

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petitions	:	
of	:	
<b>MARTIN M. ESTRUCH</b>	:	ORDER
for Redetermination of a Deficiencies or for Refund of	:	DTA NOS. 822326
Personal Income Tax under Article 22 Tax Law for the	:	AND 822510
Years 2005 and 2006.	:	

---

Petitioner, Martin M. Estruch, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2005 and 2006.

A small claims hearing was scheduled before Presiding Officer Barbara Russo at the offices of the Division of Tax Appeals, 340 Main Street, Rochester, New York, on Wednesday, May 13, 2009 at 10:45 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated June 17, 2009 that the default determination be vacated. The Division of Taxation was given until July 22, 2009 to file a response to petitioner's application but declined to do so.

Petitioner appeared by Jon M. LaDelfa, CPA.

Upon a review of the entire case file in this matter as well as the arguments presented by petitioner for vacatur of the default determination, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. Petitioner claimed EZ wage tax credits and QEZE real property tax credits for tax years 2005 and 2006. The Division of Taxation disallowed the credits and issued Notice of Deficiency

L-030251512-7 for tax year 2005 in the amount of \$5,448.55 in tax and \$1,091.23 in interest and Notice of Deficiency L-028724334-9 for tax year 2006 in the amount of \$4,497.37 in tax and \$63.65 in interest.

2. Petitioner filed petitions dated June 6, 2008 and September 16, 2008 protesting the two assessments. On April 6, 2009, notices of small claims hearings were mailed to petitioner and petitioner's representative for the two petitions here at issue scheduling a small claims hearing at 340 East Main Street, Rochester, NY 14604 on Wednesday, May 13, 2009 at 10:45 AM.

3. On May 13, 2009, Presiding Officer Barbara Russo called the *Matter of Martin M. Estruch* involving the petitions here at issue. Petitioner failed to appear at the hearing in person or by his authorized representative. No one representing petitioner attempted to contact the Division of Tax Appeals in any manner. The representative of the Division of Taxation moved that petitioner be held in default.

4. On June 11, 2009, Presiding Officer Russo found petitioner in default and denied the petitions.

5. Petitioner filed an application dated June 17, 2009 to vacate the June 11, 2009 default. The application consists of a letter from petitioner's representative stating that his staff misfiled the hearing notice because it was their busy time of the year and that he was therefore "uninformed" of the scheduled hearing. In addition, the application includes a letter previously sent to a conciliation conferee arguing the meaning of the relevant provisions of the Tax Law and whether they permit special assessments to qualify for the QEZE real property tax credit. The documents referenced in this letter were not submitted in the application to vacate the default and the application does not specify what special assessments were 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 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. It is understandable that people do sometimes make mistakes. Under some circumstances, mistakes may even constitute reasonable cause. However, in the instant matter, the representative’s excuse that the hearing notice was misfiled because he was busy strikes me as unconvincing. Moreover, it should be noted that petitioner also received a copy of the hearing notice. Even if we accept that the representative misfiled his copy of the notice, it remains unexplained why petitioner did not appear at the hearing or at the very least did not contact his

representative to inquire about the hearing notice he received. Accordingly, I find that petitioner has failed to show a valid excuse for not attending the hearing.

D. Petitioner's representative has explained in detail how his interpretation of the relevant statutes differs from that of the Division of Taxation. However, he has provided few details regarding the specific items claimed by petitioner. It is difficult to assess the merits of petitioner's case without making certain assumptions about the expenses petitioner claimed as credits on his returns for 2005 and 2006. Accordingly, I must conclude that petitioner has failed to show that he has a meritorious case. Since petitioner has failed to show a valid excuse for failing to appear, the merits of petitioner's case are rendered moot in any event.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on June 11, 2009 is sustained.

DATED: Troy, New York  
September 10, 2009

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE