the Administrative Law Judge's determination to correct the year that petitioner filed his Motion for Summary Judgment.

application petitioner again raised the argument that, because of the death of his wife and litigation in which he was engaged, he was unable to respond to the notice to schedule a hearing. He also argued that because of his physical disabilities it would be difficult for him to attend a hearing. However, at the same time, he argued that the default should be vacated because he cannot afford to pay the deficiency and is forced to work as a result. He offered no other reasons for failing to attend the hearing on the scheduled date. Several doctors' notes going back to 1975 were included. None of these notes addressed petitioner's physical ability to attend the hearing on May 19, 1998.

As for his demonstrating a meritorious case, petitioner argues that the City of New York, or more specifically, the borough president of Manhattan, conspired against him in retaliation for court actions petitioner brought against the City of New York. Part of this retaliation manifested itself, according to petitioner, in the City's intentional failure to withhold the proper amount of State and City incomes taxes from his salary during the years in issue. Petitioner did not file returns during the years in issue because he thought the City was withholding the proper amount of income tax to cover his full liability. Apparently the City did not withhold the full amount necessary to cover petitioner's liability because the Division issued the instant notices of deficiency. The City did, in fact, withhold amounts of tax for Federal, State and City purposes because at conference the conferee gave petitioner credit for amounts withheld by his employer, resulting in a reduction in the assessments. Moreover, as part of his proof, petitioner submitted numerous wage and tax statements indicating that his employer withheld substantial sums for State and City taxes, in certain years in amounts exceeding $2,000.00.[4]

The Division responded to the application in a memorandum dated September 9, 1998 stating that petitioner had not offered an excuse for his failure to appear at the hearing because the fact that a hearing is held in Troy and not New York City is not an excuse for failure to

[4]We modified the first paragraph of finding of fact "13" of the Administrative Law Judge's determination to clarify the record.

appear. Moreover, the Division argues that petitioner has not offered sufficient proof that his illness or disability was serious enough that he could not attend the hearing.

The Division also argues that petitioner has not shown a meritorious case. The Division maintains that the primary liability for filing returns and paying the tax is on the taxpayer. The taxpayer is entitled to claim a credit on his return for tax withheld by his employer, but the employee is liable for any tax due that the employer failed to withhold.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The rules of the Tax Appeals Tribunal provide:

> 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 (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 party shows an excuse for the default and a meritorious case" (20 NYCRR 3000.15[b][3]).

The Administrative Law Judge noted that petitioner twice requested an adjournment and twice his request was rejected. The Administrative Law Judge found that petitioner was fully aware of the hearing, made a conscious decision not to appear, and the Division's motion for default was granted pursuant to 20 NYCRR 3000.15(b)(2) (***see, Matter of Zavalla***, Tax Appeals Tribunal, August 31, 1995; ***Matter of Morano's Jewelers of Fifth Ave.***, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner, upon any motion to vacate, to show a valid excuse for not attending the hearing and to show that he has a

meritorious case (20 NYCRR 3000.15[b][3]; ***see also, Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Ave.***, ***supra***).

The Administrative Law Judge found that petitioner did not establish a valid excuse for his failure to appear at the hearing. The first reason given for the default was that petitioner could not make the trip to Troy. The Administrative Law Judge noted that the Tax Law and regulations do not give petitioners a right to have a hearing at the location of their choice. The Administrative Law Judge pointed out that petitioner was given the opportunity to have a hearing scheduled in New York City but he did not respond to the notice. Petitioner alleges that he did not respond to this notice due to the death of his wife and ongoing litigation in which he was engaged. The Administrative Law Judge noted, however, that four months elapsed between the time the notice to schedule the hearing was issued (to which there was no response) and the date of the hearing. During this four month period petitioner took the time to engage in litigation with the City of New York and the Administrative Law Judge found that he could have taken a minimal amount of time to notify the Division of Tax Appeals that he wished to have a hearing in New York City on a date convenient to him. Petitioner has complained that Mr. Haber failed to contact him to set a date for a hearing, but the record shows that Mr. Haber's attempts to contact petitioner were unsuccessful. Regardless, the Administrative Law Judge found that it was as much petitioner's responsibility to contact the Division of Tax Appeals with a hearing date and location as it was Mr. Haber's. The record shows that Mr. Haber notified the Division of Tax Appeals by letter dated February 20, 1998, with a copy to petitioner, requesting that the hearing be set for May 19, 1998 in Troy. The Administrative Law Judge found that this letter should have put petitioner on notice that he should respond in some way if the date and location

were not convenient to him. Instead, he waited until two weeks before the hearing to send his first communication to the Division of Tax Appeals.

Petitioner argued that he was physically incapable of attending the hearing and that his doctor had told him he could not even ride on the subway. The Administrative Law Judge viewed this allegation as contradicted by the fact that petitioner is currently employed and presumably must report to work every day. Moreover, the Administrative Law Judge noted, petitioner never contacted either the Division of Tax Appeals or the Division of Taxation to attempt to discuss alternate methods of handling his case, such as by submission of documents without a hearing. Instead, petitioner simply did not appear for the hearing. The Administrative Law Judge found that petitioner's excuses for failing to appear were insufficient and concluded that petitioner has failed to meet the first criterion to have the default order vacated.

The Administrative Law Judge also concluded that petitioner failed to establish a meritorious case. Petitioner's sole argument was that the Manhattan borough president, in conspiring against him, intentionally failed to withhold a sufficient amount of income tax to cover petitioner's liability during the years in issue. As a result, the Administrative Law Judge stated, petitioner did not file returns for these years, and the Division assessed him for the taxes due. Petitioner argues that it is his employer who is liable for the tax and not him.

The Administrative Law Judge found that petitioner failed to show that there was any conspiracy and, even if there was, there was no evidence that his employer engaged in a deliberate attempt to withhold insufficient tax from petitioner's wages.

The Administrative Law Judge stated that, notwithstanding petitioner's factual allegations, his case had no legal merit. Failure of an employer to meet its obligation to withhold income tax

does not in any way lessen the obligation of an employee to pay income tax (***Church v. Commissioner***, 810 F2d 19, 87-1 USTC ¶ 9145; ***United States v. Kuntz***, 259 F2d 871, 58-2 USTC ¶ 9886). While the Division may pursue the employer for the full amount that should have been withheld, the employee must report his entire income, whether subject to withholding or not, and may claim a credit against the tax due on this sum only in the amount the employer actually withheld (***United States v. Kuntz***, ***supra***; Tax Law §§ 673, 676).

Thus, the Administrative Law Judge found that even if petitioner had been granted a hearing, on the arguments presented, he would not prevail. Accordingly, the Administrative Law Judge concluded that petitioner failed to show a meritorious case and denied his motion to vacate the default. In view of this conclusion, the Administrative Law Judge deemed petitioner's motions for default and for summary determination to be moot.

ARGUMENTS ON EXCEPTION

Petitioner only takes exception to that part of the determination as denies his motion to vacate the default and, in that regard, he raises the same legal arguments as were presented below.

Petitioner has also filed three motions with the Tax Appeals Tribunal. The first two motions, filed August 5, 1999, were for reargument and to reopen the record below. The third motion, filed August 15, 1999, was to recuse Administrative Law Judges Daniel Ranalli, Andrew Marchese and Catherine Bennett from any involvement in the case below.

The Division continues to argue that petitioner has failed to offer a valid excuse for his failure to appear at the hearing or to show a meritorious case.

The Division opposes all three motions filed with the Tax Appeals Tribunal.

OPINION

We first address the three motions petitioner has filed with the Tax Appeals Tribunal. Since these motions do not appear in the record below, they are dealt with here summarily.

Section 3000.16 of the Rules of Practice of the Tax Appeals Tribunal provides that a motion to reopen the record or for reargument may be made to the Administrative Law Judge who rendered the determination within 30 days after the determination has been issued. The determination in this case was issued on December 31, 1998. Petitioner's motions to reopen and for reargument were made to the Tax Appeals Tribunal more than six months after the determination was issued. Since both of these motions were incorrectly filed with this Tribunal, rather than with the Administrative Law Judge and were untimely filed more than 30 days after the determination was issued, the Tax Appeals Tribunal is without jurisdiction as to them.

Petitioner's last motion was to recuse Administrative Law Judges Ranalli, Marchese and Bennett and was filed August 15, 1999. The Rules of Practice of the Tax Appeals Tribunal permit a party to make a motion to the Supervising Administrative Law Judge to recuse an Administrative Law Judge assigned to his or her case (***see***, 20 NYCRR 3000.8). This motion contemplates a *prehearing* remedy permitting a litigant to replace an Administrative Law Judge who, it is believed, may be biased in considering his or her case. This motion too is untimely since it was filed more than six months after the case was considered by the Administrative Law Judge and the determination was issued. Further, this motion was improperly filed with the Tax Appeals Tribunal rather than the Division of Tax Appeals. For both of these reasons, the Tax Appeals Tribunal is without jurisdiction to consider this motion. Further discussion of these three motions is, therefore, unwarranted.

We now address the issues raised on exception.

The Rules of Practice of the Tax Appeals Tribunal provide, in relevant part, that:

> 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 . . . (20 NYCRR 3000.15[b][1]).

Essentially, this regulation leaves it to the sound discretion of the Administrative Law Judge whether or not to grant a request for an adjournment. After reviewing the facts surrounding petitioner's request for an adjournment, it appears that the denial of such request may have been improper. Moreover, we do not approve or condone the manner or tone in which such denial was conveyed. However, the issue before us is whether the default determination rendered against petitioner should be vacated. The issue on exception with this Tribunal does not involve the merits surrounding the denial of petitioner's adjournment request.

The Rules of Practice of the Tax Appeals Tribunal provide, in pertinent part, that: " 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]).

We agree with the order of the Administrative Law Judge, for the reasons stated therein, that petitioner has neither shown an excuse for his failure to appear nor a meritorious case. Therefore, we affirm the order of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. Petitioner's motions filed with the Tax Appeals Tribunal to reopen the record, to re-argue and to recuse the Administrative Law Judges are dismissed for lack of jurisdiction;

2. The exception of Roydell Campbell is denied;

3. The order of the Chief Administrative Law Judge denying the application of Roydell Campbell to vacate the default determination is sustained;

4. The order of the Administrative Law Judge holding Roydell Campbell in default is affirmed; and

5. The petition of Roydell Campbell is denied.

DATED: Troy, New York
January 13, 2000

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Donald C. DeWitt
President

_____
Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner