

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT M. AND CATHERINE A. LEWIS	:	ORDER
	:	DTA NO. 817976
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1995, 1996 and 1997.	:	

Petitioners, Robert M. and Catherine A. Lewis, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1995, 1996 and 1997.

A hearing was scheduled before Presiding Officer Arthur Johnson at the offices of the Division of Tax Appeals, Westchester District Office, 90 South Ridge Street, Rye Brook, New York on December 13, 2001 at 2:45 P.M. Petitioners failed to appear and a default determination was duly issued. Petitioners have made a written request that the default determination be vacated. The Division of Taxation has filed a response opposing petitioners' request.

Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On August 2, 2000, the Division of Tax Appeals received a petition from Robert M. and Catherine A. Lewis protesting a conciliation order issued by the Bureau of Conciliation and Mediation Services which sustained the denial of petitioners' request for a refund of New York State personal income tax for the years 1995, 1996 and 1997.

2. On November 5, 2001, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioners and to the Division of Taxation advising them that a hearing had been scheduled for Thursday, December 13, 2001 at 2:45 P.M. in the Westchester District Office at 90 South Ridge Street, Rye Brook, New York 10573-2800.

3. At no time did petitioners respond to the notice of hearing. On December 13, 2001, at 2:45 P.M., Presiding Officer Arthur Johnson commenced a hearing in the ***Matter of Robert M. and Catherine A. Lewis***. Petitioners did not appear at the hearing and a default was duly noted. On January 10, 2002, Presiding Officer Johnson issued a default determination against petitioners.

4. On February 7, 2002, petitioners filed an application to vacate the default determination. Petitioners asserted that due to an illness they were unable to attend the scheduled hearing.

With respect to the merits of their case, petitioners assert that they are seeking a refund because, as nonresidents of New York State, they incorrectly paid New York State personal income tax on all of Mr. Lewis's income when, in fact, he worked only part of the time in New York State. Petitioners assert that they can document days worked in and out of New York to prove their entitlement to the refund.

5. The Division of Taxation by its letter of March 8, 2002 opposes petitioner's request to vacate the default and questions why, if Mr. Lewis was too ill to attend the hearing, Mrs. Lewis could not have appeared in his place. In addition, the Division questions why petitioners could not make a telephone call to the Division of Tax Appeals on the day of the hearing to state that they would be unable to appear. The Division of Taxation asserts that petitioners' "failure to make a courtesy telephone call, and then delay for nearly a month after the hearing before sending a letter regarding Petitioners' failure to appear, demonstrates a lack of good faith."

With respect to the merits of petitioners' case, the Division asserts that petitioners have failed to sufficiently document their claim to meet their burden of proving a meritorious case.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "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." (20 NYCRR 3000.13[d][2].) The rules further provide that: "Upon 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].)

B. There is no doubt based upon the record presented in this matter that petitioners 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 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; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. The Division of Taxation does not contest that Mr. Lewis was ill on the date of his hearing. However, the Division points out that petitioners could at the very least have called to say that they would not be appearing for the hearing. Both the Division of Tax Appeals and the Division of Taxation incurred the expense of sending personnel to Rye Brook to give petitioners the opportunity to contest the denial of their refund claim. This could have been avoided with a simple phone call from petitioners.

On the other hand, it seems unlikely that Mrs. Lewis could have effectively represented petitioners since it is Mr. Lewis's days in and out of New York that are at issue. Moreover, since this matter involves review of the denial of a refund claim, petitioners would have little to gain from delaying the resolution of this matter. Accordingly, I find that Mr. Lewis's illness establishes reasonable cause for petitioners' failure to appear at their hearing.

D. Petitioners assert that they have a meritorious case because Mr. Lewis paid New York tax on all of his earnings even though, as a nonresident, he should have paid tax based upon days worked in New York. Petitioners assert that they have documentation to demonstrate which days were worked in New York. Petitioners are required by the regulations to demonstrate that they have a meritorious case because it would be pointless to reopen a matter in which petitioners have no chance of prevailing. In the instant matter, petitioners have raised a legitimate issue and have described the evidence which they seek to introduce at hearing. If petitioners can prove what they have alleged, they would be entitled to some relief. While petitioners have not yet proven that they are entitled to the relief sought, they have demonstrated

enough that it may be said that they have a meritorious case and should be given the opportunity to prove their case.

E. It is ordered that the request to vacate the default order be, and it is hereby, granted and the Default Determination issued January 10, 2002 is vacated. This matter will be scheduled for hearing on Thursday, June 27, 2002 at 10:30 A.M. at the offices of the Division of Tax Appeals in Troy, New York. A notice of hearing will be issued in due course.

DATED: Troy, New York
May 9, 2002

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE