STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CRYSTAL A. NICHOLSON	:	DECISION DTA NO. 818695
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1997 and 1998.	:	

Petitioner Crystal A. Nicholson, c/o 411 East 71st Street, Apt. 12, New York, New York 10022, filed an exception to the order of the Administrative Law Judge issued on October 17, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

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 and make an additional finding of fact. The Chief Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

On June 15, 2001, the Division of Tax Appeals received a petition from Ms. Crystal Nicholson protesting an income execution which had been served on petitioner's employer. Petitioner complained that she had never been told the factual basis of the assessment, had not been granted a conciliation conference and had been denied due process of law because the Commissioner of Taxation and Finance had never instituted a court proceeding, never obtained a court judgment, never advised her of her administrative rights, never advised her of her right to a prompt hearing and never advised her of the facts the Department of Taxation and Finance relied upon in issuing the warrant.

In its answer, the Division of Taxation asserted that notices of deficiency (Notice Nos. L-016987210 and L-016987211, dated December 2, 1999) were issued to petitioner because she claimed the foreign earned income exclusion although domiciled in New York. The answer asserts that petitioner's Request for Conciliation Conference was not mailed until February 8, 2001 and that the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request (CMS# 185088) to petitioner on March 2, 2001.

On November 2, 2001, the Bureau of Conciliation and Mediation Services "(BCMS)" advised the Division of Tax Appeals that it had rescinded the Conciliation Order Dismissing Request. On November 13, 2001, the Division of Tax Appeals advised petitioner that she would be scheduled for a conciliation conference in BCMS and requested that she sign a Stipulation for

Discontinuance of Proceeding form withdrawing her petition at the Division of Tax Appeals with the condition that if this matter was not resolved at conference, petitioner would be allowed to file a new petition. Petitioner was advised that if she did not signed the petition, a timeliness hearing would be scheduled for her in the Division of Tax Appeals and if she did not appear for her hearing, she could be defaulted. Petitioner never signed the stipulation. On February 15, 2002, the Division of Taxation sent petitioner a second Stipulation for Discontinuance of Proceeding form. Again, petitioner failed to sign and return the form. On February 19, 2002, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Division of Taxation advising them that a hearing had been scheduled for them on March 28, 2002.

On March 28, 2002 at 9:15 A.M., Presiding Officer Thomas C. Sacca called the ***Matter of Crystal A. Nicholson***, involving the petition here at issue. Present was the representative for the Division of Taxation. Petitioner did not appear and no representative appeared on her behalf. The representative for the Division of Taxation moved that petitioner be held in default. On May 2, 2002, Presiding Officer Sacca issued a determination finding petitioner in default.

We make the following additional finding of fact.

> Petitioner was advised by letter dated May 2, 2002 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."

On June 20, 2002 the Division of Tax Appeals received a petition from Crystal A. Nicholson protesting the same assessments protested in her first petition as well as the March 15, 2002 Conciliation Order sustaining said assessments. On June 26, 2002, Frank Landers of the

Petition Intake, Review and Exception Unit of the Division of Tax Appeals returned the petition to petitioner explaining that she had already received a default determination in this matter. He went on to explain the process whereby petitioner could seek to have the default determination vacated. By letter dated July 5, 2002, petitioner requested that the default determination of May 2, 2002 be vacated. In this request, petitioner stated:

> I originally filed for and was granted an Appeal Hearing in April or May of 2001. Upon being notified of this, The Department of Taxation and Finance decided to grant me a Conciliation and Mediation Hearing, in lieu of the Appeal, which was subsequently scheduled for February 05, 2002.
>
> Apparently they never informed the Division of Tax Appeals of this fact because I received a letter informing me of the date of the Appeal Hearing anyway. When I received it I knew that it was in error because I still had not yet to receive the Conciliation Order.
>
> On February 15, 2002 The Department of Taxation and Finance sent me a Stipulation for Discontinuance of Proceeding form but I failed to return it to them. I guess this is what caused the confusion with your division.

In her letter of July 5, 2002, petitioner does not address the merits of her case.

By letter dated July 29, 2002, the Division of Taxation opposed petitioner's request. The Division of Taxation asserts that petitioner has not established reasonable cause for her failure to appear for hearing and has not presented evidence of a meritorious case. The Division of Taxation states that:

> In fact, petitioner concedes that she was sent a Stipulation of Discontinuance of Proceeding which she failed to sign and return. Such failure to sign and return caused the Small Claims Hearing to continue as scheduled. This outcome was explained to the petitioner in the cover letter accompanying the Stipulation (Exh. A). Petitioner knew that if the stipulation was not signed the hearing would occur, no reasonable cause exists.

> As for a meritorious case, the petitioner claimed a Foreign Earned Income Exclusion for income earned at the Society of the New York Hospital (1997) and New York Presbyterian Hospital (1998) which are both located in New York City. Petitioner has shown no evidence that the wages were earned in a foreign country. Petitioner appears to live and work in New York City. The Division has grounds to ask for a frivolous petition penalty.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge determined that petitioner, appearing *pro se,* did not comprehend the significance of a default and could be excused for her failure to appear at the scheduled hearing. However, the Chief Administrative Law Judge found that petitioner utterly failed to establish a meritorious case or to even address this issue in her request to vacate her default. After reviewing the petition, the Chief Administrative Law Judge noted that petitioner's claim that she was denied due process because the Division of Taxation never instituted court proceedings or obtained judicial approval for its warrant was without basis. The Chief Administrative Law Judge noted that Tax Law § 692 clearly authorized the Division of Taxation to issue warrants for the collection of tax without first commencing a judicial proceeding. Further, he concluded that petitioner failed to explain how, as an individual living and working in New York City, she could qualify for her claimed foreign earned income exclusion. As a result, the Chief Administrative Law Judge denied petitioner's request to vacate the default order and sustained the default determination issued May 2, 2002. The Chief Administrative Law Judge did not address the Division's request to impose a penalty for filing a frivolous petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that she was never advised that in order to overturn the default determination, she was required to discuss the merits of her case. Petitioner argues that she properly reported her New York income on her federal tax return as having been earned in a foreign country based on petitioner's belief that New York is a foreign country. Further, petitioner argues that she accurately entered the information from her federal return on her New York State income tax return. Petitioner also disputes that she should be subject to a penalty for filing a frivolous petition.

The Division, in opposition, asserts that petitioner did not qualify for the foreign earned income exclusion. Further, the Division argues that petitioner was advised of the procedure to follow in order to request that the default determination entered against her be vacated. Finally, the Division requests that a penalty be imposed against petitioner for filing a frivolous petition.

OPINION

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

20 NYCRR 3000.13(c)(4) provides as follows:

> After the petition and answer have been served, or the time for serving an answer has expired, the controversy shall be at issue and the small claims unit shall schedule the controversy for a small claims 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.

20 NYCRR 3000.13(d) provides, in pertinent part, as follows:

> (d) *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 presiding officer shall render a default determination against the dilatory party.
>
> (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 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.

The record before us clearly indicates that petitioner failed to appear at the scheduled hearing for which she had been given notice. In addition, petitioner failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and the Presiding Officer properly rendered a default determination pursuant to 20 NYCRR 3000.13(d)(2) (***see***, ***Matter of Morano's Jewelers of Fifth Ave.***, 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 3000.13(d)(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 Capp***, Tax Appeals Tribunal, January 2, 1992; ***Matter of Franco***, Tax Appeals Tribunal, September 14, 1989).

Despite petitioner's claim to the contrary, the record demonstrates that petitioner was advised of the procedure to follow in order to request that her default be vacated. A review of the record below and the exception filed by petitioner shows that while the Chief Administrative Law Judge found that petitioner presented an acceptable excuse for not appearing at the

scheduled hearing, she submitted no evidence of a meritorious case for consideration by this Tribunal.

Petitioner argues on exception that she properly reported her New York income on her federal tax return as having been earned in a foreign country based on petitioner's belief that New York is a foreign country. Further, petitioner argues that she accurately entered the information from her federal return on her New York State income tax return, as required. We reject petitioner's assertion that she has demonstrated that she has a meritorious case. Petitioner, as a resident of New York State who earned income in New York State while working for a New York employer during the years at issue has demonstrated no entitlement to the foreign income exclusion provided by Internal Revenue Code (IRC) § 911. Section 911 provides a limited exclusion from gross income of income earned in a "foreign country." Pursuant to 26 CFR § 1.911-2(h) a "foreign country" for purposes of IRC § 911 is defined as

> any territory under the sovereignty of a government other than that of the United States. It includes the territorial waters of the foreign country (determined in accordance with the laws of the United States), the air space over the foreign country, and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources.

By definition, therefore, New York State is not considered a foreign country for purposes of the foreign income exclusion.

Tax Law § 2018 provides that:

> If any petitioner commences or maintains a proceeding in the division of tax appeals primarily for delay, or if the petitioner's position in such proceeding is frivolous, then the tax appeals tribunal may impose a penalty against such petitioner of not more

> than five hundred dollars. *The tax appeals tribunal shall promulgate rules and regulations as to what constitutes a frivolous position* (emphasis added).

In light of this statutory directive, the Rules of Practice and Procedure of the Tribunal (20 NYCRR 3000.21) provide that:

> If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the *tribunal may, on its own motion* or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500.

We find that petitioner's position in this proceeding that she is not liable for personal income tax on her wage income because it was earned in a foreign country (i.e., New York State) is patently frivolous. Therefore, a penalty of $500.00 is hereby imposed against petitioner pursuant to Tax Law § 2018 for maintaining a position in this proceeding which is frivolous (***see***, ***Matter of Klein***, Tax Appeals Tribunal, August 28, 2003; ***see also***, ***Matter of Maloney***, Tax Appeals Tribunal, March 6, 2003).

With this modification, we affirm the order of the Chief Administrative Law Judge denying petitioner's request to vacate her default because petitioner has failed to establish a meritorious case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Crystal A. Nicholson is denied;

2. The order of the Chief Administrative Law Judge denying the application of Crystal A. Nicholson to vacate the default determination is sustained;

3. The order of the Administrative Law Judge holding Crystal A. Nicholson in default is affirmed;

4. The petition of Crystal A. Nicholson is denied; and

5. Penalty in the amount of $500.00 for filing a frivolous petition is imposed.

DATED: Troy, New York
October 30, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner