

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVID LEE : ORDER
for Redetermination of a Deficiency or for Refund : DTA NO. 825285
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 2010. :

Petitioner, David Lee, filed a petition 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 2010.

A hearing was scheduled before Presiding Officer Barbara J. Russo at the offices of the Division of Tax Appeals, NYS Department of Taxation & Finance, Metro-NYC Regional Office, 15 Metro Tech Center, Brooklyn, New York, on August 13, 2013 at 10:45 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner, appearing pro se, has made a written request that the default determination be vacated. On October 31, 2013, the Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a written response in opposition to petitioner's application to vacate the default determination.

Upon review of the entire case file in this matter, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On October 9, 2012, petitioner, David Lee, filed a petition with the Division of Tax Appeals protesting a notice from the Division of Taxation disallowing a request for refund of New York State personal income tax for the year 2010 in the amount of \$915.00. A disallowance of a

refund claim dated February 23, 2010 and issued by the Division of Taxation was attached to the petition. However, this disallowance was for the year 2008 rather than for 2010, the year in issue in this matter. The 2008 disallowance was based on a failure to produce documentation to verify a dependent claimed for the earned income credit.

2. Petitioner also attached to the petition a birth certificate indicating that he is the father of Donovan Lee, born in the Bronx on April 29, 1992. There is also a copy of a social security card for Donovan, along with a letter from the high school in the Bronx allegedly attended by Donovan.

3. In its answer, the Division of Taxation stated that the earned income credit claimed by petitioner for 2010 in the amount of \$915.00 was denied because petitioner failed to provide documentation requested by the Division of Taxation. The answer failed to mention what specific documentation petitioner failed to provide.

4. On July 8, 2013, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and the Division of Taxation advising them that a hearing had been scheduled for Tuesday, August 13, 2013 at 10:45 A.M. at the Metro-NYC Regional Office, 15 Metro Tech Center, in Brooklyn, New York.

5. On August 13, 2013, at 10:45 A.M., Presiding Officer Barbara Russo commenced a hearing in the *Matter of David Lee*. Petitioner did not appear at the hearing and a default was duly noted.

6. On August 26, 2013, petitioner sent a letter to the Metro-NYC Regional Office requesting that the hearing be rescheduled. The letter was forwarded to and received by the Division of Tax Appeals on August 30, 2013. In the letter, petitioner alleged that on the day of

the hearing he was not feeling well due to a medication he was taking. He additionally stated that his accountant was also ill that day. There is no indication in the file that a representative had ever been authorized by petitioner to appear in this proceeding.

7. Presiding Officer Russo responded to petitioner's letter on August 30, 2013, stating that because petitioner did not make a request for an adjournment prior to the hearing and did not appear at the hearing, she would be issuing a default determination in response to the Division of Taxation's motion for default made at hearing.

8. On September 5, 2013 Presiding Officer Russo issued a default determination against petitioner, denying the petition in this matter.

9. On September 27, 2013, petitioner filed an application to vacate the default determination. In his application he described the symptoms of his illness and alleged that the symptoms were caused by medication he was taking. He attached a letter from his doctor stating that petitioner was taking gout medication that would cause the symptoms described.

10. The Division of Taxation's response, filed on October 31, 2013, opposed the application arguing that the doctor's letter was not properly authenticated and did not establish the exact dates petitioner was on the medication. The Division also argued that petitioner failed to attach any documents supporting a meritorious claim. The Division reiterated its argument that petitioner failed to submit documentation supporting his claim for the earned income credit for the year 2010.

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 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. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division of Taxation’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 established a valid excuse for his failure to appear at the hearing. While there is no excuse for his failure to at least extend the courtesy of telephoning the Division of Tax Appeals on the hearing date, explaining his circumstances and requesting an adjournment, there is no doubt, based on his physician’s letter, that he was taking medication that could have produced symptoms making his appearance difficult if not impossible. Accordingly, petitioner has met the first criterion to have the default order vacated.

D. Petitioner has also established a meritorious case. While it is somewhat unclear from the pleadings, it appears that the Division of Taxation disallowed petitioner’s claim for the earned income credit for 2010 because he failed to verify the dependent requirement for obtaining the

credit. In his petition, petitioner provided ample proof that he had a son in high school during the year in issue. If this is the only reason for the disallowance, then petitioner may well be able to prove at hearing that he was entitled to the credit.

E. It is ordered that the request to vacate the default order be, and it is hereby, granted, and the Default Determination issued on September 5, 2013 is vacated. This matter will be rescheduled for hearing as soon as circumstances may permit.

DATED: Albany, New York
January 9, 2014

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE