

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SAMMER YAKOUP AND DAREEN ASAF : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 827719
New York State Personal Income Tax under Article 22 of :
the Tax Law for the Year 2014. :

Petitioners, Sammer Yakoup and Daren Asaf, 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 2014. A hearing was scheduled before Administrative Law Judge Winifred M. Maloney in New York, New York, on Tuesday, September 18, 2018 at 10:30 a.m. Petitioners failed to appear and a default determination was duly issued on November 8, 2018. Petitioner Sameer Yakoup has made a written application, dated December 5, 2018, that the default determination be vacated. The Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted its written opposition on December 18, 2018, which date began the 90-day period for rendering this order. Upon review of the entire case file in this matter, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, issues the following order.

FINDINGS OF FACT

1. On June 10, 2016, petitioners, Sammer Yakoup and Daren Asaf, filed a petition with the Division of Tax Appeals protesting a conciliation order issued on April 15, 2016. The conciliation order sustained a September 10, 2015 notice of disallowance of petitioners' refund claim in the amount of \$1,498.00. The basis for the notice was the Division of Taxation's

(Division's) disallowance of petitioners' claim to an earned income credit for lack of substantiation of earned income. The Division also disallowed petitioners' claim to the Empire State child credit for lack of substantiation.

2. In their petition, petitioners asserted that they provided documentation to substantiate their claimed credits for 2014, but were nevertheless denied their refund. Attached to their petition were, among other things, a form 1099-misc in the name of Sammer Yakoup reflecting compensation in 2014, a statement from Faiz O. Alzoobae, M.D., asserting that petitioners were the parents of two children, and birth certificates for the same children.

3. This matter was originally scheduled for hearing on January 26, 2018. Petitioner Sammer Yakoup sought and obtained an adjournment of the scheduled hearing based on his assertion that petitioner Dareen Asaf had just given birth to their third child and he was needed to care for the family. After a pre-hearing conference call, the new hearing date was set for September 2018.

4. On August 13, 2018, the calendar clerk of the Division of Tax Appeals sent notices of hearing to petitioner and the Division of Taxation advising them that a hearing in the above matter had been scheduled for Tuesday, September 18, 2018, at 10:30 a.m., at the offices of the New York State Liquor Authority, 317 Lenox Avenue, 4th Floor, New York, New York.

5. On September 18, 2018, at 10:30 a.m., Administrative Law Judge Winifred M. Maloney commenced a hearing as scheduled in the *Matter of Sammer Yakoup and Dareen Asaf*. The Division appeared by its attorney. Petitioners did not appear at the hearing and a default was duly noted.

6. On November 8, 2018, Administrative Law Judge Maloney issued a default determination against petitioners, denying the petition in this matter.

7. On December 8, 2018, petitioners filed this application to vacate the default determination. In the application, petitioner Sammer Yakoup stated that “[t]he reason that I was unable to make it because I had an emergency with my kids and had to rush them to the doctors.” Attached to petitioners’ application is a note on the letterhead of Faiz O. Alzoobae, M.D., dated September 21, 2018, asking that petitioner Sammer Yakoup be excused from court due to “child’s illness” and “high fever” from September 18 to September 19, 2018. Petitioners did not contact the Division of Tax Appeals prior to the hearing regarding the problem or to request an adjournment.

8. Petitioners did not discuss the merits of their case in their application.

9. In its opposition to the instant application, the Division noted that petitioners failed to make any attempt to contact the Division of Tax Appeals on the day of the hearing, but instead waited until December 5, 2018, or 75 days later, to first raise the excuse of the child’s illness. Hence, the Division asserted that petitioners fail to provide a valid and timely excuse for the default.

10. The Division also maintained that petitioners did not present any evidence of merit to their claims in their application and, therefore, failed to demonstrate a meritorious case.

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. Petitioners did not appear at the scheduled hearing or obtain an adjournment.

Therefore, the administrative law judge correctly granted the Division of Taxation’s motion for default pursuant to 20 NYCRR 3000.15 (d) (2) (*see Matter of Hotaki*, Tax Appeals Tribunal, December 14, 2006; *Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995).

C. Once the default determination was issued, it was incumbent upon petitioners to show an acceptable excuse for not attending the hearing and to show that they had a meritorious case (20 NYCRR 3000.15 [d] [3]; *see Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006; *Matter of Zavalla*). Although tenuous, petitioners have presented a reasonable excuse for the default. Unquestionably, petitioners should have telephoned the Division of Tax Appeals on the hearing date, explained the circumstances and requested an adjournment and this order does not condone such failure. Moreover, it is always hazardous to fail to appear at a hearing without an adjournment. There are certain emergency situations, however, that prevent attendance and they must be looked at on a case-by-case basis. Here, it is determined that, in this case, petitioner Sammer Yakoup’s child’s emergency illness, accompanied by an explicitly substantiating doctor’s letter, meets the first criterion to have the default determination vacated (*cf. Matter of Scarlatos*, Tax Appeals Tribunal, January 21, 2011 [where Tribunal affirmed denial of application to vacate a default determination on the basis of a sick child in the absence of substantiating evidence of the illness]).

D. Petitioners also have 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” (*Matter of Gordon*, Tax Appeals Tribunal, January 29, 2015). At issue are the Division’s disallowance of petitioners’ claims to the earned income credit and child care credit for 2014. In their petition, petitioners provided documents purporting to demonstrate income for Sammer Yakoup during the year in issue. Additionally, attached to the petition were birth certificates for petitioners’ children. If a failure to substantiate was the reason for the disallowance, it appears that petitioners may well be able to prove at hearing that they were entitled to the credits.

E. The application of petitioners, Sammer Yakoup and Daren Asaf, to vacate the default determination of November 8, 2018 is granted, and this matter will be rescheduled for hearing as soon as circumstances may permit.

DATED: Albany, New York
February 14, 2019

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE