

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH A. INSINGA	:	ORDER
	:	DTA NO. 821924
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2003.	:	

Petitioner, Joseph A. Insinga, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2003.

A hearing was scheduled before Presiding Officer Barbara Russo at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on Friday, November 7, 2008 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated November 30, 2008 that the default determination be vacated. On December 22, 2008, petitioner submitted additional information with regard to his request to vacate the default determination. The Division of Taxation raised no objection to petitioner's application.

Petitioner appeared pro se. The Division of Taxation (the Division) was given an opportunity to respond to the application to vacate by January 28, 2009 but did not do so.

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

FINDINGS OF FACT

1. Petitioner, a nonresident of New York, filed a petition protesting the disallowance of an alimony deduction claimed on his 2003 personal income tax return. In its answer filed on December 19, 2007, the Division of Taxation affirmatively stated that Tax Law § 631(b)(6) provides that the deduction for alimony shall not be a deduction derived from New York sources.

2. On September 29, 2008, the Division of Tax Appeals mailed to the parties a Notice of Small Claims Hearing scheduling a hearing in the instant matter for November 7, 2008 at 9:15 A.M. at 1740 Broadway, New York, NY 10019.

3. On November 7, 2008, Presiding Officer Barbara Russo called the ***Matter of Joseph A. Insinga*** involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a duly authorized representative. At no time did petitioner request an adjournment of the hearing. The representative of the Division of Taxation moved that petitioner be held in default.

4. On November 20, 2008, Presiding Officer Russo found petitioner in default and denied petitioner's petition.

5. Petitioner filed an application dated November 30, 2008 to vacate the November 20, 2008 default. On December 22, 2008, petitioner submitted additional information with respect to his application. Petitioner explained that he had become violently ill on November 3, 2008 necessitating a visit to the emergency room of his local hospital. By November 7, 2008, the day of the hearing, he had still not recovered sufficiently to be able to attend his hearing. Petitioner submitted his hospital records to substantiate his assertions.

6. Petitioner asserts that by denying his alimony deduction, New York State is taxing the same income twice. Unfortunately, petitioner has provided no specifics regarding what he claimed as a deduction or what was denied by the Division of Taxation.

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 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 3000.13[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 petitioner did not appear at the hearing scheduled in this matter or obtain an adjournment. Therefore, the small claims 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 he had a meritorious case (20 NYCRR 3000.13[d][3]; *see also Matter of Zavalla; Matter of Morano’s Jewelers of Fifth Avenue*).

C. Petitioner has demonstrated that he had a valid excuse for failing to attend his hearing. He substantiated that he was seriously ill at the time and was unable to travel to New York to attend his hearing.

D. It is not clear from the record before me what petitioner claimed as an alimony deduction on his return. Moreover, it is not clear what modification the Division of Taxation made to the deduction claimed by petitioner. It is clear, however, that the Division of Taxation purports to rely upon a section of the law, Tax Law § 631(b)(6), which was declared unconstitutional some eight years before the instant matter was commenced (*Matter of Lunding v New York Tax Appeals Tribunal*, 522 US 287, 118 S Ct 766, 139 L Ed 2d 717 [1998]).

E. Under these circumstances, I find that there is sufficient merit to petitioner's case to warrant a hearing to determine whether petitioner's alimony deduction was correctly computed by the Division of Taxation.

F. It is ordered that the application to vacate the default determination be, and it is hereby, granted and the Default Determination issued on November 20, 2008 is vacated. A new hearing shall be scheduled in due course.

DATED: Troy, New York
March 19, 2009

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE