

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**WINSTON KING** : ORDER  
for Redetermination of a Deficiency or for Refund : DTA NO. 826404  
of New York State Personal Income Tax under :  
Article 22 of the Tax Law for the Year 2009. :

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Petitioner, Winston King, 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 2009.

A hearing was scheduled before Presiding Officer Alexander Chu-Fong in New York, New York, on July 31, 2015 at 9:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner, appearing by Gilbert Ellis, Enrolled Agent, has made a written request that the default determination be vacated. On October 14, 2015, the Division of Taxation, appearing by Amanda Hiller, Esq. (Alejandro Taylor, 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 July 18, 2014, petitioner, Winston King, filed a petition with the Division of Tax Appeals protesting a Notice of Deficiency of personal income tax from the Division of Taxation (Division) dated April 10, 2013. The deficiency was for the year 2009 in the amount of \$4,009.37 in tax, plus penalty of \$1,187.46 and interest of \$1,118.89. In his petition, petitioner alleged that

he “filed both Individual & Corporate taxes,” and that the Division assessed personal income tax against him for income from work contracted to his corporation. Petitioner maintained that the corporation paid corporate taxes on this income and the Division erroneously disregarded the corporate tax paid and assessed him, individually.

2. Petitioner also attached to the petition a Response to Taxpayer Inquiry issued by the Division on March 10, 2014. This document indicated that the assessment against petitioner was based on a disallowance of business expense deductions claimed on petitioner’s federal schedule C. No mention was made of the existence of any corporation owned by petitioner.

3. In its answer, the Division stated that petitioner failed to provide documentation to substantiate business expenses claimed on his 2009 federal income tax return, resulting in the issuance of the Notice of Deficiency. The answer also alleged that the petition was untimely in that it was filed with the Division of Tax Appeals on July 22, 2014, more than 90 days from the date of the notice, which was April 10, 2013. In his petition, petitioner neither mentioned, nor offered any explanation for, the fact that the petition was dated over a year after the date of the Notice of Deficiency.

4. On May 28, 2015, 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 Friday, July 31, 2015, at 9:30 A.M. at 163 West 125<sup>th</sup> Street, New York, New York. A letter was attached to the Notice of Hearing advising the parties that, since the timeliness of the petition had been raised as an issue, the hearing would confine itself solely to this issue.

5. On July 31, 2015, at 9:30 A.M., Presiding Officer Alexander Chu-Fong commenced a hearing in the *Matter of Winston King*. Neither petitioner nor his representative appeared at the

hearing and a default was duly noted.

6. On August 27, 2015, Presiding Officer Chu-Fong issued a default determination against petitioner, denying the petition in this matter.

7. On September 22, 2015, petitioner filed an application to vacate the default determination. In his application petitioner's representative, Gilbert Ellis, alleged that he "was involved in a minor car accident in route to DTA Hearing Scheduled for 9:30AM," and as a result was unable to attend the hearing. He attached a letter from his insurance company stating that his claim, with a date of loss of July 31, 2015, had been finalized.

8. The Division of Taxation's response, filed on October 14, 2015, opposed the application arguing that, while petitioner's representative may have shown a possible excuse for the default, he has failed to show a meritorious case with respect to the timeliness issue. The Division attached to its response to the application copies of the Notice of Deficiency (Notice No. L-038937626), affidavits of mailing from Division employees and the complete certified mail record indicating that the notice was mailed to petitioner on April 10, 2013. The Division argues that, since the petition was not filed until July 22, 2014, it was filed 458 days after the issuance of the notice.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In 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, "Upon 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 failed to established a valid excuse for his failure to appear at the hearing. While a car accident could be a valid excuse for failing to appear, too little information was provided about Mr. Gilbert’s accident, other than that it was “minor.” Also, there is no excuse for his failure to at least extend the courtesy of telephoning the Division of Tax Appeals on the hearing date, to explain the situation. There may have been time to start the hearing later, allowing Mr. Gilbert time to arrive. Additionally, no explanation has been offered for petitioner’s failure to appear. He received a hearing notice as well as Mr. Gilbert, yet he also failed to appear. Accordingly, petitioner has not met the first criterion to have the default order vacated.

D. Second, and more importantly, even if petitioner had shown an excuse for failure to appear, he has not established a meritorious case. The only issue to be resolved in this matter is whether petitioner filed a timely petition following the issuance of the Notice of Deficiency. The Division has submitted sufficient mailing documents to prove that the Notice of Deficiency was

mailed to petitioner on April 10, 2013. The petition received by the Division of Tax Appeals was filed as postmarked on July 18, 2014. This was over a year after the issuance of the Notice of Deficiency. Pursuant to Tax Law § 689(b), a petition must be filed within 90 days of the issuance of a notice of deficiency. The petition was filed well beyond the 90-day period, and thus the Division of Tax Appeals has no jurisdiction over it. Petitioner has offered no proof, whatsoever, and not even an allegation, that his petition was timely filed or that the Division's mailing was flawed in any way. Accordingly, petitioner has failed to establish a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied, and the petition of Winston King is denied and the Notice of Deficiency issued on April 10, 2013 is sustained.

DATED: Albany, New York  
December 17, 2015

/s/ Daniel J. Ranalli  
SUPERVISING ADMINISTRATIVE LAW JUDGE