STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAULINO HERNANDEZ	:	ORDER DTA NO. 823226
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2007.	:	

Petitioner, Paulino Hernandez, 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 2007. 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 Wednesday, September 29, 2010 at 9:30 A.M. Petitioner failed to appear and a Default Determination was duly issued on October 21, 2010. Petitioner, appearing pro se, filed a written application on January 11, 2011, requesting that the Default Determination be vacated. The Division of Taxation, appearing by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a written opposition to petitioner's application on January 26, 2011. Upon a review of the entire case file in this matter, Supervising Administrative Law Judge Daniel J. Ranalli issues the following order.

FINDINGS OF FACT

1. Petitioner, Paulino Hernandez, timely filed his New York State Resident Income Tax Return (Form IT-201) with the Division of Taxation (Division) for the year 2007, claiming a

refund of $1,735.00. This amount included a school tax credit in the amount of $145.00 and New York State and New York City earned income credits.

2. The Division commenced a correspondence audit of petitioner's 2007 tax return by a letter, dated March 10, 2008, requesting documentation in support of petitioner's reported income and claimed qualifying dependents.

3. On April 17, 2008, the Division sent a subsequent letter to petitioner informing him that additional documentation was required in order to process the claimed refund. The letter stated, in part, "[a]ll of the documentation requested in this letter must be provided for your refund to be considered . . . . If we do not receive a reply within 30 days from the date of this letter, we will close this case and deny your refund."

4. Petitioner then submitted a letter to the Division, dated May 27, 2008, with supporting documentation attached.[1] From the information provided, the Division determined that petitioner's dependents were properly claimed. However, the Division also determined that the remaining documentation failed to substantiate petitioner's reported income and, by letter dated July 14, 2008 (refund denial), informed petitioner that his claimed refund was partially denied. Specifically, the refund denial stated that while the claimed school tax credit would be allowed, the remaining claimed refund (i.e., $1,590.00) was disallowed.

5. Thereafter, petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS) seeking to dispute the refund denial. On June 19, 2009, a

[1] The attached documentation included copies of petitioner's social security card and driver's license; the social security cards, passports and birth certificates of petitioner's dependents; school and medical information pertaining to the dependents; information pertaining to petitioner's bank account and two letters from individuals petitioner purported to be his "two employers."

Conciliation Order, CMS No. 226003, was issued by BCMS in which petitioner's request was denied and the refund denial was sustained.[2]

6. On September 1, 2009, petitioner filed a petition with the Division of Tax Appeals in protest of the Conciliation Order dated June 19, 2009. Therein, petitioner elected to have the proceeding conducted in the Small Claims Unit (Tax Law § 2012) and alleged the following:

> I was denied a refund after having provided evidence to sustain my claims on form IT-201. The evidence provided by me was Birth Certificates of my dependents proving a relationship, Social Security cards proving status and others proving they lived with me, expense records from the entities that paid me for my services [*sic*].

7. A Power of Attorney, Form POA-1, was contemporaneously filed with the petition, seeking to appoint Albert Adams as petitioner's representative. In the section of the Form POA-1 designated as "Declaration of representative," Mr. Adams indicated his designation to be "other" and declined to provide further information on the space provided to do so.

8. By letter dated September 10, 2009, the Division of Tax Appeals Petition Intake Unit sent an acknowledgment letter to petitioner,[3] noting the following, in pertinent part:

> As this petition is deemed in proper form, it has been forwarded to the Office of Counsel for preparation of the answer. . . . **However, we need a properly executed "power of attorney" in order for your representative to be kept informed. Please complete and return the enclosed power of attorney in accordance with the procedural regulations[.]**

9. The acknowledgment letter was mailed to the same address listed as petitioner's on the petition, i.e., 354 S. 2nd Street, Apt. 4-D, Brooklyn, New York. On October 4, 2009, the acknowledgment letter sent to petitioner was returned by the postal service as undeliverable. On

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[2] The Conciliation Order indicated that requester (i.e., petitioner) "appeared by Albert Adam [*sic*]." The cover letter preceeding the enclosed Conciliation Order carbon copied Mr. Adams.

[3] A copy of the acknowledgment letter was also sent to Mr. Adams.

November 13, 2009, Mr. Adams contacted the Division of Tax Appeals Petition Intake Unit by telephone and provided a new address for petitioner: 182 S. 3rd Street, Brooklyn, New York.

10. Subsequently, on November 16, 2009, a Power of Attorney was received by the Division of Tax Appeals indicating petitioner's address to be that which was provided by Mr. Adams on November 13, 2009. This Power of Attorney again failed to delineate Mr. Adams's representative designation. The Petition Intake Unit sent a letter to Mr. Adams informing him that if his designation did not fall within those specifically enumerated on the Form POA-1, he was required to request "special permission" from the Secretary to the Tax Appeals Tribunal "in order to represent Paulino Hernandez in the Division of Tax Appeals." The letter provided Mr. Adams with specific instructions for requesting special permission and further requested verification of petitioner's new mailing address. A copy of the letter was mailed to petitioner. Thereafter, special permission was not sought and the Division of Tax Appeals was not notified of any other representative appointed by petitioner.

11. On April 24, 2010, petitioner filed a duplicate petition with the Division of Tax Appeals in which a new address was again provided for petitioner. This petition listed petitioner's address as 93-02 104th Street, 3rd floor, Richmond Hill, New York. By telephone, on April 27, 2010, the Petition Intake Unit verified this address with petitioner as being accurate.

12. A Notice of Small Claims Hearing was sent to petitioner on August 23, 2010.[4] The notice advised petitioner of a hearing scheduled in the instant matter for September 29, 2010 at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York. Also stated in the notice was the following:

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[4] The notice was sent to the address petitioner had most recently provided the Division of Tax Appeals, i.e., 93-02 104th Street, 3rd floor, Richmond Hill, New York (***see*** Finding of Fact 11).

> Failure to appear at the scheduled hearing may result in dismissal of the petition. Any adjournment may be requested but will be granted only for good cause and only if the request is received in writing by the Division of Tax Appeals at least 15 days prior to the hearing date . . . .

13. On September 29, 2010, at the date, time and location stated in the Notice of Small Claims Hearing, Presiding Officer Barbara Russo called the ***Matter of Paulino Hernandez*** involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a representative. Neither petitioner nor anyone acting on his behalf contacted the Division of Tax Appeals to seek an adjournment of the hearing, or for any other reason. The representative of the Division moved that petitioner be held in default. On October 21, 2010, Presiding Officer Russo found petitioner in default and denied his petition with the issuance of a Default Determination. The Default Determination, together with a letter by Supervising Administrative Law Judge Ranalli explaining the procedure by which an order vacating the default may be sought, were sent to petitioner on October 21, 2010.[5]

14. Petitioner filed an application seeking to vacate the October 21, 2010 default on January 26, 2011. On the envelope in which the application was sent, in the space provided for the mailer's return address, petitioner wrote his name and listed his address as "93-02 104 St., Richmond Hil [*sic*], NY 11418." The application contained the following statement:

> I request that the default determination of October 21, 2010 be vacated. My representative was not able to make it to the appointment that ultimately resulted in the denial of my claim. I did not know this happened until it was too late.
>
> My claim besides being true has what I think to be solid supporting documents. Please find enclosed copies of these documents and of previous correspondence with New York State.

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[5] The Default Determination and Supervising Administrative Law Judge Ranalli's letter were sent to petitioner at 93-02 104th Street, 3rd Floor, Richmond Hill, New York, i.e., the address most recently provided by petitioner (***see*** Finding of Fact 11).

Attached to petitioner's application were, among other items: the October 21, 2010 Default Determination and letter; copies of two forms 1099-MISC, Miscellaneous Income, both issued to petitioner and pertaining to the 2007 tax year; letters written by the issuers of the forms 1099-MISC; a letter from petitioner's son's college; copies of the letters sent to petitioner by the Division (***see*** Findings of Fact 2 and 3); and a copy of the Conciliation Order (***see*** Finding of Fact 5). Petitioner did not provide any additional information pertaining to the merits of his application.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "[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." (20 NYCRR 3000.13[d][2].) The rules further provide that "[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." (20 NYCRR 3000.13[d][3].)

B. Based upon the record presented in this matter, it is clear that petitioner did not appear at the hearing scheduled in this matter or obtain an adjournment. It is also clear that petitioner did not properly appoint a representative to appear on his behalf (***see*** Finding of Fact 10). Therefore, Presiding Officer Russo 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 Determination was issued, it was incumbent upon petitioner to show a valid excuse for

not attending the hearing and prove the existence of a meritorious case (20 NYCRR 3000.13[d][3]; ***Matter of Zavalla***; ***Matter of Morano's Jewelers of Fifth Avenue***).

C. A petitioner appearing in a proceeding in the Division of Tax Appeals conducted by an administrative law judge may appear pro se or may be represented by either their spouse, an attorney admitted to practice in New York State, a public accountant licensed in New York State or an enrolled agent who is enrolled to practice before the Internal Revenue Service (***see*** Tax Law § 2014[1]). However, in proceedings conducted in the Small Claims Unit, the list of permissible representative designations is expanded to also allow representation by an individual who the Tax Appeals Tribunal has "authorized to represent the petitioner for a particular matter" (Tax Law § 2014[2]).

D. Petitioner's application to vacate the Default Determination in the instant matter is premised on grounds that his "representative was not able to make it" to the small claims hearing scheduled and held on September 29, 2010 and that he "did not know this happened until it was too late." Petitioner believes the facts asserted in his application to be both true and supported by the record.

The problem with the theory upon which petitioner seeks to base his application is that, pursuant to Tax Law § 2014(2), petitioner had not appointed a representative. At no point since the instant petition was filed (i.e., September 1, 2009) was any representative properly appointed to represent petitioner before the Division of Tax Appeals pursuant to the requirements of Tax Law § 2014 (***see*** Findings of Fact 8 and 10). On multiple occasions, both petitioner and Mr. Adams were notified of the invalidity Mr. Adams's appointment as petitioner's representative. In fact, both were advised, in no uncertain terms, of the procedure by which "special permission" could be obtained, which, if sought and granted, would have permitted Mr. Adams to represent

petitioner in the instant matter in accordance with Tax Law § 2014(2) (***see*** Finding of Fact 10). However, in the absence of such special permission, it was incumbent upon petitioner to appear at the scheduled hearing for which he received notice.

E. Parties to a small claims hearing are to be given notice of such hearing at least 30 days prior to the scheduled hearing (20 NYCRR 3000.13[c][4]). However, at the written request of either party, "made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjourment may be granted on less notice" (20 NYCRR 3000.13[d][1]).

The Notice of Small Claims Hearing sent to petitioner on August 23, 2010 was sent to the same address as petitioner listed as his return address on the envelope in which the instant application was mailed to the Division of Tax Appeals. As such, petitioner was provided with notice of the scheduled hearing on August 23, 2010, or 37 days in advance of the hearing. At no point was an adjournment of the scheduled hearing requested by petitioner. Irrespective of whether a petitioner appears pro se or by a duly authorized representative, such individual's inability "to make it" to a scheduled hearing does not constitute an "emergency." Moreover, whether or not an adjournment request is warranted on account of an emergency is irrelevant when the requested adjournment is not made in writing (***see Matter of Tong***, Tax Appeals Tribunal, January 23, 1992). Therefore, it is concluded that petitioner has failed to establish a valid excuse for not attending the scheduled hearing.

F. A default determination may be vacated only upon petitioner's satisfaction of both requirements of 20 NYCRR 3000.13[d][3]: (1) a showing of the existence of a valid excuse for his absence, and (2) a showing of the existence of a meritorious case. Given petitioner's failure to demonstrate the existence of a valid excuse for his absence from the scheduled hearing, it is

unnecessary to contemplate the existence of a meritorious case as doing so cannot change the outcome of this order. Nonetheless, assuming, arguendo, that petitioner had proved the existence of a valid excuse for his absence, petitioner's application is also void of a showing of the existence of a meritorious case.

An application to vacate a default determination should be denied when "it is not shown that there is a meritorious [case], for the courts should not be burdened with unfounded claims to relief nor should a just cause be delayed by the interposition of an unwarranted defense" (***Investment Corp. Of Phila. v. Spector***, 12 AD2d 911, 210 NYS2d 668, 669 [1961], citing ***Rothschild v. Haviland***, 172 App Div 562, 563, 158 NYS 661 [1916]). Moreover, the existence of a meritorious case is not established "merely by presenting a proposed answer . . . in conclusory form" (***id.***). When a petitioner's application fails to elaborate on what he intends to prove and also fails to detail what documents establish the merits of his case, the "meritorious case" requirement of 20 NYCRR 3000.13(d)(3) has not been met (***Matter of Saffner***, Tax Appeals Tribunal, October 19, 2006). Therefore, petitioner's assertion in his application that "[m]y claim besides being true has what I think to be solid supporting documents" and the provision of such documents, without further advancement of the legal theory that petitioner purports such documents to advance, does not amount to a meritorious case.

G. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on October 21, 2010 is sustained.

DATED: Troy, New York
June 23, 2011

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE