

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MICHAEL H. SCARLATOS : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 822578
Personal Income Tax under Article 22 of the Tax Law :
for the Tax Year 2003. :

Petitioner, Michael H. Scarlatos, filed an exception to the order of the Chief Administrative Law Judge issued on June 3, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Justine Clarke Caplan, Esq., of counsel).

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

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 determination.

FINDINGS OF FACT

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

The Internal Revenue Service made changes to petitioner's 2003 federal income tax return on or about December 5, 2005. Petitioner failed to report these changes to New York State as

required by Tax Law § 659. However, pursuant to the authority of section 6103(d) of the Internal Revenue Code, the Internal Revenue Service notified the New York State Department of Taxation & Finance of these federal changes at some point in 2006. The Department of Taxation & Finance issued Notice of Additional Tax Due L-028680198 to petitioner on June 4, 2007 in the amount of \$760.00 plus interest of \$202.32. Petitioner paid the full amount due but then claimed a refund of the interest paid in the amount of \$202.32. On April 11, 2008, a Notice of Disallowance was issued to petitioner denying in full his requested refund. A Conciliation Order was issued by the Bureau of Conciliation and Mediation Services on October 10, 2008 sustaining the disallowance of the claimed refund.

Next, petitioner filed a petition with the Division of Tax Appeals arguing that the Division of Taxation (Division) had an obligation to notify petitioner promptly of the additional tax due and that interest should be refunded because of the Division's failure to do so. On December 7, 2009, a Notice of Small Claims Hearing was mailed to petitioner advising him of a hearing scheduled in the instant matter for January 12, 2010 at the Manhattan District Office of the Department of Taxation and Finance, 1740 Broadway, New York, NY 10019.

On January 12, 2010, Presiding Officer Barbara Russo called the *Matter of Michael Scarlatos* involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a duly authorized representative. Neither petitioner nor anyone representing petitioner attempted to contact the Division of Tax Appeals in any manner. The representative of the Division of Taxation moved that petitioner be held in default. On January 28, 2010, Presiding Officer Russo found petitioner in default and denied his petition.

Petitioner filed an application dated March 3, 2010 to vacate the January 28, 2010 default. In his application, petitioner claimed that his child was sick. No specifics were provided. In

addition, petitioner argued that New York State is obligated to notify a taxpayer promptly when the taxpayer owes additional state tax because of federal changes so that interest charges do not accumulate.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge determined that petitioner's application to vacate the default determination issued against him should be denied due to petitioner's failure to appear at the scheduled hearing. The Chief Administrative Law Judge pointed out that petitioner did not establish a valid excuse for not attending the hearing. The Chief Administrative Law Judge also noted that petitioner failed to demonstrate a meritorious case. Thus, the request to vacate the default determination was denied.

ARGUMENTS ON EXCEPTION

On exception, petitioner maintains that he failed to attend the hearing due to his child being sick. Petitioner argues that the default determination should be vacated.

The Division requests that petitioner's exception be denied.

OPINION

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

20 NYCRR 3000.13(d) provides, in pertinent part, as follows:

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 [presiding officer] 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 [presiding

officer] 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.

The record before us clearly indicates that petitioner failed to appear at the scheduled hearing for which he had received notice. In addition, petitioner failed to request an adjournment of the proceeding. As a result, we agree that petitioner was in default and that the Presiding Officer properly rendered a default determination pursuant to 20 NYCRR 3000.13(d)(2) (*see Matter of Morano's Jewelers of Fifth Ave.*, 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 3000.13(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; *see also Matter of Franco*, Tax Appeals Tribunal, September 14, 1989). On exception, petitioner failed to demonstrate an excuse for not appearing at the hearing and failed to present a meritorious case.

We find that the Chief Administrative Law Judge accurately and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Thus, we affirm the order of the Chief Administrative Law Judge denying petitioner’s application to vacate the default determination entered against him.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael H. Scarlatos is denied;
2. The order of the Chief Administrative Law Judge denying the application to vacate the default determination is sustained;

3. The order of the Presiding Officer holding petitioner Michael H. Scarlatos in default is affirmed; and

4. The petition of Michael H. Scarlatos is denied.

DATED: Troy, New York
January 21, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner