STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROYDELL CAMPBELL	:	ORDER 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, filed a 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 years 1984, 1986, and 1988.

A hearing was scheduled before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 19, 1998 at 9:15 A.M. Petitioner failed to appear. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew S. Haber, Esq., of counsel).

A Default Order was mailed to petitioner on June 18, 1998, and petitioner made a request by written application that the default determination be vacated.

FINDINGS OF FACT

1. On March 3, 1997, the Division of Tax Appeals received a petition from Roydell Campbell. In the petition, petitioner argued that his employer, the City of New York, 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.

2. 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.

3. 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 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

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

12. 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, 1988.

13. Petitioner's application contained a large number of documents in support of his claim. In the 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.

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.

12. 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 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.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "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: "Upon 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].)

B. There is no doubt on the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Twice petitioner requested an adjournment and twice his request was rejected. It was clear that petitioner was fully aware of the hearing and made a conscious decision not to appear. Therefore, the Administrative Law Judge correctly granted the Division's motion for default 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 Avenue***, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner 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 Avenue***, ***supra***).

C. Petitioner has not established a valid excuse for his failure to appear at the hearing. The first reason given for the default is that petitioner could not make the trip to Troy. Nowhere in the Tax Law or the regulations is there an absolute right given to petitioners to have a hearing

at the location of their choice. In fact Tax Law § 2006(15) grants to the Tribunal the power, function and duty "to have all other powers and perform such other duties as are necessary and proper to operate and administer the division of tax appeals consistent with the purposes of such division described in [article 40]." Such operational powers and duties certainly include the authority to designate hearing locations. Petitioner was given the opportunity to have a hearing scheduled in New York City but he did not respond to the notice to schedule. 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. It is understandable that he might not respond at the time his wife died; however, four months elapsed between the time the notice to schedule was issued and the date of the hearing. During this time petitioner took the time to engage in litigation with the City of New York and he could have taken a minimal amount of time out 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. Mr. Haber alleges that he could not contact petitioner by telephone. Regardless of who failed to contact whom, 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. In fact, Mr. Haber notified the Division of Tax Appeals by letter, with a copy to petitioner, indicating that he wanted a hearing on May 19, 1998. At the very least, 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. This is simply insufficient to establish an excuse.

Petitioner also contends that he was physically incapable of attending the hearing and that his doctor had told him he could not even ride on the subway. This allegation is contradicted

by the fact that petitioner is currently employed and presumably must report to work every day. Moreover, at no time did petitioner contact 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. This again is an insufficient excuse. Accordingly, petitioner has failed to meet the first criterion to have the default order vacated.

D. Petitioner has also 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, 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.

First, petitioner has not shown that there was such a conspiracy and even if there was, it does not appear that a part of this conspiracy was a deliberate attempt to withhold insufficient tax from petitioner's wages. In each of the years in issue, the wage and tax statements show that more than $1,000.00 was withheld in State tax alone. In many of the years, more than $2,000.00 was withheld. Such withholding does not evidence a deliberate attempt to withhold an insufficient amount of tax.

More important, beyond all the factual allegations made by petitioner, his case has no legal merit. The Federal law is well settled that the 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; ***U.S. v. Kuntz***, 259 F2d 871). 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 (***U.S. v. Kuntz***, ***supra***; Tax Law §§ 673, 676).

All the cases cited by petitioner in his application are inapposite because they apply only where an employer or an officer of an employer has withheld tax from his employees and then failed to remit the taxes to the State. This is not what happened in the instant case. Thus, even if petitioner had been granted a hearing, on the arguments presented, he would not prevail. He has therefore failed to show a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued June 4, 1998 is sustained. In light of the denial of petitioner's request to vacate the default, petitioner's other motions are rendered moot.

DATED: Troy, New York
December 31, 1998

CHIEF ADMINISTRATIVE LAW JUDGE