STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT AND JACQUELINE POINDEXTER	:	DECISION DTA NO. 820279
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1996.	:	
	:	

Petitioners Robert and Jacqueline Poindexter, 153-27 120th Avenue, Jamaica, New York 11434, filed an exception to the order of the Chief Administrative Law Judge issued on January 5, 2006. Petitioners appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a letter brief in lieu of a formal reply brief. Oral argument was not requested.

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

ISSUE

Whether the Chief Administrative Law Judge properly denied petitioners' motion to reopen a default determination entered against them.

FINDINGS OF FACT

We find the facts as determined by the Chief Administrative Law Judge except for findings of fact "5" and "7" which have been modified. The Chief Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On April 15, 1997, petitioners filed their 1996 Federal income tax return reporting tax of $66,874.00 with no withholding, no estimated tax payments and no payments with the return. On June 2, 1997, the Internal Revenue Service ("IRS") issued to petitioners a notice and demand for payment of the amount shown on their return. Petitioners did not make the payments demanded and the IRS notified petitioners of its intent to execute a levy to collect the unpaid liability. Petitioner Robert Poindexter submitted a Request for a Collection Due Process Hearing. In the request, petitioner, who is a songwriter, stated that he was in a dispute with certain record companies over royalties due him with regard to songs he had written. Petitioner requested that the IRS subpoena information from the record companies so that he could file a more accurate return. The Appeals Office denied the request for subpoenas and sustained the proposed collection action. Petitioner appealed that decision to the United States Tax Court. The Tax Court ruled that while petitioner was entitled to challenge the underlying tax liability, he had failed to raise any justiciable issue or identify any item on his return that was incorrect (***Robert Eugene Poindexter v. Commissioner***, 122 TC 280). The decision of the Tax Court was affirmed by the U.S. Court of Appeals (***Poindexter v. Commissioner***, 132 Fed Appx 919) and petitioner has now filed a petition for rehearing in that matter.

Similarly, petitioners timely filed their New York State resident personal income tax return for the year 1996 reporting taxable income of $169,404.00 and reporting New York State

and New York City personal income tax due of $19,335.00 plus underestimation penalty of $34.00. Petitioners included payment of $5,000.00. On July 7, 1997, the Division of Taxation issued a notice and demand (L-013821803) for $14,301.00 in tax as reported on the return plus penalty and interest.

Petitioners challenged the notice and demand by filing a request for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS scheduled a conciliation conference on August 10, 2004; however, petitioners failed to appear and a Conciliation Default Order was issued on September 3, 2004.

Petitioners next filed a petition with the Division of Tax Appeals which was received on December 1, 2004. In their petition, petitioners first addressed the circumstances surrounding their default at their conciliation conference. Inasmuch as petitioners filed a timely petition with the Division of Tax Appeals, their default at BCMS places them in the same position procedurally as if they had never requested a conciliation conference in the first instance. Hence their default in BCMS does not prevent them from having a hearing in the Division of Tax Appeals and thus need not be addressed further. Petitioners also asserted on the merits that the assessment is in error since it is based upon the information included on their Federal form 1040 and that their Federal liability is currently the subject of a hearing before the United States Court of Appeals.

We modify finding of fact "5" of the Chief Administrative Law Judge's determination to read as follows:

> On August 8, 2005, the Division of Tax Appeals mailed a Notice of Small Claims Hearing addressed to petitioners advising them that their hearing was scheduled for Wednesday, September 14, 2005 at 2:45 P.M. at the New York State Housing Finance Agency, 641 Lexington Avenue, Fourth Floor, New York, NY 10022.

> The notice was addressed to Robert and Jacqueline Poindexter at their Jamaica, New York address and showed the sender as the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York 12180-2894.[1]

On September 14, 2005, Presiding Officer Joseph Pinto called the ***Matter of Robert and Jacqueline Poindexter*** for hearing. Petitioners did not appear at the hearing. No written request for an adjournment of the hearing or other communication was received from petitioners. On September 22, 2005, Presiding Officer Pinto issued a default determination denying the petition of Robert and Jacqueline Poindexter.

We modify finding of fact "7" of the Chief Administrative Law Judge's determination to read as follows:

> On October 4, 2005, petitioners filed a request to vacate the default determination. The request was addressed to the Supervising Administrative Officer, Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York. The request indicated that petitioners had received the notice of hearing. However, Mr. Poindexter asserted that initially he mistakenly believed that the notice of hearing was for his son because it referred to the New York Housing Finance Agency and petitioners' son had been corresponding with New York housing departments for section 8 housing. Petitioners' son has the same name as Mr. Poindexter. According to petitioners, the notice was somehow lost. When petitioners realized their mistake, they attempted to locate a New York State tax facility on Lexington Avenue in Manhattan by calling 411 information operator and later, someone at BCMS in Albany. They could find not find information about any New York State tax facility on Lexington Avenue in Manhattan. Petitioners do not explain why they failed to call or write to the Troy Offices of the Division of Tax Appeals using the same address as they used on October 4, 2005 when requesting that the default determination be vacated.[2] [3]

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[1]We modified finding of fact "5" to more accurately reflect the record.

[2]The Notice of Hearing also contains the main phone number of the offices of the Division of Tax Appeals in Troy, New York.

[3]We modified finding of fact "7" to more accurately reflect the record.

With respect to the merits of their case, petitioners asserted that the disposition of their 1996 IRS taxes is still being decided in the U.S. Court of Appeals and the Federal decision will affect the outcome of their state and city taxes.

It is noted that the hearing notice in question contains a heading identifying the "DIVISION OF TAX APPEALS" in 18-point bold-face type. Furthermore, it is noted that petitioners had corresponded twice with the Division of Tax Appeals, each time addressing the envelope to the correct address and had twice received correspondence from the Division of Tax Appeals before receipt of the hearing notice. All correspondence from the Division of Tax Appeals contained its correct address as well as its telephone number and fax number.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge found that the record established that petitioners did not appear at the scheduled hearing or obtain an adjournment and that, accordingly, the presiding officer properly granted the Division of Taxation's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (***see***, ***Matter of Zavalla***, Tax Appeals Tribunal, August 31, 1995). The Chief Administrative Law Judge pointed out that once the default order was issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that they have a meritorious case (20 NYCRR 3000.13[d][3]; ***see also***, ***Matter of Zavalla***, ***supra***).

The Chief Administrative Law Judge found petitioners' excuse for failing to appear at the scheduled hearing less than persuasive. The Chief Administrative Law Judge noted that the heading appearing on the hearing notice issued to petitioners includes the name of the Division of Tax Appeals in 18-point bold type. The caption indicates in bold capital letters that it is a Notice of Small Claims Hearing. The Chief Administrative Law Judge did not find credible that

petitioner could confuse this hearing notice with a notice from a housing agency. Moreover, the Chief Administrative Law Judge pointed out, the hearing notice was addressed to Robert and Jacqueline Poindexter. Even if petitioners' son is also named Robert, the Chief Administrative Law Judge did not find credible that petitioners could be confused by the notice unless the son's wife was also named Jacqueline. Further, the Chief Administrative Law Judge noted that accepting, for purposes of argument, that petitioners were confused by the hearing notice, petitioners have not shown why they did not merely call or write to the Division of Tax Appeals to clear up any confusion on their part. It seems more likely, the Chief Administrative Law Judge observed, that petitioners were attempting to delay their hearing in the hope that they would be successful in their appeal of their Federal case. Accordingly, the Chief Administrative Law Judge found that petitioners failed to establish a reasonable excuse for their failure to appear at their hearing.

The Chief Administrative Law Judge noted that petitioners self-assessed the amount of tax shown on the personal income tax return which they filed with the Division of Taxation (***see***, Tax Law § 682[a]). While they have suggested that they would be able to file a more accurate return if only the IRS would subpoena information from certain record companies, the Chief Administrative Law Judge pointed out that they did not identify any item on their return which is incorrect in any way. Moreover, the Chief Administrative Law Judge observed, petitioners identified no error on their Federal return and have failed to show how their Federal appeal would have any effect on their New York return. Accordingly, the Chief Administrative Law Judge found that petitioners have failed to demonstrate a meritorious case.

ARGUMENTS ON EXCEPTION

On exception, petitioners make the same argument as were raised below. Petitioners claim that they were confused by the address on the notice of hearing and that their claim might have merit.

In its response, the Division of Taxation argues that petitioners have not shown an excuse for their failure to request an adjournment or to appear at the hearing. The Division of Taxation questions why petitioners did not contact the Division of Tax Appeals in Troy to find out the time and place of the hearing and, further, pointed out that petitioners have a history of defaulting in this matter. Moreover, the Division of Taxation asserted that petitioners have not established a meritorious case since they have not alleged that they do not owe the self-assessed tax reported on their return.

OPINION

The Rules of Practice of the Tax Appeals Tribunal provide that where a party fails 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 (20 NYCRR 3000.13[d][2]). These Rules also 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]; ***see also***, ***Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Ave.***, Tax Appeals Tribunal, May 4, 1989). In this case, the Chief Administrative Law Judge has correctly concluded that petitioners presented neither an acceptable excuse for defaulting in appearance nor a meritorious case. We do not find credible that petitioner could successfully contact the Division of Tax Appeals on

October 4, 2005 when requesting vacatur of the default order, but could not figure out how to contact the Division of Tax Appeals' offices to request an adjournment or clarify the place of hearing. Further, mere conclusory statements not supported by the facts will not suffice to prove a meritorious case (***see***, ***Matter of Grabowski***, Tax Appeals Tribunal, September 20, 2001; ***Matter of Morano's Jewelers of Fifth Ave.***, ***supra***). We find that the Chief Administrative Law Judge completely addressed the issues presented to him and correctly applied the Tax Law and relevant case law to the facts of this case. Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the order in any respect. Therefore, we affirm the order of the Chief Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert and Jacqueline Poindexter is denied;

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

3. The order of the Presiding Officer holding Robert and Jacqueline Poindexter in default is affirmed; and

4. The petition of Robert and Jacqueline Poindexter is denied.

DATED: Troy, New York
September 7, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/Robert J. McDermott
Robert J. McDermott
Commissioner