

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
KEVIN FERGUSON : DECISION
 : DTA NO. 830106
for Redetermination of a Deficiency or for Refund of :
New York State and City Personal Income Taxes under :
Article 22 of the Tax Law and the Administrative Code :
of the City of New York for the Year 2016. :

Petitioner, Kevin Ferguson, filed an exception to the order of the Supervising Administrative Law Judge issued on September 14, 2023. Petitioner appeared by Gilbert Ellis, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on December 11, 2023, the date that petitioner's reply brief was due.

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

ISSUE

Whether the default determination issued in this matter should be vacated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 8, which we have modified to more fully reflect the record. As so modified, the facts are

set forth below.

1. On October 21, 2020, petitioner, Kevin Ferguson, filed a petition with the Division of Tax Appeals protesting a notice of deficiency, assessment number L-051125819, issued to him dated February 20, 2020 (notice). Petitioner listed as his address “1582 Saint Johns Place, Brooklyn, NY 11213.” On November 6, 2020, the Petition Intake Unit sent correspondence to petitioner requesting that he correct an improperly executed power of attorney form that was attached to the petition.

2. On December 2, 2020, petitioner submitted a power of attorney, form TA-105, that authorized Gilbert Ellis, Ellis Maynard Walwyn & Associates LLC, 253 Ralph Avenue, Brooklyn, New York 11233, to represent him in this matter. Petitioner’s address listed on the power of attorney form was the same address used on the notice and the petition.

3. On or about January 20, 2023, Presiding Officer Juan Cartagena sent a letter to the parties informing them that he was assigned to the matter. In this letter, he also stated that the hearing would be scheduled for Tuesday, March 7, 2023, at 11:00 a.m. in New York, New York. Additionally, Presiding Officer Cartagena provided the parties an opportunity to proceed with a videoconference using CISCO Webex. Presiding Officer Cartagena requested that petitioner contact the Hearing Support Unit if he wished to proceed with a virtual hearing rather than an in-person hearing. Petitioner did not contact the Hearing Support Unit to request that the in-person hearing be changed to a virtual hearing.

4. On January 31, 2023, a notice of hearing was issued to petitioner at his address listed on the petition that scheduled the small claims hearing in the above-captioned matter for March 7, 2023, at 11:00 a.m. at the NYS Dept. of Public Service, 90 Church Street, 4th Floor, New York, New York, 10007-2919. A copy of the notice of hearing was simultaneously sent to

petitioner's representative at his address listed on the power of attorney form and to the Division of Taxation (Division).

5. Petitioner did not respond to the notice of hearing.

6. On Tuesday, March 7, 2023, at 11:00 a.m., Presiding Officer Cartagena commenced a small claims hearing as scheduled in the *Matter of Kevin Ferguson*. The Division appeared by its representative. Neither petitioner nor his representative appeared at the hearing. Additionally, petitioner did not submit a written request for an adjournment of the hearing. Consequently, the representative of the Division moved that petitioner be held in default.

7. On April 20, 2023, Presiding Officer Cartagena issued a default determination against petitioner, denying the petition in this matter.

8. Petitioner's application to vacate the default determination was filed on May 24, 2023. In his letter, petitioner's representative stated that on March 3, 2023, one of his clients tested positive for COVID-19 and that, as a result, he was working remotely on the day of the hearing and was unable to attend. Included with petitioner's application is a copy of an email from petitioner's representative's office to the Division's representative in this matter noting that, as a result of an exposure to COVID-19, Mr. Ellis would not attend the scheduled hearing. The email does not request an adjournment. The email indicates that it was sent at 8:09 a.m. on the morning of the hearing. Petitioner failed to submit any documentation that addressed the merits of his case with his application.

9. In its opposition to petitioner's application, the Division stated that petitioner never contacted the Division of Tax Appeals to request an adjournment of the hearing nor did he submit any evidence of a meritorious case.

THE ORDER OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

Noting petitioner's failure to contact the Division of Tax Appeals to request an adjournment of the hearing, the Supervising Administrative Law Judge found that petitioner failed to provide a reasonable excuse for his default, notwithstanding his excuse of a COVID-19 exposure. In addition, the Supervising Administrative Law Judge found that petitioner had not established a meritorious case, having submitted no evidence in support thereof. Accordingly, the Supervising Administrative Law Judge denied petitioner's application to vacate the default determination.

ARGUMENTS ON EXCEPTION

Petitioner continues to assert that his representative had been exposed to COVID-19, and was therefore unable to attend the scheduled hearing. Referring to the email sent to the Division's representative, petitioner contends that he reasonably expected that Ms. Hink-Brennan would relay the information to the Presiding Officer for an adjournment.

Petitioner makes no assertion that he has a meritorious case.

The Division contends that the default determination was properly upheld because Mr. Ellis failed to appear for the hearing and failed to secure an adjournment. The Division further contends that Ms. Hink-Brennan did not see the email until after the hearing. In any case, the Division asserts that the email did not request an adjournment or request that it be forwarded to the Presiding Officer, but only noted that the representative would not be present.

The Division also notes that petitioner has provided no evidence of a meritorious case.

OPINION

With respect to small claims hearings, our Rules of Practice and Procedure (Rules) provide that "[i]n 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” (20 NYCRR 3000.13 [d] [2]). As petitioner neither appeared at the scheduled hearing nor obtained an adjournment, the Presiding Officer properly rendered a default determination (*Matter of Sun*, Tax Appeals Tribunal, April 11, 2024).

The Rules further provide a means of vacating a small claims default determination if a petitioner files a written application to the Supervising Administrative Law Judge in which the petitioner “shows an excuse for the default *and* a meritorious case” (20 NYCRR 3000.13 [d] [3] [emphasis added]).

In order to establish a meritorious case for purposes of vacating a default, petitioner must make a prima facie showing of legal merit, and may not rely on conclusory statements unsupported by the facts (*Matter of Getso*, Tax Appeals Tribunal, January 13, 2016). Petitioner has offered no evidence regarding the merits of his case. Indeed, petitioner does not even argue that his case has legal merit. Accordingly, having failed to show a meritorious case, petitioner’s exception must be denied.

We note that petitioner’s brief on exception also references 20 NYCRR 3000.16 (a) (2) of our Rules in support of his contention that the Division should have relayed the email to the Presiding Officer. That provision, however, deals with vacating an Administrative Law Judge determination on the merits and has no application to the present circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kevin Ferguson is denied; and

2. The order of the Supervising Administrative Law Judge denying petitioner's application to vacate the default determination is affirmed.

DATED: Albany, New York
June 3, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner