

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MENSCH MILL & LUMBER CORPORATION : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 817686
Personal Income Tax under Article 22 of the Tax Law for :
the Period July 1, 1998 through September 30, 1998. :

Petitioner, Mensch Mill & Lumber Corporation, 35 - 20 College Point Blvd., Flushing, New York 11354 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period July 1, 1998 through September 30, 1998. A hearing on the petition was scheduled before Presiding Officer James Hoefer at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York 11787 on Wednesday, November 15, 2000 at 1:15 P.M. Neither petitioner nor its representative appeared at the hearing. On December 7, 2000, a default determination denying the petition was issued by Presiding Officer Hoefer.

On February 13, 2001, petitioner, appearing by Nick Mastrogiannis, CPA, filed a request that the December 7, 2000 default determination be vacated. The Division of Taxation, appearing by Barbara G. Billett, Esq. (Peter T. Gumaer, Esq., of counsel) filed a response in opposition to petitioner's request on March 9, 2001.

FINDINGS OF FACT

1. On June 1, 1999 and April 4, 2000, the Division of Taxation (the "Division") issued to petitioner personal income tax assessments L016413726, for the period 7/1/98 - 9/30/98, and

L016903243, for the period 10/1/98 - 12/31/98. The assessments involved penalties imposed by the Division for failure to timely file quarterly withholding tax returns. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) with respect to the two assessments. Petitioner’s request resulted in the cancellation by BCMS of assessment L016913243. However, petitioner’s request was denied by BCMS with respect to assessment L016413726 because the conferee determined that the request was made more than 90 days after the issuance of the statutory notice. On May 4, 2000, petitioner filed a petition challenging assessment L016413726.

2. A hearing in this matter was scheduled for November 15, 2000 in Hauppauge, New York. A Notice of Small Claims Hearing was mailed on October 10, 2000 to advise petitioner and its representative of the impending hearing.

3. On November 15, 2000, Presiding Officer James Hoefer called the *Matter of Mensch Mill & Lumber Corporation* for hearing. Neither petitioner nor its representative appeared at the hearing, requested an adjournment of the hearing or otherwise communicated with the Division of Tax Appeals. On December 7, 2000, Presiding Officer Hoefer issued a default determination denying the petition of Mensch Mill & Lumber Corporation.

4. On February 9, 2001, petitioner’s representative filed a request to vacate the default determination. Petitioner’s representative never directly addresses the reason for failing to appear at the hearing in his request. Instead, the representative stated that there must have been a misunderstanding and that he was under the impression that both assessments were being dealt with by the conciliation conferee. Attached to the request is a copy of a BCMS consent form which cancels the penalty imposed by assessment L016903243 as well as a BCMS conciliation

order for assessment L016413726 which dismisses petitioner's request for conference because the request was filed late.

5. Petitioner's request to vacate the default determination does not address the merits of petitioner's case regarding the timeliness of its request for a conciliation conference. However, attached to the request are copies of checks and withholding returns.

6. In its response, the Division of Taxation argues that petitioner has shown neither an excuse for its 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

it 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's request to vacate the default determination does not explain why petitioner did not appear at the hearing. While petitioner's representative hints vaguely of some misunderstanding, this suggestion of a misunderstanding does not demonstrate reasonable cause. If the representative thought that the assessment had been canceled, why would he have filed a petition for a hearing with the Division of Tax Appeals? This is not explained. Even assuming that there was some confusion on the part of the representative, petitioner has not explained why it could not contact the Division of Tax Appeals when it received its hearing notice instead of just ignoring it. Accordingly, I find that petitioner has not established reasonable cause for its failure to appear for its hearing.

D. The issue in this matter is whether BCMS properly dismissed petitioner's request for a conciliation conference because the request was filed late. Neither the petition nor the request to vacate the default determination addresses this issue in any manner. Accordingly, I find that petitioner has not established that it has a meritorious case.

E. The request of Mensch Mill & Lumber Corporation to vacate the default determination issued December 7, 2000 is denied.

DATED: Troy, New York
May 10, 2001

/s/ Andrew M. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE