

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**ROBERT A. AND KATHLEEN J.  
GRABOWSKI** : DECISION  
DTA NO. 817414

for Redetermination of a Deficiency or for Refund of  
Personal Income Tax under Article 22 of the Tax Law for :  
the Year 1989.

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Petitioners Robert A. and Kathleen J. Grabowski, 2611 Sabin Way, Spring Hill, Tennessee 37174, filed an exception to the order of the Chief Administrative Law Judge issued on March 15, 2001. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners' request for oral argument was denied.

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

***ISSUE***

Whether petitioners have demonstrated that the default determination entered against them should be vacated.

### ***FINDINGS OF FACT***

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

On November 22, 1999, petitioners filed a petition challenging an assessment of personal income tax under Article 22 of the Tax Law for the tax year 1989. The assessment was the result of the Division of Taxation's ("Division") determination that petitioners had failed to file a tax return for the 1989 tax year and was based upon information furnished to the Division by the Internal Revenue Service. Petitioners are unable to prove that they had filed a timely New York State return or paid the tax due. However, petitioners complain of the amount of time it took for the Division to determine that no return had been filed and to assert that tax was due. Petitioners assert that because of this delay penalty and interest should be waived and the amount of tax should be reduced by 50 percent.

A hearing in this matter was scheduled for October 26, 2000 in Syracuse, New York. A Notice of Small Claims Hearing was mailed on September 18, 2000 to advise petitioners of the impending hearing.

On October 26, 2000, Presiding Officer Arthur Johnson called the ***Matter of Robert A. and Kathleen J. Grabowski*** for hearing. Petitioners did not appear at the hearing, request an adjournment of the hearing or otherwise communicate with the Division of Tax Appeals. On December 7, 2000, Presiding Officer Johnson issued a default determination denying the petition of Robert A. and Kathleen J. Grabowski.

On December 18, 2000, petitioners filed a request to vacate the default determination. The request states that petitioners' daughter was having labor pains in conjunction with the eventual

birth of their first grandchild who was born on November 8, 2000. The request does not address the merits of petitioners' case

In its response, the Division argues that petitioners have shown neither an excuse for their default nor a meritorious case. The Division points out that petitioners did not attempt to contact the Division of Tax Appeals either on the date of the hearing or at any other time before the default determination was issued. Moreover, the Division notes that petitioners admit that they have no proof that they filed a timely return with payment and are attempting to meet their burden of proof merely by asserting a defense of laches.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his order, the Chief Administrative Law Judge noted that the Rules of Practice and Procedure of the Tax Appeals Tribunal (hereinafter the "Tribunal") provide that where an adjournment has not been granted, a default determination may be entered against a party who fails to appear at a scheduled hearing either in person or by their representative. The Chief Administrative Law Judge also noted that the Tribunal's Rules allow a default determination to be vacated where the party who has defaulted demonstrates that they have a valid excuse for not attending the hearing and a meritorious case.

Here, since petitioners did not appear at the scheduled hearing or obtain an adjournment, the Chief Administrative Law Judge concluded that a default determination was correctly entered. The Chief Administrative Law Judge did not find that petitioners' excuse provided reasonable cause for their failure to appear at their hearing, especially since petitioners made no effort to contact the Division of Tax Appeals to obtain an adjournment of the hearing. Further, the Chief Administrative Law Judge concluded that petitioners failed to address the merits of the

case in their application to vacate the default. Although they had indicated in their petition that they were unable to prove that they filed a timely return, they gave no details of any steps they took to obtain such proof. The Chief Administrative Law Judge found their complaint, that it took the Division of Taxation a long time to catch them, did not establish a meritorious case. As a result, the Chief Administrative Law Judge denied petitioners' motion to vacate their default.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners repeat the arguments presented to the Chief Administrative Law Judge. They assert that they did not attend the October 26, 2000 hearing because their daughter went into labor. Since that event occurred less than 15 days prior to the hearing, petitioners urge that they were unable to comply with the requirement that an adjournment be requested in writing at least 15 days prior to the scheduled hearing. Petitioners argue that the Division's intentional delay in acting on information provided by the Internal Revenue Service put petitioners at a disadvantage in obtaining proof of payment of their tax liability for 1989. Petitioners also maintain that they have demonstrated that they have a meritorious case based on the allegations in their petition.

The Division, in opposition, argues that the Chief Administrative Law Judge correctly found that petitioners' excuse for not attending the hearing was unreasonable. The Division states that there is no evidence that petitioners ever attempted to contact the Division of Tax Appeals prior to the time a default determination was issued. The Division also maintains that the Chief Administrative Law Judge correctly found that petitioners failed to demonstrate a meritorious claim. Their attempt to sustain their burden of proof by raising a defense of laches does not constitute a meritorious claim. Petitioners provided no proof to support this defense nor

did they submit any proof that they filed a timely income tax return for 1989 or paid the tax due for that year.

### ***OPINION***

Section 3000.13(d)(1) of the Rules of Practice and Procedure of the Tribunal provides:

[a]t 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 (20 NYCRR 3000 *et seq.*).

Although petitioners argue that they could not submit a timely written request for adjournment because the medical situation which caused their failure to appear at the hearing occurred less than 15 days prior to the hearing, petitioners made no attempt to contact the Division of Tax Appeals at any time or by any means to obtain an adjournment.

As provided by section 3000.13(d)(2) of the Tribunal's Rules, where a party or the party's representative fail to appear at a scheduled hearing, and an adjournment has not been granted, the presiding officer shall render a default determination against the party failing to appear. Section 3000.13(d)(3) of these Rules 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 also, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Ave.*, Tax Appeals Tribunal, May 4, 1989). In this case, the Chief Administrative Law Judge has correctly concluded that petitioners presented neither an acceptable excuse for defaulting in appearance nor a meritorious case. Mere conclusory statements not supported by the facts will not suffice to prove a meritorious case (*Matter of Morano's Jewelers of Fifth Ave.*, *supra*). We find that the Chief

Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the Tax Law and relevant case law to the facts of this case. Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the order in any respect. As a result, we affirm the order of the Chief Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert A. and Kathleen J. Grabowski is denied;
2. The order of the Chief Administrative Law Judge denying the application of Robert A. and Kathleen J. Grabowski to vacate the default determination is sustained;
3. The order of the presiding officer holding Robert A. and Kathleen J. Grabowski in default is affirmed; and
4. The petition of Robert A. and Kathleen J. Grabowski is denied.

DATED: Troy, New York  
September 20, 2001

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/s/Donald C. DeWitt  
Donald C. DeWitt  
President

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/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

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/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner