STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **ZHOUCHUAN SUN** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2015.	:	DECISION DTA NO. 830060

Petitioner, Zhouchuan Sun, filed an exception to the order of the Supervising Administrative Law Judge issued on August 24, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on November 27, 2023, the date that petitioner's reply brief was received.

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

ISSUE

Whether the default determination issued in this matter should be vacated.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge, except for findings of fact 8 and 10, which we have modified to more fully reflect the record. As so modified, the facts appear below.

1. On September 17, 2020, petitioner, Zhouchuan Sun, filed a petition with the Division of Tax Appeals protesting a conciliation order, CMS No. 000311188, dated June 19, 2020. The conciliation order recomputed a notice of deficiency, assessment number L-049373694 that was issued to petitioner that assessed additional New York State personal income tax for the year 2015.

2. Petitioner listed his address as "65 Palmer Ln, Thornwood, NY 10594" in his petition.

3. On or about January 20, 2023, Presiding Officer Juan Cartagena sent a letter to petitioner and to the Division of Taxation (Division) informing them that he was assigned to the matter. In this letter, he also informed the parties that the hearing would be scheduled for Thursday, March 2, 2023, at 11:00 a.m. in New York City. Additionally, Presiding Officer Cartagena provided the parties an opportunity to proceed with a virtual hearing using CISCO Webex. Presiding Officer Cartagena requested that petitioner contact the Hearing Support Unit if he wished to proceed with a virtual hearing rather than an in-person hearing. Petitioner did not contact the Hearing Support Unit to request that the in-person hearing be changed to a virtual hearing.

4. On January 24, 2023, a notice of hearing was issued to petitioner at his address listed on his petition that scheduled the small claims hearing in the above-captioned matter for March 2, 2023, at 11:00 a.m. at the NYS Dept. of Public Services, 90 Church Street, 4th Floor, New York, New York, 10007-2919. A copy of the notice of hearing was simultaneously sent to the Division.

5. Petitioner did not respond to the notice of hearing.

6. On Thursday, March 2, 2023, at 11:00 a.m., Presiding Officer Cartagena commenced a small claims hearing as scheduled in the ***Matter of Zhouchuan Sun***. The Division appeared by its representative. Petitioner did not appear at the hearing. Additionally, petitioner did not submit a written request for an adjournment of the hearing. Consequently, the representative of the Division moved that petitioner be held in default.

7. On April 20, 2023, Presiding Officer Cartagena issued a default determination against petitioner, denying the petition in this matter.

8. Petitioner's application to vacate the default determination was filed on April 28, 2023. In his unsworn letter, petitioner stated that he never received the notice of hearing. Petitioner explained that his mailbox was destroyed by a car accident that happened on February 2, 2023. Attached to his letter was a copy of an incident report form filed with the Mount Pleasant Police Department that described the damage to his mailbox. The form is dated February 4, 2023 and asserts that the incident occurred on February 2, 2023. Also attached to petitioner's letter are photographs showing a damaged but still standing mailbox. Petitioner did not offer any explanation for how the damage to his mailbox prevented him from attending the scheduled hearing. Moreover, petitioner did not offer any evidentiary materials on the substance of his case with his application, but he asserted that he prepared various evidence and supporting documents.

9. In its opposition to the instant application, the Division states that petitioner failed to provide a reasonable excuse for the default. Specifically, the Division points out that petitioner failed to explain how a broken mailbox on February 2, 2023 prevented him from receiving mail before the incident occurred. Presiding Officer Cartagena sent a letter on January 20, 2023, advising of the hearing date and a notice of hearing was mailed on January 24, 2023.

Additionally, the Division notes that petitioner failed to submit any evidence of a meritorious case with his application.

10. In response to the Division's reply to his application, petitioner submitted additional documentation that included a copy of an undated email from petitioner to a Division auditor purporting to support petitioner's claim that he was a real estate professional during 2015; a 2015 schedule E with attachments; several computer-printed, workpaper-type documents containing the handwritten notation "work sample;" and a copy of his master of business administration degree from Duke University, among other certifications. The unsworn cover letter accompanying this submission did not explain how any of these documents support his case.

THE ORDER OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge determined that the Presiding Officer correctly rendered a default determination because petitioner did not appear at the scheduled hearing or obtain an adjournment. The Supervising Administrative Law Judge then considered whether petitioner had shown an acceptable excuse for not attending the hearing, as well as a meritorious case, both of which must be established to prevail on a motion to vacate a default. The Supervising Administrative Law Judge found that petitioner's proffered reason for his failure to appear at the hearing, the damage to his mailbox on February 2, 2023, was not an acceptable excuse, given the lack of any evidence in the record of how the damaged mailbox prevented him from receiving mail or for how long this impediment existed. The Supervising Administrative Law Judge also found that petitioner did not show a meritorious case because the submitted documents were unsworn and lacked any context or explanation to support the substance of his case.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the damage to his mailbox as described provides a reasonable excuse for his failure to appear at the scheduled hearing. Petitioner does not allege that mail was not delivered to his damaged mailbox, but that rain and snow soaked the delivered mail beyond recognition and readability. Petitioner further asserts that his mother-in-law threw away some of these soaked and unreadable articles of mail. Petitioner asserts that the damaged mailbox is the most likely explanation for his failure to appear at the scheduled hearing. Petitioner contends that his clear intent to proceed to a hearing in this matter is shown by his multiple communications with the Division and the Division of Tax Appeals. Petitioner also asserts that, given the passage of time from the filing of his petition, he could not have reasonably expected that a notice of hearing would be mailed to him in late January 2023.

To establish a meritorious case, petitioner relies on the documents submitted in support of his application to the Supervising Administrative Law Judge. Specifically, petitioner contends that such documents establish that he was a real estate professional during the year at issue and that, accordingly, he was entitled to claim a loss on his schedule E in connection with his interest in certain real property.

The Division asserts that petitioner's exception reiterates his application to the Supervising Administrative Law Judge to vacate the default. The Division argues that such arguments were properly dismissed below and should be similarly dismissed on exception.

OPINION

The Tax Appeals Tribunal Rules of Practice and Procedure (Rules) 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 [b] [2]). As petitioner neither appeared at the scheduled hearing nor obtained an adjournment, the presiding officer properly rendered a default determination (***Matter of Tasty Sub, LLC***, Tax Appeals Tribunal, September 15, 2022).

The Rules further provide: "Upon 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 [b] [3]). This is consistent with the well-established principle that actions and proceedings should be determined on the merits where possible (***Matter of Morano's Jewelers of Fifth Ave., Inc.***, Tax Appeals Tribunal, May 4, 1989, citing ***Stolpiec v Weiner***, 100 AD2d 931 [2d Dept 1984] and ***Stark v Marine Power & Light Co***., 99 AD2d 753 [2d Dept 1984]).

We agree with the Supervising Administrative Law Judge that petitioner did not show a reasonable excuse for his default. Although petitioner showed that his mailbox was damaged on February 2, 2023, he concedes that the Postal Service continued to deliver mail to the mailbox. Petitioner did not submit any evidence, such as a weather report, to show that weather conditions on or about the days in question could have rendered some of his mail unreadable as claimed. Similarly, petitioner submitted no evidence (beyond his unsworn assertion) of his claim that his mother-in-law threw away some of his mail. We note, too, that petitioner offered no evidence of any effort to mitigate the problem of his damaged mailbox, such as a request for the Postal Service to hold his mail, evidence that would indicate a contemporaneous concern for the problem. The mailbox damage alone is thus plainly insufficient to show that petitioner did not receive the notice of small claims hearing in a readable condition.

Additionally, we note that petitioner's contention that he had no reason to expect a notice

of hearing in late January 2023 is undermined by the presiding officer's letter to petitioner on or about January 20, 2023 (***see*** finding of fact 3). Finally, we note that communications between petitioner and the Division and the Division of Tax Appeals prior to the issuance of the notice of small claims hearing do not excuse his failure to appear at the small claims hearing.

While petitioner's failure to provide a reasonable excuse for his default is sufficient to require the denial of his exception, we also address the second requirement to vacate a default; that is, whether petitioner has established a meritorious case.

The standard for a meritorious case in this context is a prima facie showing of legal merit (***see Matter of Morano's Jewelers of Fifth Ave.***). Conclusory statements unsupported by facts are insufficient (***Matter of Gordon***, Tax Appeals Tribunal, January 29, 2015).

As indicated in petitioner's papers submitted to support his application to vacate the default, and by the Division in opposition thereto, the substantive dispute in the present matter is whether the Division properly denied petitioner's claimed rental real estate loss for the 2015 tax year. The parties agree that petitioner's entitlement to that loss depends upon whether petitioner qualified as a real estate professional during the year at issue.

By way of a brief explanation, rental real estate activity is generally considered a passive activity under the Internal Revenue Code (IRC) and deductions with respect to passive activities are limited to gains from such activities (***see*** IRC [26 USC] § 469 [c], [d]). Rental real estate activity may be considered nonpassive, and losses allowed, where a taxpayer materially participates in rental real estate activity as a real estate professional (IRC [26 USC] § 469 [c] [7]).

The IRC sets forth the following test for determining whether a taxpayer is a real estate professional:

> "(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, and
>
> (ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates" (IRC [26 USC] § 469 [c] [7] [B]).

The first part of the test thus requires a taxpayer to show that their total real estate rental activities during the tax year at issue constitute more than one-half of their total personal services performed during that year. Here, although petitioner's papers acknowledge that he began full-time employment at a bank in June of 2015, petitioner has offered no evidence of the hours in which he was employed in that activity. Hence, there is no prima facie showing in the record that his claimed rental real estate activity was more than one-half of his total personal services performed in 2015 as required under IRC (26 USC) § 469 (c) (7) (B). Petitioner has thus failed to establish a meritorious case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

The exception of Zhouchuan Sun is denied; and the order of the Supervising Administrative Law Judge denying petitioner's application to vacate the default determination is affirmed.

DATED: Albany, New York
April 11, 2023

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner