

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SUMAN K. AND SASHI KHANNA** : ORDER  
for Redetermination of a Deficiency or for Refund of : DTA NO. 819444  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1998. :

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Petitioners, Suman K. and Sashi Khanna, 63-84 Fitchett Street, A-2, Rego Park, New York 11374, 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 year 1998.

A hearing was scheduled before Administrative Law Judge Dennis Galliher at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on Tuesday, February 24, 2004 at 9:15 A.M. Petitioners failed to appear and a default determination was duly issued. Petitioners have made a written request dated April 13, 2004 that the default determination be vacated. On April 21, 2004, the Division of Taxation filed a response in opposition to petitioners' application to vacate the default.

Petitioner Suman K. Khanna appeared on his own behalf and for his spouse. The Division of Taxation ("the Division") appeared by Mark F. Volk, Esq. (John E. Matthews, 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 March 27, 2003, the Division of Tax Appeals received a petition from Suman K. and Sashi Khanna protesting a Notice of Deficiency issued by the Division of Taxation which asserted a deficiency of New York State personal income tax for the year 1998.<sup>1</sup> Petitioners had requested a conference in the Bureau of Conciliation and Mediation Services (“BCMS”) but their request for a conference had been dismissed as untimely.

2. On July 1, 2003, the calendar clerk of the Division of Tax Appeals mailed to Benjamin Zadka, petitioners’ former representative, a Stipulation for Discontinuance of Proceedings upon Recission of a Conciliation Order Dismissing a Request and advised him that:

The Bureau of Conciliation and Mediation Services has advised us that they have rescinded the Conciliation Order Dismissing Request previously mailed.

As such, timeliness of your client’s conference request is not at issue. Therefore, please sign and return the enclosed stipulation as your petition in this matter is no longer necessary.

At a later date the Bureau of Conciliation and Mediation Services will schedule a conference on the *merits*. If not resolved to your satisfaction by the conciliation conferee, you will be allowed to proceed before the Division of Tax Appeals as stated in the stipulation.

Please note that if you do not return the stipulation immediately, we will schedule a hearing on timeliness.

3. Petitioners did not sign and return the stipulation as requested. Accordingly, the assistant calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated July 17, 2003 to petitioners, to petitioners’ former representative and to the Division of Taxation advising them to contact each other to set a mutually convenient

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<sup>1</sup> While the petition indicates that the 1997 and 1998 tax years are being protested, the assessment at issue covers only the 1998 tax year.

hearing date during the months of November or December 2003. Petitioners did not respond to this notice.

4. On September 5, 2003, John E. Matthews, the Division of Taxation's representative, advised petitioners' former representative by letter that:

You should recently have received the enclosed Notice of Hearing from the Division of Tax Appeals, asking the parties to select a hearing date. Prior to that notice, you should also have received the enclosed Stipulation of Discontinuance from the Division of Tax Appeals. Since this matter has been taken back by the Bureau of Conciliation and Mediation Services, and a conference has been scheduled for September 16, 2003, the related matter at the Division of Tax Appeals needs to be closed. Please execute the enclosed Stipulation and return a copy to me and to the Division of Tax Appeals so that this matter can be concluded. As noted within the Stipulation, you still retain the right to return to the Division of Tax Appeals if the matter is not resolved to your satisfaction at the Bureau of Conciliation and Mediation Services.

However, petitioners did not sign and return the stipulation as requested.

5. On September 16, 2003, petitioners took part in a conciliation conference at the Bureau of Conciliation and Mediation Services. On December 5, 2003 a conciliation order was issued denying petitioners' request and sustaining the assessment.

6. On January 19, 2004, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that a hearing was scheduled for February 24, 2004 at the Division of Tax Appeals offices in Troy, New York. Petitioners did not respond to the Notice of Hearing.

7. On February 6, 2004, John E. Matthews, the Division of Taxation's representative advised the petitioners by a fax transmittal:

Here is a letter and stipulation that I sent to Mr. Zadka in September. Please sign the stipulation and fax it back to me. I have also sent you a blank petition - fill this in, attach a copy of the BCMS order you received recently and dated 12 - 5 - 03. Then mail it to the address on page 4. The hearing for 2/24 will be cancelled and you can get a new hearing in NYC a few months later.

Petitioners did not follow Mr. Matthew's advice in any respect.

8. On February 24, 2004 at 9:15 A.M., Administrative Law Judge Dennis Galliher called the *Matter of Suman K. and Sashi Khanna*, involving the petition here at issue. Present was Mr. Matthews as representative for the Division of Taxation. Neither petitioner appeared, and no representative appeared on their behalf. The attorney for the Division of Taxation advised the administrative law judge that petitioners had been made aware of the hearing and the importance of attending the hearing and moved that petitioners be held in default. On March 19, 2004, Administrative Law Judge Galliher issued an order finding petitioners in default.

9. On March 29, 2004, petitioners filed a new petition protesting the same assessment as the instant petition. By letter dated April 1, 2004, petitioners' former representative was advised that they could not file a second petition inasmuch as they had already filed a petition and received a default determination. Mr. Zadka was advised that petitioners' only option was to move to vacate the default determination.

10. On April 16, 2004 petitioners filed a request to vacate the default determination. In their request they state:

1. The hearing to be held at Troy on Tuesday, 2-24-04 at 9:15 AM was a Stipulation for discontinuance of Proceedings was filed on 2-20-04 after speaking to counsel John E. Matthews [sic].

2. I was advised by counsel John E. Matthews not to appear at Troy on 2-24-04. Please find herewith enclosed letter sent by fax to me and cover page. We signed and faxed it back to him.

In addition, petitioners assert that Mr. Zadka, their former representative, was involved in an automobile accident and that he still has all of their files and paperwork.

11. Attached to the request to vacate the default determination is a copy of a fax transmittal cover sheet from Mr. Matthews to Mr. Khanna. It reads, "Here is another copy of the stipulation that I sent you last week. Please sign the stipulation and fax it back to me. Thank

you.” Also attached is a Stipulation for Discontinuance of Proceeding Upon Recission of A Conciliation Order Dismissing A Request. The stipulation was signed by Mr. Matthews on September 5, 2003 and by Mr. Khanna on February 20, 2004. The signed stipulation was not filed with the Division of Tax Appeals until April 16, 2004. Petitioners never provided a copy of the signed stipulation to the Division of Taxation. It is noted that a different copy of the same stipulation was included with petitioners’ second petition. That copy indicated that it was signed by Mr. Khanna on December 6, 2003 although it was not filed with the Division of Tax Appeals until March 29, 2004.

While petitioners assert that Mr. Zadka was involved in an automobile accident, they do not specify when the accident occurred or to what extent Mr. Zadka was prevented from representing them. Petitioners do not assert that their default was due to Mr. Zadka’s accident. On June 22, 2004, petitioners’ new representatives filed a power of attorney authorizing them to represent petitioners in the instant matter.

12. Petitioners have made no assertions whatsoever with regard to the merits of their case. In fact, it is not possible to determine from the information submitted by petitioners what they are protesting in this petition.

13. By letter dated April 21, 2004, the Division of Taxation has opposed petitioners’ request. In the letter, Mr. Matthews pointed out the steps he took to assist petitioners and that petitioners never responded to him. In particular, Mr. Matthews indicates that, “I am in receipt of your cover letter of April 20, 2004, and the attached correspondence from Mr. Khanna. Previously I had not been provided with a copy of the Stipulation of Discontinuance signed by Mr. Khanna.” There is nothing in this case file which substantiates Mr. Khanna’s claim that he

sent a copy of the signed stipulation to Mr. Matthews or conflicts with Mr. Matthews's assertion that he never received one.

### **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 administrative law judge 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 3000.15[b][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 3000.15[b][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 administrative law judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(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 had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Nicholson*, Tax Appeals Tribunal, October 30, 2003; *Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioners have failed to establish a reasonable cause for their failure to appear at their hearing. Petitioners are in their present predicament because they ignored every attempt by the Division of Taxation and the Division of Tax Appeals to assist them in complying with the procedural requirements of the tax appeals process. While petitioners wish to place the blame on

the Division of Taxation, it is clear that their own inaction caused the default. Petitioners knew that they had not obtained an adjournment of their hearing. They also knew that they had not taken any of the steps required to obtain an adjournment. Thus, their claim that Mr. Matthews advised them that they did not have to appear at the hearing is simply inconsistent with the advice he is demonstrated to have given them.

D. Section 3000.15(b)(3) of the Rules of Practice and Procedure requires petitioners to also demonstrate that they have a meritorious case in order to have their default vacated. Petitioners have failed entirely to address the merits of their case in their request to vacate. In fact, it is unknown why petitioners object to the assessment issued against them by the Division of Taxation. Accordingly, petitioners have failed to demonstrate that they have a meritorious case (*see, Matter of First Class Pizza & Restaurant, Inc.*, Tax Appeals Tribunal, April 24, 2003).

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued March 19, 2004 is sustained.

DATED: Troy, New York  
July 15, 2004

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE