STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
WILLIAM GORDON	:	DECISION DTA NOS. 825296 AND 825368
for Redetermination of Deficiencies 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 Years 2006 and 2007.	:	

Petitioner, William Gordon, filed an exception to the order of the Supervising Administrative Law Judge issued on February 27, 2014. Petitioner appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner has presented adequate grounds to vacate a default determination.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge, except for findings of fact 1, 7, and 8, which we have modified to more accurately reflect the record. The Supervising Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. On October 15, 2012 and November 21, 2012, petitioner, William Gordon, filed petitions with the Division of Tax Appeals protesting notices of deficiency of personal income tax due from the Division of Taxation (Division) issued on July 25, 2011 and December 11, 2011, respectively. In his petitions, petitioner alleged that the notices of deficiency for both 2006 and 2007 were based on wages that he did not receive. He claimed that the Division used wage amounts that were incorrectly reported by his employer, New Era Veterans, Inc. For the 2006 tax year, petitioner claimed that he received only $12,586.00 in wages. He attached to his petition for that tax year a spreadsheet, apparently created by petitioner, that appears to list his bimonthly gross pay for 2006, totaling $12,586.00. Petitioner also attached to his petition a wage and income transcript from the Internal Revenue Service (IRS) indicating that New Era Veterans, Inc., reported wages paid to petitioner of $20,679.00. Petitioner provided no wage amounts for the 2007 tax year. He claimed in both petitions that he filed a civil action for unpaid wages, but attached no documentation related to this action. Finally, he claimed that the Division did not factor all his available credits in calculating his tax due for either year. Petitioner elected to have the proceedings conducted in the small claims unit of the Division of Tax Appeals.

2. In its answer to the petitions, the Division stated that petitioner failed to file an income tax return for either year in issue and that it obtained petitioner's income information from the IRS. The Division also stated that, in computing petitioner's tax due for each year in issue, all applicable credits and the standard deduction were applied.

3. On August 19, 2013, the calendar clerk of the Division of Tax Appeals sent two notices of small claims hearing to petitioner and the Division of Taxation advising them that a hearing had been scheduled for Monday, September 23, 2013 at 1:45 P.M., at the Metro-NYC

Regional Office, 15 Metro Tech Center, in Brooklyn, New York.

4. On September 23, 2013, at 2:30 P.M., Presiding Officer Barbara Russo commenced a hearing in the ***Matters of William Gordon***. Petitioner did not appear at the hearing and a default was duly noted.

5. On October 10, 2013, Presiding Officer Russo issued a default determination against petitioner, denying the petitions in this matter.

6. On October 16, 2013, petitioner filed an application to vacate the default determination. In the application, petitioner alleged that he "was delayed by a smoke/fire condition on the trains (MTA) that existed on the date of the . . . hearing . . . ."

7. As to the merits of his case, petitioner's application reiterated the same arguments raised in his petitions, i.e., that his employer incorrectly reported his wages for the years in issue. The proof submitted with his application was a canceled check, dated December 29, 2006, from New Era Veterans, Inc., payable to petitioner. The check has a cancellation stamp dated January 2, 2007. Petitioner claims that because the check was cashed in 2007, it should have been reported as 2007 income rather than as 2006 income as his employer reported. Petitioner also submitted with his application a spreadsheet listing his 2006 wages by payroll period date, check date, check number, and amount. The amounts so listed total $20,679.35. Petitioner provided no further documentation or other proof concerning his alleged civil action against his employer.

8. After having been granted an extension of time, the Division filed a letter in opposition to petitioner's application on December 12, 2013. The Division argued in the letter that petitioner's excuse for the default lacks credibility. The Division attached to its letter

information obtained from the Metropolitan Transit Authority (MTA), indicating that there were service delays on many of its lines on September 23, 2013 and that such delays lasted up to 77 minutes. The MTA information lists various reasons for the delays. A smoke or fire condition is not among the reasons so listed.

9. The Division also submitted a certification from the Commissioner of Taxation and Finance indicating that a search had been made of the Division's files for the years 2006 and 2007, and no returns had been filed by petitioner, William Gordon, for those years. As to the merits of the case, the Division argued that tax is due on income in the year in which it accrues or is made available to the employee and that petitioner does not dispute that he had New York income during the years at issue or that he was required to file New York personal income returns during the years in issue, but failed to do so.

THE ORDER OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge denied petitioner's application to vacate the default determination, finding that petitioner failed to establish either a valid excuse for his failure to appear at the scheduled small claims hearing or a meritorious case, the two conditions necessary to obtain relief from a default determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner continues to argue that a smoke or fire condition on an MTA train caused his failure to appear at the scheduled hearing. Petitioner also continues to argue that wages actually paid to him by his employer during 2006 were substantially less than wages reported by his employer for that year. Additionally, petitioner continues to argue that a check

dated December 29, 2006 was erroneously included in his 2006 income because he did not cash the check until 2007. Petitioner also contends that a judgment was rendered in his favor in a small claims civil action he brought against his former employer in Bronx County Civil Court. He further contends that such judgment establishes his claim regarding the amount of wages he was actually paid in 2006.

The Division continues to argue on exception that petitioner has shown neither a valid reason for his default nor a meritorious case.

With his brief on exception, petitioner also sought to submit documents purportedly related to the merits of his case. Such documents include information related to his Bronx civil court action against his employer. By letter dated April 25, 2014, this Tribunal advised petitioner that we would not consider any evidentiary materials that were not part of the record before the Supervising Administrative Law Judge.

OPINION

We affirm the order of the Supervising Administrative Law Judge.

With respect to small claims hearings, our Rules of Practice and Procedure provide that "[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]).

Here, petitioner did not appear at the scheduled hearing or obtain an adjournment. Accordingly, the Presiding Officer properly rendered a default determination against petitioner

pursuant to 20 NYCRR 3000.13 (d) (2).

Our rules further provide that, "[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the [defaulting] party shows an excuse for the default and a meritorious case" (20 NYCRR 3000.13 [d] [3]).

With respect to the first criterion for vacatur, we agree with the Supervising Administrative Law Judge that petitioner has not established a valid excuse for his failure to appear at the hearing. As the Supervising Administrative Law Judge found, even if his train was delayed on the hearing date, petitioner made no apparent attempt to arrive at the hearing location, even though he would have been late. Indeed, petitioner apparently did not contact the Division of Tax Appeals regarding his failure to appear at the hearing prior to his receipt of the Presiding Officer's default determination. Such conduct weighs against the credibility of petitioner's claim that he made a genuine effort to attend the hearing, but was prevented by forces beyond his control, and thus weighs against a finding of an acceptable excuse for the default (***cf***., ***Matter of Morano's Jewelers of Fifth Avenue***, Tax Appeals Tribunal, May 4, 1989 ["[P]etitioner's appearance later in the day to try and cure the default indicates the nondeliberateness of the delay and a good faith intent to carry out the proceedings"]).

While petitioner's failure to demonstrate a valid excuse for his default is sufficient to require the denial of his exception, we nonetheless note our agreement with the Supervising Administrative Law Judge's conclusion that petitioner has not established a meritorious case.

In order to meet the meritorious case criterion for vacatur, petitioner must make a prima facie showing of legal merit, and may not rely on conclusory statements unsupported by the facts

(***see Matter of Morano's Jewelers of Fifth Avenue***). Here, the only evidence in the record supportive of petitioner's claim that his employer overstated his 2006 wages is an apparently self-created spreadsheet. As the order below aptly notes, the spreadsheet lacks any supporting information or foundation for the source of the calculations contained therein. Accordingly, given the limited probative value of such evidence, petitioner's claim that his actual wages were less than that reported by his employer amounts to a conclusory statement unsupported by facts. Petitioner has thus failed to make the required prima facie showing.

As to petitioner's claim that the check dated December 29, 2006 was erroneously included in his 2006 income because he did not cash the check until 2007, we note that actual or constructive receipt of income generally controls the year in which such income is reportable (***see*** Treas. Reg. § 1.451-1 [a]). Accordingly, the fact that the check in question was cashed in 2007 does not, by itself, tend to prove that the income from the check was properly reportable in 2007. Moreover, the merit of petitioner's timing argument is significantly undermined by his failure to file a 2007 return and thus to report the income from the check for the year in which he apparently concedes it is taxable.

Finally, we note that there is no evidence in the record supporting petitioner's contention that the actual amount of wages paid to him in 2006 was established in a civil action he brought against his former employer. This argument must fail accordingly. We also note that petitioner sought to introduce additional evidence related to this contention with his brief on exception, which we rejected. As this Tribunal has stated many times, "a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not

conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]" (***Matter of Naughton Energy Corp.***, Tax Appeals Tribunal, November 29, 2012). Consequently, we do not consider evidence that was not made part of petitioner's application to vacate the default determination (***see Matter of Estruch***, Tax Appeals Tribunal, May 20, 2010).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William Gordon is denied; and

2. The order of the Supervising Administrative Law Judge denying petitioner's application to vacate the default determination is affirmed.

DATED: Albany, New York
January 29, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner