STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CARLOTTA ZAVALLA	:	DECISION DTA No. 811105
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1987.	:	

Petitioner Carlotta Zavalla, 19 Dover Court, Hazlet, New Jersey 07730, filed an exception to the order of the Chief Administrative Law Judge issued on June 16, 1994. Petitioner appeared by Philip M Tinari, E.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Neither petitioner nor the Division of Taxation filed a brief. The Division of Taxation was given until April 10, 1995 to file a brief, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUE

Whether adequate grounds were presented by petitioner to vacate a default order.

FINDINGS OF FACT

We find the facts as determined by the Chief Administrative Law Judge. These facts are set forth below.

On August 14, 1992, the Division of Tax Appeals received a petition from Carlotta Zavalla for redetermination of a deficiency or for refund of personal income tax for the year 1987. The petition challenges a deficiency of income tax in the amount of $2,182.00.

Petitioner's sole allegation in the petition is that her employer had issued her a corrected W-2 form, however the Division of Taxation ("Division") "rejected" it. Attached to the petition are: (1) a copy of the conciliation order (CMS No. 109185), dated July 17, 1992, denying petitioner's request and sustaining the notice; and (2) an unsigned copy of a consent form from the Bureau of Conciliation and Mediation Services ("BCMS") which lists the "final disposition of the Deficiency" as $2,182.00tax due plus $941.00 interest, for a total of $3,123.00, and requires petitioner's (or petitioner's representative's) signature to indicate acceptance of the "final disposition" and to waive any right to petition for a hearing on the matter with the Division of Tax Appeals.[1]

On September 21, 1992, petitioner was informed by a letter from Frank McMahon of the Petition, Intake, Review & Exception Unit of the Division of Tax Appeals that her case qualified for small claims treatment, and that if she wished to have the matter conducted in the small claims unit, petitioner would need to sign the letter and return it within 10 days to the Division of Tax Appeals. On September 30, 1992, the Division of Tax Appeals received the signed letter, dated September 24, 1992, confirming petitioner's election to proceed in the small claims unit.

On December 15, 1992, the Division, by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel), filed an answer to the petition, denying petitioner's claim regarding the Division's rejection of her corrected W-2 form. In addition, the Division affirmatively stated that: (1) petitioner timely filed a nonresident New York State income tax return for the year 1987; (2) petitioner reported wages of $39,875.00 on her Federal income tax return for 1987, but only $4,404.00 in wages on her New York State return for that year; and (3) the deficiency is based on the Division's assertion that the entire amount of petitioner's wages is taxable for purposes of New York State income tax. The Division also affirmatively stated that: (1) petitioner's employment terminated when petitioner's employer ceased its business activities in

[1]The consent form makes reference to the Notice of Deficiency (Notice No. L000359754, dated August 20, 1990), however, there are no copies of said notice in evidence.

New York; (2) the difference in the wages reported by petitioner on her Federal and State returns includes severance pay received by petitioner upon leaving her job; (3) under the New York Tax Law, severance pay is allocated by a nonresident of New York State consistent with the wage allocation percentage reported in the three most recent prior years; and (4) since petitioner's wages for the years 1984, 1985 and 1986 were fully allocated to New York on petitioner's tax returns, the severance pay received by petitioner in 1987 is fully taxable by New York State. In this regard, the Division affirmatively stated that petitioner has the burden of proving wherein the assessment is erroneous and/or improper. The Division requests that the petition be denied and the assessment sustained in full, together with the applicable interest.

On December 23, 1992, the Division of Tax Appeals received a letter from a Mr. Philip M. Tinari, E.A., the preparer of petitioner's tax returns. First, Mr. Tinari asked that the matter be heard in the small claims unit. Then Mr. Tinari asserted that the Division had overlooked the corrected W-2 form issued by petitioner's employer, which form served as the basis for petitioner's New York income as listed on the New York State return. Mr. Tinari reasoned that the fact that petitioner was given a corrected W-2 form at all indicates that the prior W-2 form was incorrect, and that if this were the case, then the Division based its assessment on incorrect information. Finally, Mr. Tinari made the following argument:

> "[i]t appears that this whole case is based on an incorrect W2 [sic] form issued from California when the New York office closed. Humans make mistakes and humans are able to correct some of the mistakes made. This is a corrected mistake which the Taxation Division does not wish to address. The tax on this income has been paid to New Jersey in 1987 and the statute for amending the 87 return has past [sic]. We still consider this return correct as filed and no N.Y. tax is due."

On December 30, 1992, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, wrote to Mr. Tinari to inform him that the matter had been transferred to the small claims unit.

On January 18, 1994, Allen Caplowaith, a Presiding Officer for the Division of Tax Appeals, sent a Notice of Small Claims Hearing to petitioner, informing her that a hearing on the petition

had been scheduled for Thursday, February 24, 1994 at 9:15 A.M. The notice contained, inter alia, the following paragraph:

> "[f]ailure to appear at the scheduled hearing may result in dismissal of the petition. An adjournment may be requested but will be granted only for good cause and only if the request is received in writing at least 15 days prior to the hearing date, and only to such time and place as the Division of Tax Appeals finds appropriate."

On January 31, 1994, Mr. Tinari sent a letter to the Division of Tax Appeals requesting an adjournment from the February 24, 1994 hearing based on the fact that he was "fully booked for tax preparation until after April 15, 1994," but that if a "meeting" could be scheduled for after that date, he would "be happy to attend." Mr. Tinari, as well, reiterated petitioner's position in the letter, urging that no tax is due from petitioner, and that New York State had failed to recognize the corrected W-2 form submitted. Mr. Tinari attached a copy of his December 23, 1992 letter to the Division of Tax Appeals (see, above) as well as a copy of the corrected W-2 form.

On February 3, 1994, Presiding Officer Caplowaith telephoned Mr. Tinari to inform him that his request for an adjournment of the small claims hearing was denied, based on the fact that the excuse tendered by Mr. Tinari was "not valid", and that the case appeared to the Presiding Officer to be more complicated than Mr. Tinari had made it seem in his January 31, 1994 letter. Apparently during that conversation, Mr. Tinari informed Presiding Officer Caplowaith that without the adjournment, petitioner would have to attend the hearing without Mr. Tinari, carrying a letter from Mr. Tinari in his stead.

Neither petitioner nor her representative appeared at the hearing on February 24, 1994, and on March 31, 1994, Presiding Officer Caplowaith issued a default determination against petitioner. A copy of this determination and a letter from Andrew F. Marchese, Chief Administrative Law Judge, was sent to petitioner on that same date. Judge Marchese's letter indicated that:

> "[p]ursuant to the Rules of Practice and Procedure, a default determination may be vacated upon written application to the

> supervising administrative law judge. The applicant must show an excuse for the default and proof of a meritorious case."

Petitioner, on April 27, 1994, filed an application to vacate the default determination ("application"). The application offers the following excuse for petitioner's having failed to appear at the February 24, 1994 hearing: "[w]e had written in February to postpone the meeting with the Appeals Officer because my accountant was unable to make that date. We were refused." In regard to proving that a meritorious case exists, petitioner asserts that: (1) her case is based on a corrected W-2 form issued by her former employer; (2) the Division refuses to accept the corrected W-2; (3) a Federal corrected W-2 takes precedence over the initial W-2 which was wrong; and (4) her tax return is based on the corrected W-2 and is considered correctly filed. A copy of the corrected W-2 form is attached to petitioner's letter. This W-2 reflects that petitioner was paid $36,274.77 in wages in 1987, had $6,855.20 withheld for Federal income taxes, had $2,593.64 withheld for social security tax, was paid $4,257.03 in New York State wages, had $184.00 withheld for state income tax to New York State, and had $17.16 withheld for local income tax to New York City.

On May 12, 1994, the Division submitted a timely response to petitioner's application to vacate the default order. In this response, the Division, by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), stated only that it "does not object to or concur with the . . . taxpayer's request to vacate the default order."

OPINION

In the order issued below, the Chief Administrative Law Judge held that under 20 NYCRR 3000.9(d)(3) a default determination may be vacated if petitioner can demonstrate both an excuse for the default and a meritorious case.

In the matter at hand, the Chief Administrative Law Judge decided that petitioner's application to vacate the default determination issued against her should be denied. The basis for said denial was that petitioner's explanation that an adjournment had been requested but was

refused was insufficient to overcome petitioner's burden of demonstrating an excuse for the default and, further, the Chief Administrative Law Judge found unpersuasive petitioner's attempts to prove a meritorious case.

The Chief Administrative Law Judge, in discussing the reason for analyzing whether or not petitioner demonstrated a meritorious case, cited case law which held that "if the matter were to go to hearing, it would be petitioner's burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax asserted was erroneous, and this burden is a heavy one" (Order, conclusion of law "D").

The Chief Administrative Law Judge held that the issue in this case relates to the provisions of personal income tax regulation 20 NYCRR 132.20, and while petitioner did not address this issue at all, she attempted to prove a meritorious case exists by stating that: 1) her 1987 tax return was correctly filed using a corrected W-2 form given by her former employer (a copy of which was attached to her application); 2) the Division refused to accept the corrected W-2 form; and 3) a Federal corrected W-2 form takes precedence over the initial W-2 form which was incorrect.

The Chief Administrative Law Judge, in denying petitioner's request to vacate the default determination and finding petitioner failed to demonstrate a meritorious case, held that:

> "[s]uch statements are not equivalent to factual allegations of error in the Division's assessment method or results . . . . Absent a more detailed statement of the reasons behind petitioner's argument that no New York taxes were due in 1987, and/or corroborating evidence (beyond the corrected W-2 form submitted) to support petitioner's allegations, I cannot determine that the auditor's assessment method or result was erroneous" (Order, conclusion of law "D").

On exception, petitioner submits a one-page breakdown from Schlumberger Limited itemizing her 1987 earnings and argues that: 1) since part of the lump sum received was for tax payment on the early withdrawal of the Profit Sharing Plan of the employer, said amount should not be included in total income as it is not wages; 2) taxes were paid on the amount in question to

the State of New Jersey in 1987 and the statute of limitations prevents obtaining a refund; and 3) an additional payment to New York State would be double taxation.

In response, the Division, while not filing a brief in opposition, submitted a letter concurring with the order issued.

We affirm the denial by the Chief Administrative Law Judge of petitioner's application to vacate the default determination issued by the Administrative Law Judge.

20 NYCRR 3000.10 provides, in pertinent part, as follows:

> "(a) Notice. After issue is joined (see, § 3000.4[b] of this Part), the administrative law judge unit shall schedule the controversy for a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.
>
> "(b) Adjournment; default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the administrative law judge shall render a default determination against the dilatory party.
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> "(2) 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" (emphasis added.)

The record before us clearly indicates that petitioner did not appear at the scheduled hearing for which she had received notice. In addition, petitioner failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and that the Administrative Law Judge properly rendered a default determination pursuant to 20 NYCRR 3000.10(b)(2) (see, Matter of Klempner, Tax Appeals Tribunal, March 14, 1991; Matter of Morano's Jewelers, Tax Appeals Tribunal, May 4, 1989).

The issue before us now is whether such default determination should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.10(b)(3) provides 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" (see, Matter of Franco, Tax Appeals Tribunal, September 14, 1989; Matter of Kow, Tax Appeals Tribunal, December 15, 1988).

We agree with the Chief Administrative Law Judge that petitioner's explanation was insufficient to overcome her burden of demonstrating an excuse for the default and, further, we must address and reject petitioner's attempt at this late date to place before this Tribunal additional evidence, the one-page breakdown itemizing her 1987 earnings, which were not part of the record below.

As we held in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988).

A review of the record below and the exception filed by petitioner shows a failure by her to present an acceptable excuse for her failure to appear and any evidence of a meritorious case for consideration by the Tribunal.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Carlotta Zavalla is denied;

2. The order of the Chief Administrative Law Judge denying the application of Carlotta Zavalla to vacate the default determination rendered is sustained;

3. The order of the Administrative Law Judge holding Carlotta Zavalla in default is affirmed;

4. The petition of Carlotta Zavalla is in all respects denied; and

5. The Notice of Deficiency is sustained.

DATED: Troy, New York
August 31, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner