

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PHILIP A. NEWMAN : ORDER
for Redetermination of a Deficiency or for : DTA NO. 814621
Refund of Personal Income Taxes under Article :
22 of the Tax Law and the New York City :
Administrative Code for the Year 1989. :

A Default Order was mailed to petitioner on November 20, 1997, and petitioner made a request by written application that the default determination be vacated.

The following facts have been established by the pleadings and other information contained in the Division of Tax Appeals file:

On December 26, 1995, the Division of Tax Appeals received a petition from Philip A. Newman for redetermination of a deficiency or for refund of New York State and New York City personal income taxes for the year 1989. In the petition, petitioner argued that the Division of Taxation ("Division") had improperly found him liable as a person responsible for the withholding taxes of Media Horizons, Inc. He also stated that he had left the employ of Media Horizons, Inc. in April 1988, that the corporation had ceased operations in April 1989 and that there was no payroll for the corporation for the period July 23, 1989 through July 31, 1989, the period in issue in the deficiency.

On March 13, 1996, the Division filed an answer to the

petition, denying petitioner's claims and stating that during the period in issue petitioner was a person responsible for the payment of New York State and City withholding taxes and that Media Horizons, Inc. failed to pay over such taxes and, accordingly, petitioner was liable.

On March 26, 1996, petitioner elected to have this matter proceed as a small claims case.

On November 12, 1996, the Division of Tax Appeals notified petitioner that a small claims hearing in this matter had been scheduled for December 17, 1996 at 9:15 A.M. in New York City. On December 2, 1996, petitioner requested an adjournment of the hearing because he was traveling out of the country during the week of the hearing. He requested a hearing after the New Year. Petitioner's request was granted on December 13, 1996.

A second hearing was scheduled for April 7, 1997 at 10:15 A.M. in New York City. Petitioner appeared at this hearing; however, the hearing did not proceed to a conclusion because petitioner requested that his case be transferred out of the small claims unit and be transferred to an administrative law judge for a hearing and determination.

On May 15, 1997, the calendar clerk of the Division of Tax Appeals sent a calendar call notice to petitioner and the Division's attorney, Robert Tompkins, Esq., directing them to set a mutually convenient date for hearing during the months of September or October 1997. The calendar clerk was to be advised of the date by June 23, 1997.

Neither petitioners nor the Division's attorney,

Mr. Tompkins, sent a response. Accordingly, the Division of Tax Appeals set the hearing date, as the parties had been advised in the calendar call notice.

On September 2, 1997, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioner informing him that a hearing on his petition had been scheduled for Tuesday, October 7, 1997 at 1:15 P.M.

On September 8, 1997, petitioner again requested an adjournment of the hearing. His reason was, again, that he was going to be traveling out of the country during the hearing week. On September 10, 1997, Judge Ranalli denied petitioner's request, advising that the case was nearly two years old and had already been scheduled three times. He also reminded petitioner that the Division of Tax Appeals had provided petitioner the opportunity to choose a convenient date months before the hearing, but that petitioner had ignored that opportunity. Judge Ranalli did provide one final opportunity for petitioner to reschedule the hearing date, provided petitioner contacted the Division of Taxation's new attorney, Peter T. Gumaer, prior to the hearing date, and set a new date for a hearing to be held during the week of October 13, 1997. No further communications to the Division of Tax Appeals were forthcoming from petitioner.

On October 7, 1997 at 2:00 P.M., Administrative Law Judge Winifred M. Maloney called the matter for hearing. Neither petitioner nor any representative appeared. Peter T. Gumaer appeared for the Division and moved that a default order be issued to petitioner for his failure to appear at the hearing.

On October 22, 1997, petitioner sent a letter to the Division of Tax Appeals advising that he had attempted to contact Mr. Gumaer several times but had been unsuccessful. Petitioner had apparently left telephone messages for Mr. Gumaer on four occasions. In the letter, petitioner requested a new hearing date in December. Judge Ranalli replied to petitioner's letter, advising him that, inasmuch as he had failed to set a new hearing date prior to the date of the originally scheduled hearing, the hearing commenced without him, and Mr. Gumaer had made a motion to find petitioner in default. Judge Ranalli further advised petitioner that unless Mr. Gumaer withdrew the motion, a default order would be issued. Mr. Gumaer did not withdraw his motion and Judge Maloney issued a default determination on November 20, 1997.

On December 1, 1997, petitioner filed an application to have the default determination vacated. As an excuse petitioner submitted the same information he had previously submitted, i.e., that he had made repeated attempts to contact Mr. Gumaer to set a new hearing date, but that Mr. Gumaer had not returned his calls until nine days after the scheduled hearing date. There was no explanation offered as to why petitioner did not contact the Division of Tax Appeals during this period to advise of his problem.

To demonstrate a meritorious case, petitioner repeated the same allegations as were contained in his petition to the effect that Media Horizons, Inc. had ceased operations prior to the period in issue and that petitioner had terminated his

employment with Media Horizons in September 1988.

In response to petitioner's application, Mr. Gumaer filed a letter in which he stated that "[e]ach and every call was promptly returned by me. Petitioner was never available so I left messages. Petitioner would then wait days before trying again." Mr. Gumaer also states that as late as 1:15 P.M. on the day of the hearing he continued to attempt to contact petitioner to no avail. Finally, at 2:00 P.M., the hearing commenced and the default motion was made.

As to petitioner's claim of a meritorious case, Mr. Gumaer indicates that "there are several exhibits indicating that petitioner is responsible for the taxes at issue."

OPINION

A. 20 NYCRR 3000.15(b)(3) first requires that an excuse be shown in order to have a default determination vacated. Petitioner has had numerous opportunities both to schedule and appear at hearings in this matter. Except for one instance when he appeared at a hearing and then requested that the small claims hearing be stopped and the matter transferred to an administrative law judge, petitioner has demonstrated a consistent pattern of being too busy to either appear at a hearing or respond to inquiries from the Division of Tax Appeals and the Division of Taxation. Petitioner's hearing had to be scheduled three times in order to accommodate his schedule and yet, when he was provided the opportunity in May 1997 to select a date convenient to his own schedule, he failed to respond to the calendar call. Even when Judge Ranalli offered him one

final opportunity to reschedule the hearing, his pattern of missed telephone calls and his failure to even contact the Division of Tax Appeals until two weeks after the hearing indicate a lack of seriousness with regard to going forward with this matter. Petitioner was given a specific final deadline to fix a hearing date. It was his responsibility, not Mr. Gumaer's, to ensure that a date was set prior to the deadline; he failed to take this responsibility and accordingly has failed to show an excuse for his failure to appear at the hearing.

B. 20 NYCRR 3000.15(b)(3) also requires that a meritorious case be shown in order to have a default determination vacated. Petitioner made several allegations in his petition and his application to vacate; however, he has failed to submit any proof to support these allegations or even allege that he has any evidence that would substantiate his claims. At a minimum he should have itemized the amount and type of proof he would have offered at a hearing to prevail on his case. Mr. Gumaer has indicated that he has evidence demonstrating that petitioner was responsible for the taxes in issue. Petitioner, who has the burden of proof, has offered nothing and has therefore failed to demonstrate a meritorious case.

C. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued November 20, 1997 is sustained.

DATED: Troy, New York
December 31, 1997

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE