

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RENATE WERNER	:	DECISION
	:	DTA NO. 817021
for Revision of a Determination or for Refund of Real	:	
Estate Transfer Tax under Article 31 of the Tax Law	:	
for the Year 1997.	:	

Petitioner Renate Werner, Kroeckelbergstrasse 14, D65193, Wiesbaden Germany, filed an exception to the order of the Administrative Law Judge issued on June 29, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Neither petitioner nor the Division of Taxation filed briefs.

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

ISSUE

Whether the Administrative Law Judge was correct to deny petitioner's motion to vacate a default determination issued to her.

FINDINGS OF FACT

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

On April 2, 1999, petitioner filed a petition challenging a Notice of Determination asserting real estate transfer tax due under Article 31 of the Tax Law for the year 1997. The petition states in relevant part that petitioner is not liable for the tax assessed because the real estate transfer was to a not-for-profit organization. The petition contains a power of attorney (form DTF-1) which purports to appoint Mr. Heinz von Kuthy as petitioner's representative. However, on the back of the power of attorney form a sworn statement by Mr. von Kuthy indicates that he has agreed to receive mail for petitioner (but not certified mail) and does not agree to act as petitioner's representative in this matter.

A small claims hearing in this matter was scheduled for November 17, 1999 in Troy, New York. On October 13, 1999, a Notice of Small Claims Hearing was mailed to petitioner at her Wiesbaden address and separately to Mr. von Kuthy at his Connecticut address. On November 16, 1999, the calendar clerk of the Division of Tax Appeals received a telephone call from Mr. von Kuthy for the purpose of requesting an adjournment. The calendar clerk advised Mr. von Kuthy that all adjournment requests must be made in writing.

On November 17, 1999, Presiding Officer James Hoefer called the *Matter of Renate Werner* for hearing. Neither petitioner nor Mr. von Kuthy appeared at the hearing. No written request for an adjournment of the hearing was ever received from either petitioner or Mr. von Kuthy. On December 23, 1999, Presiding Officer Hoefer issued a default determination denying the petition of Renate Werner.

On March 7, 2000, petitioner filed a request to vacate the default determination. The request indicates without elaboration that petitioner had requested a postponement of the hearing and had not consented to a ruling in her absence. The request also indicates that petitioner has

given a power of attorney to Dr. Heinz Neunteufel. No such power of attorney has ever been filed with the Division of Tax Appeals. The request does not address the merits of petitioner's case.

In its response, the Division of Taxation ("Division") points out that petitioner has shown neither an excuse for her default nor a meritorious case.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his order denying petitioner's request to vacate the determination rendered against her by default, the Administrative Law Judge noted that section 3000.13(d)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.13[d][2]) provides for the issuance of a default determination if a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted. Further, the Administrative Law Judge observed that section 3000.13(d)(3) of those Rules provide that upon a written application to the Supervising Administrative Law Judge, a default determination may be vacated if the defaulting party shows an excuse for the default and a meritorious case.

The Administrative Law Judge concluded that, since petitioner did not appear at the scheduled hearing or obtain an adjournment, the presiding officer correctly granted the Division's motion for a default determination in its favor. Thereafter, it was incumbent on petitioner to show a valid excuse for failing to attend the hearing and that she has a meritorious case. The Administrative Law Judge determined that petitioner failed to meet her burden in this regard. Specifically, the Administrative Law Judge found that no written request for an adjournment was ever submitted and no adjournment was ever granted. The Administrative Law Judge concluded that petitioner showed no circumstances which could have allowed her to conclude that an adjournment had been granted. Additionally, the Administrative Law Judge determined that

petitioner failed to demonstrate that she had a meritorious case. The only premise underlying petitioner's claimed exemption from the real estate transfer tax imposed by Article 31 of the Tax Law is that the property at issue was transferred to a not-for-profit organization. The Administrative Law Judge pointed out that Tax Law § 1405 sets forth the exemptions from the tax imposed under said Article 31. Section 1405 does not provide an exemption from tax for transfers to not-for-profit organizations. Since no other grounds for exemption were asserted, the Administrative Law Judge concluded that petitioner did not establish that she had a meritorious case.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that her motion to vacate the default should have been granted because the Division's opposition to her motion was not submitted within the time allowed therefor by the Administrative Law Judge. Additionally, petitioner argues that the November 16, 1999 telephone request by Dr. von Kuthy for a postponement of the November 17, 1999 hearing should have been granted because the notice of hearing had not been received in time to allow for an appearance on that date or even a written request for an adjournment. Finally, petitioner urges that her case has merit in that no transfer tax is due on the transfer of real property to a not-for-profit organization.

OPINION

Petitioner is correct that the letter submitted by the Division in opposition to her motion to vacate was not received by the Administrative Law Judge within the time frame established by him in his March 9, 2000 letter. Rather, on May 2, 2000 the Division, through its attorney, submitted a letter opposing petitioner's motion; asserting that the untimeliness of its letter in

opposition was due to a mail delivery error; and asking the Administrative Law Judge to accept the letter even though it was late filed. A copy of the Division's letter was sent to petitioner. No response was filed by petitioner, no objection was made to the acceptance of the Division's letter in opposition and petitioner did not allege that she would be prejudiced if this late-filed letter was considered on the motion. Therefore, in the absence of a statutory prohibition, opposition or a showing of prejudice by petitioner, it was within the discretion of the Administrative Law Judge to accept the Division's letter in opposition to petitioner's motion (*see*, 20 NYCRR 3000.23[b]).

With or without the Division's letter in opposition, however, petitioner's motion must fail. Section 3000.13(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides: "[a]t 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." Here, an oral request for adjournment was made one day before the scheduled hearing; no written request was ever made for an adjournment; and no emergency conditions warranting an adjournment with less than the required amount of notice are alleged to have existed. As provided by section 3000.13(d)(2) of the Tribunal's Rules, where a party or the party's representative fail to appear at a scheduled hearing, and an adjournment has not been granted, the presiding officer shall render a default determination against the party failing to appear. Section 3000.13(d)(3) of these Rules 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." In this case, the Administrative Law Judge has correctly concluded that petitioner presented neither an excuse for defaulting in appearance nor a

meritorious case. Therefore, we affirm the order of the Administrative Law Judge denying petitioner's motion to vacate the default determination issued to her.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Renate Werner is denied;
2. The order of the Administrative Law Judge, dated June 29, 2000, denying the application of Renate Werner to vacate the default determination rendered is sustained; and
3. The petition of Renate Werner is, in all respects, denied.

DATED: Troy, New York
January 11, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner