STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT AND JACQUELINE POINDEXTER	:	ORDER DTA NO. 820279
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1996.	:	
	:	

Petitioners, Robert and Jacqueline Poindexter, 153-27 120th Avenue, Jamaica, New York 11434, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1996. A hearing on the petition was scheduled before Presiding Officer Joseph Pinto on September 14, 2005. Petitioners did not appear at the hearing. On September 22, 2005, Presiding Officer Pinto issued a default determination denying the petition.

On October 4, 2005, petitioners, appearing *pro se*, filed a request that the September 22, 2005 default determination be vacated. The Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Andrew S. Haber, Esq., of counsel), filed a response in opposition to petitioners' request on October 21, 2005.

Based upon the record and pleadings filed in this matter, Andrew F. Marchese, Chief Administrative Law Judge, issues the following order.

FINDINGS OF FACT

1. On April 15, 1997, petitioners filed their 1996 Federal income tax return reporting tax of $66,874.00 with no withholding, no estimated tax payments and no payments with the return. On June 2, 1997, the Internal Revenue Service issued to petitioners a notice and demand for payment of the amount shown on their return. Petitioners did not make the payments demanded and the IRS notified petitioners of its intent to execute a levy to collect the unpaid liability. Petitioner Robert Poindexter submitted a Request for a Collection Due Process Hearing. In the request, petitioner, who is a songwriter, stated that he was in a dispute with certain record companies over royalties due him with regard to songs he had written. Petitioner requested that the IRS subpoena information from the record companies so that he could file a more accurate return. The Appeals Office denied the request for subpoenas and sustained the proposed collection action. Petitioner appealed that decision to the United States Tax Court. The Tax Court ruled that while petitioner was entitled to challenge the underlying tax liability, he had failed to raise any justiciable issue or identify any item on his return that was incorrect (***Robert Eugene Poindexter v. Commissioner***, 122 TC 280). The decision of the Tax Court was affirmed by the U.S. Court of Appeals (***Poindexter v. Commissioner***, 132 Fed Appx 919) and petitioner has now filed a petition for rehearing in that matter.

2. Similarly, petitioners timely filed their New York State resident personal income tax return for the year 1996 reporting taxable income of $169,404.00 and reporting New York State and New York City personal income tax due of $19,335.00 plus underestimation penalty of $34.00. Petitioners included payment of $5,000.00. On July 7, 1997, the Division of Taxation issued a notice and demand (L-013821803) for $14,301.00 in tax as reported on the return plus penalty and interest.

3. Petitioners challenged the notice and demand by filing a request for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS scheduled a conciliation conference on August 10, 2004; however, petitioners failed to appear and a Conciliation Default Order was issued on September 3, 2004.

4. Petitioners next filed a petition with the Division of Tax Appeals which was received on December 1, 2004. In their petition, petitioners first addressed the circumstances surrounding their default at their conciliation conference. Inasmuch as petitioners filed a timely petition with the Division of Tax Appeals, their default at BCMS places them in the same position procedurally as if they had never requested a conciliation conference in the first instance. Hence their default in BCMS does not prevent them from having a hearing in the Division of Tax Appeals and thus need not be addressed further. Petitioners also asserted on the merits that the assessment is in error since it is based upon the information included on their Federal form 1040 and that their Federal liability is currently the subject of a hearing before the United States Court of Appeals.

5. On August 8, 2005, the Division of Tax Appeals mailed to petitioners a Notice of Small Claims Hearing advising petitioners that their hearing was scheduled for Wednesday, September 14, 2005 at 2:45 P.M. at the New York State Housing Finance Agency, 641 Lexington Avenue, Fourth Floor, New York, NY 10022. The notice was addressed to Robert and Jacqueline Poindexter at their Jamaica, New York address.

6. On September 14, 2005, Presiding Officer Joseph Pinto called the ***Matter of Robert and Jacqueline Poindexter*** for hearing. Petitioners did not appear at the hearing. No written request for an adjournment of the hearing or other communication was received from petitioners.

On September 22, 2005, Presiding Officer Pinto issued a default determination denying the petition of Robert and Jacqueline Poindexter.

7. On October 4, 2005, petitioners filed a request to vacate the default determination. The request indicated that petitioners had received the notice of hearing. However, Mr. Poindexter asserted that initially he mistakenly believed that the notice of hearing was for his son because it referred to the New York Housing Finance Agency and petitioners' son had been corresponding with New York housing departments for section 8 housing. Petitioners' son has the same name as Mr. Poindexter. According to petitioner, the notice was somehow lost. When petitioner realized his mistake, he attempted to locate a New York State tax facility on Lexington Avenue in Manhattan but was unable to do so.

8. With respect to the merits of their case, petitioners asserted that the disposition of their 1996 IRS taxes is still being decided in the U.S. Court of Appeals and the Federal decision will affect the outcome of their state and city taxes.

9. It is noted that the hearing notice in question contains a heading identifying the "DIVISION OF TAX APPEALS" in 18-point bold-face type. Furthermore, it is noted that petitioners had corresponded twice with the Division of Tax Appeals, each time addressing the envelope to the correct address and had twice received correspondence from the Division of Tax Appeals before receipt of the hearing notice. All correspondence from the Division of Tax Appeals contained its correct address as well as its telephone number and fax number.

10. In its response, the Division of Taxation argued that petitioners have not shown an excuse for their default. The Division of Taxation questioned why petitioners did not contact the Division of Tax Appeals to find out the time and place of the hearing and, further, pointed out that petitioners have a history of defaulting in this matter. Moreover, the Division of Taxation

asserted that petitioners have not established a meritorious case since they have not alleged that they do not owe the self-assessed tax stated on their return. Finally, the Division of Taxation asserts that petitioners' Federal suit lacks any merit whatsoever.

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 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. Petitioners' excuse for not appearing at hearing is less than persuasive. The heading of the hearing notice which petitioners received includes the name of the Division of Tax Appeals

in 18-point bold type. The caption indicates in bold capital letters that it is a Notice of Small Claims Hearing. I do not see how anyone could confuse this with a notice from a housing agency. Moreover, the notice is addressed to Robert and Jacqueline Poindexter. Even if petitioners' son is also named Robert, I fail to see how this could be confusing unless the son's wife is also named Jacqueline. Even if we accept for the purposes of argument that this was all nothing more than a merry mix-up on petitioners' part, I fail to see why petitioners did not merely call or write to the Division of Tax Appeals to clear up any confusion on their part. It seems more likely to me that petitioners were attempting to delay their hearing in the hope that they would be successful in their appeal of their Federal case. Accordingly, I must conclude that petitioners have not established reasonable cause for their failure to appear at their hearing.

D. Petitioners self-assessed the amount of tax shown on the return which they filed with the Division of Taxation (Tax Law § 682[a]). While they have vaguely suggested that they will be able to file a more accurate return if only the IRS will subpoena information from certain record companies, they have yet to identify any item on their return which is incorrect in any way. Moreover, petitioners have identified no error on their Federal return and have failed to show how their Federal appeal would have any affect on their New York return. Petitioners' appeals appear to be based upon a ruse to invoke the Internal Revenue Service's subpoena powers to gain advantage in a private dispute with third parties. Accordingly, I find that petitioners have failed to demonstrate a meritorious case.

E. The request of Robert and Jacqueline Poindexter to vacate the default determination issued September 22, 2005 is denied.

DATED: Troy, New York
January 5, 2006

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE