

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KEVIN FERGUSON : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 830106
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 a petition 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.

A small claims hearing was scheduled before Presiding Officer Juan Cartagena in New York, New York, on Tuesday, March 7, 2023, at 11:00 a.m. Petitioner failed to appear and a default determination was duly issued on April 20, 2023.

Petitioner, appearing by Gilbert Ellis, EA, has made a written application, filed on May 24, 2023, that the default determination be vacated pursuant to 20 NYCRR 3000.13 (d) (3). The Division of Taxation, by its representative, Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), filed a response by June 23, 2023, which date commenced the 90-day period for the issuance of this order.

Based upon a review of the entire case file in this matter, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

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 Services, 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. Petitioner and his representative did not appear 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 he was working remotely on the day of the hearing and was unable to attend. Petitioner failed to submit any documentation that addressed the merits of his case.

9. In its opposition to the instant application, the Division states 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.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules):

“[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. Petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly rendered a default determination pursuant to 20 NYCRR 3000.13 (d) (2) (*see Matter of Hotaki*, Tax Appeals Tribunal, December 14, 2006; *Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995).

C. Once the default determination was issued, it was incumbent upon petitioner to show an acceptable excuse for not attending the hearing and that he had a meritorious case (*see* 20 NYCRR 3000.13 [d] [3]; *Matter of Estruch*, Tax Appeals Tribunal, May 20, 2010; *Matter of Zavalla*).

The record shows that the notice of hearing was issued to the parties on January 31, 2023. Petitioner’s representative states that he failed to appear at the hearing due to a COVID-19 exposure that occurred on March 3, 2023. Petitioner never contacted the Hearing Support Unit to request an adjournment based on his circumstance. Therefore, he has failed to provide a reasonable excuse for his failure to appear.

D. Furthermore, petitioner has not established a meritorious case. “In order to meet the meritorious case criterion for vacatur, petitioner must make a prima facie showing of legal merit, and may not rely on conclusory statements unsupported by the facts” (*Matter of Gordon*, Tax Appeals Tribunal, January 29, 2015). Petitioner’s application failed to include any evidence to

meet his burden of establishing a meritorious case. As a result, petitioner's application fails on this prong as well.

E. The application of Kevin Ferguson to vacate the default determination of April 20, 2023, is denied.

DATED: Albany, New York
September 14, 2023

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE