

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RENATE WERNER	:	ORDER
	:	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 a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 1997. A hearing on the petition was scheduled before Presiding Officer James Hoefler on November 17, 1999. Petitioner did not appear at the hearing. On December 23, 1999, a default determination denying the petition was issued by Presiding Officer Hoefler.

On January 17, 2000, petitioner filed a request that the December 23, 1999 default determination be vacated. The Division of Taxation appearing by Barbara G. Billett, Esq. (Herbert M. Friedman, Jr., Esq., of counsel) filed a response in opposition to petitioner's request on May 2, 2000.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.

4. 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.

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

CONCLUSIONS OF LAW

A. Section 3000.13(d)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.13[d][2]) provides: “[i]n 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.”

Section 3000.13(d)(3) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.13[d][3]) provides: “[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.”

B. There is no doubt on the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that she has a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano’s Jewelers of Fifth Avenue, supra*).

C. Petitioner has not established a reason for her failure to appear at the hearing. The power of attorney form submitted clearly sets out the limits of what Mr. von Kuthy was willing to do on petitioner’s behalf. However, even if petitioner was mistaken in believing that Mr. von Kuthy was authorized to request an adjournment, the fact remains that Mr. von Kuthy never submitted a written request for an adjournment. Clearly, no adjournment was ever granted.

Petitioner has set forth no circumstances which could have led her to conclude that an adjournment had been granted. Accordingly, I conclude that petitioner has not established reasonable cause for her failure to appear at her hearing.

D. Petitioner has made no assertions whatsoever in her request to vacate the default regarding the merits of her case. However, in her petition, petitioner alleges that the Division of Taxation erred in not recognizing her transfer of the real property as exempt from tax since the transferee is a not-for-profit organization. Section 1405 of the Tax Law contains the exemptions from the tax imposed under Article 31 of the Tax Law. Section 1405 does not contain an exemption from tax for transfers to not-for-profit organizations. Petitioner has not asserted any other grounds for exemption of her transfer of the real property. Accordingly, I find that petitioner has not established that she has a meritorious case.

E. The request of Renate Werner to vacate the default determination issued December 23, 1999 is denied.

DATED: Troy, New York
June 29, 2000

 /s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE