

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>WILLIAM GORDON</b>	:	ORDER
for Redetermination of Deficiencies or for	:	DTA NOS. 825296 AND
Refund of New York State and New York City		825368
Personal Income Tax under Article 22 of the Tax	:	
Law and the New York City Administrative Code		
for the Years 2006 and 2007.	:	

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Petitioner, William Gordon, filed petitions for redetermination of deficiencies 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 2006 and 2007.

A hearing was scheduled before Presiding Officer Barbara J. Russo at the offices of the Division of Tax Appeals, NYS Department of Taxation & Finance, Metro-NYC Regional Office, 15 Metro Tech Center, Brooklyn, New York, on September 23, 2013 at 1:45 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request that the default determination be vacated. On December 13, 2013, the Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a written response in opposition to petitioner's application to vacate the default determination.

Upon review of the entire case file in this matter, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

***FINDINGS OF FACT***

1. On October 15, 2012 and November 21, 2012, petitioner, William Gordon, filed petitions with the Division of Tax Appeals protesting notices of deficiency of personal income tax due from the Division of Taxation (Division) issued on July 25, 2011 and December 11, 2011, respectively. In his petitions, petitioner alleged that the notices of deficiency for both 2006 and 2007 were based on wages that he did not receive. He claimed that the Division used wage amounts that were incorrectly reported by his employer, New Era Veterans, Inc. For the 2006 tax year, petitioner claims he received only \$12,586.00 in wages, although attached to his petition is a wage and income transcript from the Internal Revenue Service (IRS) indicating that New Era Veterans, Inc., reported wages paid to petitioner of \$20,679.00. Petitioner provided no wage figures for the 2007 tax year. He claimed in both petitions that he filed a civil action for unpaid wages; however no documentation of this action was provided. Finally, he claimed that the Division did not factor all his available credits in calculating his tax due for either year.

2. In its answer to the petition, the Division stated that petitioner failed to file an income tax return for either year in issue and that it obtained petitioner's income information from the IRS. The Division also stated that, in computing petitioner's tax due for each year in issue, all applicable credits and the standard deduction were applied.

3. On August 19, 2013, the calendar clerk of the Division of Tax Appeals sent two notices of small claims hearing to petitioner and the Division of Taxation advising them that a hearing had been scheduled for Monday, September 23, 2013 at 1:45 P.M., at the Metro-NYC Regional Office, 15 Metro Tech Center, in Brooklyn, New York.

4. On September 23, 2013, at 2:30 P.M., Presiding Officer Barbara Russo commenced a

hearing in the ***Matters of William Gordon***. Petitioner did not appear at the hearing and a default was duly noted.

5. On October 10, 2013, Presiding Officer Russo issued a default determination against petitioner, denying the petition in this matter.

6. On October 16, 2013, petitioner filed an application to vacate the default determination. In the application, petitioner alleged that he “was delayed by a smoke/fire condition on the trains (MTA) that existed on the date of the . . . hearing . . .”

7. As to the merits of his case, petitioner, in his application reiterated the same arguments raised in his petitions, i.e., that his employer incorrectly reported his wages for the years in issue. The proof submitted with his application was a canceled check, dated December 29, 2006, from New Era Veterans, Inc., payable to petitioner. The check has a cancellation stamp dated January 2, 2007. Petitioner claims that because the check was cashed in 2007, it should have been reported as 2007 income rather than as 2006 income as his employer reported it. Petitioner provided no further documentation or other proof concerning his alleged civil action against his employer.

8. After requesting an extension of time, the Division filed its response on December 12, 2013. In its response, the Division opposed the application, arguing that petitioner’s excuse lacks credibility. The Division attached to its response information from New York City Transit indicating that, although there were delays on some of its lines on September 23, 2013, none of the delays were caused by smoke or fire.

9. The Division also submitted a certification from the Commissioner of Taxation and Finance indicating that a search had been made of the Division’s files for the years 2006 and

2007, and no returns had been filed by petitioner, William Gordon, for those years. As to the merits of the case, the Division argues that tax is due on income in the year in which it accrues or is made available to the employee and that petitioner does not dispute that he had New York income during the years at issue or that he was required to file New York personal income returns during the years in issue, but failed to do so.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “[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]). 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 3000.13[d][3]).

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division of Taxation’s motion for default pursuant to 20 NYCRR 3000.13(d)(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 had a meritorious case (20 NYCRR 3000.13[d][3]; *see also Matter of Zavalla; Matter of Morano’s Jewelers of Fifth Avenue*).

C. Petitioner has not established a valid excuse for his failure to appear at the hearing. As

the Division argues, many of the facts alleged appear to be lacking in credibility. Petitioner argues that he was delayed on the train by a “smoke/fire condition.” However, information from New York City Transit indicates no such reason for delay. Moreover, even if petitioner was delayed on the hearing date, it appears that he made no attempt to arrive at the site, even though he would have been late. The hearing was delayed for 45 minutes until 2:30 P.M., and still petitioner did not appear at the Metro Tech Center on that day. Accordingly, petitioner has not met the first criterion to have the default order vacated.

D. More importantly, petitioner has not established a meritorious case. Petitioner seems to have raised two arguments against the notices of deficiency issued by the Division. First, that his employer did not properly report his income for either of the years in issue. The only proof offered of this is a spreadsheet, apparently prepared by petitioner, but with no supporting information or foundation for the source of the calculations contained therein. He also submitted with his petition a wage and income transcript from the IRS indicating that his employer paid compensation to him during the year 2006. This document serves only to bolster the Division’s case that petitioner had income during the years in issue but failed to report it. At no time in this proceeding did petitioner provide any explanation as to why he filed no returns during the years in issue.

Petitioner’s second argument is that he received a check from his employer in 2006, but he did not cash it until 2007 and therefore it was improperly reported as 2006 income. Notwithstanding that his employer properly reported the income in 2006 because that is when the employer paid the amount, petitioner again does not explain why, if he thinks he received this income in 2007, he did not file a tax return properly reporting this income. It is now 2014 and

petitioner has yet to file returns for the years in issue. Accordingly he has failed to demonstrate a meritorious case, thus not meeting the second criterion for vacating the default determination.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied, and the petitions of William Gordon are denied and the notices of deficiency issued on July 25, 2011 and December 11, 2011 are sustained.

DATED: Albany, New York  
February 27, 2014

/s/ Daniel J. Ranalli  
SUPERVISING ADMINISTRATIVE LAW JUDGE