

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TINA M. WASS	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 826270
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2010.	:	

Petitioner, Tina M. Wass, 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 2010. A hearing was scheduled before Administrative Law Judge Kevin R. Law in Rochester, New York, on Thursday, July 16, 2015 at 10:30 A.M. Petitioner failed to appear and a Default Determination was duly issued on July 30, 2015. Petitioner, appearing pro se, filed a written application on September 17, 2015, requesting that the Default Determination be vacated. The Division of Taxation, appearing by Amanda Hiller, Esq. (Brian J. McCann, Esq., of counsel), filed a written opposition to petitioner's application on October 26, 2015. Upon a review of the entire case file in this matter, Administrative Law Kevin R. Law issues the following order.

FINDINGS OF FACT

1. Petitioner, Tina M. Wass, filed a petition in response to a conciliation order issued by the Division of Taxation's Bureau of Conciliation and Mediation Services. The conciliation order sustained an income tax assessment for the year 2010, notice L-038811012. The petition alleges that the Division was "not complying with a Supreme Court order." No other allegations or details were provided.

2. The Division filed its answer to the petition on July 30, 2014, which denied the allegations contained in the petition and alleged that on November 9, 2012 the Division issued a notice and demand to petitioner asserting tax due of \$770.00 plus penalties and interest. The answer states that the notice was issued because an audit of petitioner's 2010 personal income tax return adjusted the earned income tax credit claimed by petitioner as a result of the Division's disallowance of a dependent claimed by petitioner on her return.

3. A hearing in this matter was scheduled for June 23, 2015. On May 20, 2015, the Division's representative, Leo Gabovich, faxed a letter to the Division of Tax Appeals that requested that the June 23, 2015 hearing be adjourned because his character and fitness interview for subsequent admission to the New York State Bar was scheduled for the same date as the hearing.

4. On May 21, 2015, petitioner and Mr. Gabovich participated in a conference call with the undersigned wherein the request for adjournment was granted. The parties and the undersigned agreed that the adjourned hearing date would take place on July 16, 2015.

5. A Final Notice of Hearing was sent to petitioner on June 8, 2015. The notice formally advised petitioner that on July 16, 2015 the hearing would take place at the offices of the Division of Tax Appeals, Alliance Reporting Services, Rochester, New York. The notice stated the following:

“An 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.”

6. On July 16, 2015, at the date, time and location stated in the Final Notice of Hearing, the undersigned called the *Matter of Tina Wass* 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 her behalf contacted the Division of Tax Appeals to seek an adjournment of the hearing. After 30 minutes had elapsed following the scheduled start of the hearing, Audra Hedden of the Division of Tax Appeals contacted petitioner via telephone inquiring as to petitioner's whereabouts. Petitioner advised Ms. Hedden that she was with her son at an orthodontist appointment and that she would not be appearing at the hearing.

7. Mr. Gabovich moved that petitioner be held in default. On July 30, 2015, the undersigned found petitioner in default and denied her petition with the issuance of a Default Determination. Accompanying the Default Determination was a letter from Supervising Administrative Law Judge Ranalli explaining the procedure by which an order vacating the default may be sought.

8. On September 17, 2015 Petitioner filed an application seeking to vacate the default determination. Accompanying the application was a letter from an orthodontist's office that stated petitioner had to accompany her son to an orthodontist appointment at that office on July 16, 2015. Petitioner did not provide any information pertaining to the merits of the underlying petition with her 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 administrative law judge 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 3000.15[b][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 3000.15[b][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, therefore it was proper to grant the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(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 both a valid excuse for not attending the hearing and prove the existence of a meritorious case (20 NYCRR 3000.15[b][3]; *Matter of Zavalla*; *Matter of Morano's Jewelers of Fifth Avenue*). Petitioner has failed to meet either prong of the test.

C. Petitioner's application to vacate the Default Determination is premised on a letter from her son's orthodontist that indicates that she had to accompany her son to an orthodontist appointment on the same date as the hearing. Petitioner's excuse is simply not a valid reason for her nonappearance at the hearing. There is no indication that the orthodontist appointment was a medical emergency. Instead, as alleged by the Division, the letter implies that this was an existing appointment and petitioner simply chose to not attend the hearing or attempt to have the matter adjourned. Accordingly, petitioner's application to vacate the default determination is denied for failing to show a valid excuse for her nonappearance.

D. Nonetheless, assuming that petitioner had provided a valid excuse for her nonappearance at the hearing, absent is a showing of the existence of a meritorious case. Petitioner's application fails to elaborate on what she intends to prove at a hearing and also fails to detail what documents establish the merits of her case. There is nothing in the hearing record to suggest that the Division's denial of her earned income credit was in error. Therefore, the "meritorious case" requirement of 20 NYCRR 3000.15(b)(3) has also not been met (*Matter of Saffner*, Tax Appeals Tribunal, October 19, 2006).

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on July 30, 2015 is sustained.

DATED: Albany, New York
December 17, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE