STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARTIN M. ESTRUCH	:	DECISION DTA NOS. 822326
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2005 and 2006.	:	AND 822510

Petitioner, Martin M. Estruch, filed an exception to the order of the Administrative Law Judge issued on September 10, 2009. Petitioner appeared by Underberg & Kessler, LLP (Scott D. Shimick, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. 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. Commissioner Tully took no part in the consideration of this 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 except for finding of fact "5," which has been modified. The Chief Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner claimed EZ wage tax credits and QEZE real property tax credits for tax years 2005 and 2006. The Division of Taxation disallowed the credits and issued Notice of Deficiency L-030251512-7 for tax year 2005 in the amount of $5,448.55 in tax and $1,091.23 in interest, and Notice of Deficiency L-028724334-9 for tax year 2006 in the amount of $4,497.37 in tax and $63.65 in interest.

Petitioner filed petitions dated June 6, 2008 and September 16, 2008 protesting the two assessments. On April 6, 2009, notices of small claims hearings were mailed to petitioner and petitioner's representative for the two petitions here at issue scheduling a small claims hearing at 340 East Main Street, Rochester, NY 14604 on Wednesday, May 13, 2009 at 10:45 AM.

On May 13, 2009, Presiding Officer Barbara Russo called the ***Matter of Martin M. Estruch*** involving the petitions here at issue. Petitioner failed to appear at the hearing in person or by his authorized representative. No one representing petitioner attempted to contact the Division of Tax Appeals in any manner. The representative of the Division of Taxation moved that petitioner be held in default.

On June 11, 2009, Presiding Officer Russo found petitioner in default and denied the petitions.

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

> Petitioner filed an application dated June 17, 2009 to vacate the June 11, 2009 default. The application consisted of a letter from petitioner's representative stating that his staff misfiled the hearing notice because it was their busy time of the year and that he was therefore "uninformed" of the scheduled hearing. In addition, the application included a letter previously sent to a conciliation conferee arguing the meaning of the relevant provisions of the Tax Law and whether such provisions permit special assessments to qualify for the QEZE real property tax credit. The documents referenced in this letter were not submitted in the application to vacate the default and the application does not specify what

special assessments were denied by the Division of Taxation. The Division did not file a response to petitioner's application.[1]

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Chief Administrative Law Judge noted that pursuant to section 3000.13 (d)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.), if 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 Chief Administrative Law Judge further observed that section 3000.13(d)(3) of such 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."

The Chief Administrative Law Judge found that petitioner did not appear at the scheduled hearing or obtain an adjournment and that the presiding officer correctly granted the Division's motion for default.

The Chief Administrative Law Judge found the excuse offered by petitioner's representative for not appearing to be "unconvincing." Further, the Chief Administrative Law Judge noted that petitioner had also received a copy of the hearing notice and he did not appear. The Chief Administrative Law Judge concluded that petitioner had failed to demonstrate that he had a valid excuse for his failure to appear for his hearing.

The Chief Administrative Law Judge found that petitioner's representative provided few specific details concerning the merits of his case. The Chief Administrative Law Judge stated

[1] We have modified this fact to more accurately reflect the record.

that it was difficult to assess the merits of the case without making certain assumptions about the expenses petitioner claimed as credits on his 2005 and 2006 income tax returns. As a result, the Chief Administrative Law Judge concluded that petitioner had failed to show that he has a meritorious case. Thus, the Chief Administrative Law Judge denied petitioner's motion to vacate the default determination.

ARGUMENTS ON EXCEPTION

On exception, the Division argues that petitioner has failed to establish that he has a meritorious case and a valid reason for not appearing at the hearing in this matter. The Division maintains that the notice of the proceeding was received in a timely manner by petitioner and his representative.

In reply, petitioner argues that he has a valid excuse for not attending the hearing because he relied on his representative to appear at the hearing and his representative failed to receive adequate notice of the hearing. Petitioner claims that the notice was never brought to the representative's attention because it was misfiled by someone in his office. Petitioner maintains that this allegedly occurred because the notice was not specifically marked "time sensitive," which should have been clearly stated on the envelope containing the notice. Petitioner asserts that the notice was received during a very busy time for the representative and that the Division of Tax Appeals should have known that a notice sent to an accountant at that time of year might be overlooked. Petitioner maintains that the Division of Tax Appeals should have known that any hearing scheduled at that time, or shortly thereafter, would be unduly burdensome on the representative.

Petitioner argues that he has a meritorious case in that he was not allowed the full extent of the QEZE credit claimed for the years at issue; to wit, petitioner was not allowed to claim a credit

for special district assessments that appeared on his Cortland County town and county tax bills. As "real property taxes" are not defined by the Tax Law, petitioner argues that under the plain meaning of the word "tax," these special district assessments should be included as real property taxes subject to the credit.

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) provides, in pertinent part, as follows:

> (4) 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 he and his representative 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 find that the Administrative Law Judge 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; ***see also, Matter of Franco***, Tax Appeals Tribunal, September 14, 1989).

A review of the record below and the exception filed by petitioner shows a failure to present an acceptable excuse to the supervising administrative law judge for not appearing at the scheduled hearing, as well as a failure to supply evidence of a meritorious case for consideration by this Tribunal.

Further, petitioner sought to introduce additional evidence with his brief in reply, which was rejected. We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (***see***, ***Matter of Purvin***, Tax Appeals Tribunal, October 9, 1997; ***see also***, ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). As a result, we do not consider as facts matters that were not made part of petitioner's application to vacate the default determination entered against him.

We find that the Chief Administrative Law Judge accurately and adequately addressed the issue presented to him and correctly applied the relevant law to the facts of this case. Thus, we

affirm the order of the Chief Administrative Law Judge denying petitioner's application to vacate the default determination entered against him.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Martin M. Estruch 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 Martin M. Estruch in default is affirmed; and

4. The petition of Martin M. Estruch is denied.

DATED:Troy, New York
May 20, 2010

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner