

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ROBERT GETSO	:	ORDER
for Redetermination of Deficiencies or for	:	DTA NOS. 825660 AND
Refund of New York State and New York City	:	825824
Personal Income Tax under Article 22 of the Tax	:	
Law and the New York City Administrative Code	:	
for the Years 2008 and 2009.	:	

Petitioner, Robert Getso, 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 2008 and 2009.

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 April 23, 2014 at 10:45 A.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 July 15, 2014, 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, Kevin R. Law, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On May 9, 2013 and August 14, 2013, petitioner, Robert Getso, filed petitions with the Division of Tax Appeals protesting notices of deficiency issued by Division of Taxation (Division). Attached to the respective petitions were conciliation default orders issued by the Division of Taxation's Bureau of Conciliation and Mediation Services (BCMS). The respective petitions each allege that petitioner defaulted for the respective conciliation conferences because a continuance should have granted. Petitioner further alleged that he did not fail to appear but that BCMS ignored supporting medical documentation.

2. In its answers to the petitions, the Division denied petitioner's allegations and alleged that the notices under protest were issued based upon information received from the Internal Revenue Service that increased the amount of income that petitioner reported on his New York State and City tax returns for the years 2008 and 2009.

3. On December 23, 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, January 27, 2014 at 1:15 P.M., at the Empire State Development Corporation, 653 Third Avenue, in New York, New York.

4. On January 10, 2014, petitioner requested an adjournment of the January 27, 2014 small claims hearing based upon a medical disability. Petitioner presented two memoranda dated January 18, 2007 and March 20, 2008, respectively, from a physician that detailed the various illnesses petitioner was being treated for. The memoranda do not make any mention of petitioner's ability to travel being restricted.

5. By letter dated January 15, 2014 the presiding officer granted petitioner's request for

an adjournment. The letter went on to state that no additional adjournments would be granted.

6. On March 17, 2014, the calendar clerk of the Division of Tax Appeals sent two final notices of small claims hearing to petitioner and the Division of Taxation advising them that a hearing had been scheduled for Wednesday, April 23, 2014 at 10:45 A.M., at the Metro-NYC Regional Office, 15 Metro Tech Center, in Brooklyn, New York.

7. On April 9, 2014, petitioner requested an adjournment of the April 23, 2014 small claims hearing based upon a medical disability. Attached to his request was a copy of the January 18, 2007 memorandum referred to in Finding of Fact 4.

8. By letter dated April 14, 2014, Presiding Officer Barbara Russo denied petitioner's request for an additional adjournment.

9. By facsimile of April 18, 2014 petitioner reiterated his request for an adjournment citing illness and medical disability as the reasons therefor.

10. By letter of April 18, 2014 Presiding Officer Barbara Russo denied petitioner's second request for an additional adjournment. The presiding officer pointed out that the medical documentation previously submitted by petitioner did not indicate petitioner's medical condition prohibited him from attending a hearing.

11. On April 23, 2014, at 10:45 A.M., Presiding Officer Barbara Russo commenced a hearing in the *Matter of Robert Getso*. Petitioner did not appear at the hearing and a default was duly noted.

12. On May 22, 2014, Presiding Officer Russo issued a default determination against petitioner, denying the petitions in this matter.

13. On June 11, 2014, petitioner filed an application to vacate the default determination.

In his application, petitioner alleged that the presiding officer erroneously refused to grant him an adjournment after he provided medical documentation detailing his illnesses that prevented him from appearing for the hearing. As to the merits, petitioner claims that the Division's own records show that the amount of tax asserted due is in error.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal's Rules of Practice and Procedure 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]). 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. Based upon the record presented in this matter, it is clear that petitioner did not appear at the hearing scheduled in this matter or obtain an adjournment. Therefore, the presiding officer properly issued a default determination against petitioner (*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 Determination was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and prove the existence of a meritorious case (20 NYCRR 3000.13[d][3]; *Matter of Zavalla*; *Matter of Morano's Jewelers of Fifth Avenue*).

C. First, petitioner has not established a valid excuse for his failure to appear at the hearing. Illness of a party does not ipso facto constitute a valid excuse. In this case, after having

been granted an adjournment petitioner requested an additional adjournment of the hearing relying on the same doctor's notes that formed the basis of his first adjournment request. While the existence of petitioner's illnesses are not doubted, lacking from petitioner's proffer is whether his illnesses prevented him from appearing and representing himself at a hearing on the date and time in question. The notes do not state when petitioner's health would be such that he could appear nor does petitioner state when he thinks he will be able to proceed with these matters. Petitioner's illnesses appear to be longstanding and permanent. Petitioner's reliance on his illnesses as a valid excuse for his nonappearance is tantamount to putting off the resolution of these matters indefinitely, a result surely at odds with the need for the prompt resolution of litigation.¹ In this case, once the presiding officer denied petitioner's request for an additional adjournment, it was incumbent upon petitioner to either be present for the hearing or to find suitable representation to act on his behalf. Petitioner did neither. Accordingly, it is determined that petitioner has not set forth a valid excuse for his nonappearance.

D. Second, even if petitioner had set forth a valid excuse for his nonappearance, he has not established a meritorious case. While petitioner contends that the Division's own records show that the amount of tax asserted due is in error, petitioner has not offered one scintilla of evidence to support this claim. Therefore, petitioner has not sustained his burden of showing the existence of a meritorious case.

¹In fact, it would appear that based upon the allegations in the petitions that petitioner also claimed his illnesses prevented him from attending the respective conciliation conferences before BCMS.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied, and the petitions of Robert Getso are denied.

DATED: Albany, New York
October 9, 2014

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE