

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MANUEL FRIAS : ORDER
DTA NO. 828498
for Redetermination of a Deficiency or for Refund of :
Personal Income Taxes under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Year 2012. :

Petitioner, Manuel Frias, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2012. A hearing was scheduled before Administrative Law Judge Donna M. Gardiner in New York, New York, on Tuesday, March 19, 2019 at 11:00 a.m. Petitioner failed to appear and a default determination was duly issued on May 30, 2019. Petitioner, by Jhonatan Mondragon, E.A., has made a written application, dated June 9, 2019,¹ that the default determination be vacated. The Division of Taxation, by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), submitted its written opposition on July 12, 2019. The 90-day period for rendering this order began on July 31, 2019. Upon a 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 or about November 30, 2017, petitioner, Manuel Frias, filed a petition with the Division of Tax Appeals protesting a denial of a refund for personal income tax for the year 2012

¹The postmark on the envelope containing petitioner's application read July 1, 2019. Thus, the application is deemed filed on that date (*see* 20 NYCRR 3000.22 [a] [1]).

(refund denial). The refund denial was issued by the Division of Taxation (Division) on February 28, 2017. The basis for the refund denial was the disallowance of petitioner's claimed rental loss, college tuition credit, and his conversion of the standard deduction to an itemized deduction on his amended New York State resident income tax return, which was filed on or about November 30, 2016. The Division noted in the refund denial that the documents provided by petitioner to substantiate his claims did not show that the Internal Revenue Service (IRS) had made a redetermination and accepted the aforementioned adjustments. Jhonatan Mondragon, E.A. signed the petition on behalf of petitioner.

2. The refund denial was sustained by a conciliation default order from the Bureau of Conciliation and Mediation Services (BCMS) issued on August 25, 2017.

3. In his petition, petitioner asserted that the refund denial was erroneous as his federal personal income tax return was adjusted by a settlement with the IRS as part of a proceeding in the United States Tax Court (Tax Court) in the *Matter of Manuel Frias v Commissioner* (Docket Nos. 22338-15S and 6993-15S L) (Tax Court case). Petitioner also asserted that BCMS erred by "improperly dismissing the case without exercising any discretion."

4. On May 3 and June 25, 2018, the Division and petitioner, respectively, filed motions for summary determination. Those motions were denied by Administrative Law Judge Donna M. Gardiner by an order dated October 11, 2018. The order stated that petitioner demonstrated that the Tax Court rendered a one-page decision in August 2016 stating that petitioner had a federal income tax deficiency of \$5,500.00 for the year 2012. Administrative Law Judge Gardiner's order added, however, that the Tax Court decision, on its face, did not adequately explain the basis for the decision and whether the IRS made a correction or change. Thus, it was determined that an issue of fact existed that required a hearing.

5. On November 6, 2018, the parties participated in a pre-hearing conference call with Administrative Law Judge Gardiner. In that call, the parties selected January 17, 2019 as a date for the hearing to be held in New York City. As he had throughout the proceeding, Mr. Mondragon represented petitioner during this conference call.

6. On December 10, 2018, the Division of Tax Appeals sent notices of hearing to the parties advising them that a hearing in the above matter had been scheduled for Thursday, January 17, 2019, at 10:30 a.m., at 317 Lenox Avenue, 4th Floor, New York, New York.

7. At the request of Mr. Mondragon, another pre-hearing conference call was held on January 8, 2019. In that call, an adjournment of the hearing was requested by and granted to petitioner in order to allow the parties to discuss the case and exchange documents. The Division and Mr. Mondragon, on behalf of petitioner, also agreed upon March 19, 2019, for a new hearing date.

8. On February 11, 2019, the Division of Tax Appeals sent notices of hearing to the parties advising them that a hearing in the above matter had been scheduled for Tuesday, March 19, 2019, at 11:00 a.m., at 317 Lenox Avenue, 4th Floor, New York, New York. No request for an adjournment of the March 19, 2019, hearing was made by either party.

9. On March 19, 2019, at 12:00 p.m., after a delay to allow for any late arrival, Administrative Law Judge Gardiner commenced the hearing as scheduled in this case. The Division appeared by its attorney. Neither petitioner nor Mr. Mondragon appeared at the hearing and a default was duly noted.

10. On May 30, 2019, Administrative Law Judge Gardiner issued a default determination against petitioner, denying the petition in this matter.

11. On July 1, 2019, petitioner filed this application to vacate the default determination.² The application contains Mr. Mondragon's affidavit of the same date, in which he made several assertions to explain the failure to attend. First, Mr. Mondragon stated that he is an individual with a memory and learning impairment that "substantially limits major life activities such as working and running a business, dealing with appointments" or organization. He added that he could not make a "rational action" regarding participation in a hearing. Mr. Mondragon did not identify any time period for the existence of the disability. He also did not offer any documentary substantiation of his disability with the motion papers.³ Furthermore, Mr. Mondragon stated that the hearing, scheduled for March 19, conflicted with his ability to prepare sales tax returns, and comply with "ongoing bookkeeping, payroll, email, and advisory obligations." He added that "tax season" is a very stressful time and severely limits his ability to make proper decisions. Finally, Mr. Mondragon stated that he was not in his "right senses to agree or disagree" to the mutually selected hearing date. He acknowledged that he failed to call or request an adjournment of the hearing.

12. Mr. Mondragon's affidavit did not explain why petitioner did not attend the hearing.

13. Mr. Mondragon's affidavit also made several statements regarding the merits of petitioner's case. He asserted that he spoke with a member of the office of the Chief Counsel of the IRS and was able to reach a settlement of petitioner's Tax Court case at \$5,500.00. Mr.

² Petitioner's application also contained a request for "a reasonable accommodation pursuant to U.S.C. § 12132 [sic]." That request has been addressed by this agency in a separate proceeding under the applicable law.

³ On October 19, 2019, Mr. Mondragon submitted a request to file a reply and "provide evidence of a disability *in camera* and *ex-parte*." As such evidence could have been provided with petitioner's instant motion, the request was denied pursuant to 20 NYCRR 3000.5 (b).

Any documents that may have been separately submitted by Mr. Mondragon as part of his request for a reasonable accommodation (*see* footnote 2), but not submitted with petitioner's papers on the instant motion, are part of a separate proceeding and not part of the record in this case.

Mondragon stated that the settlement reflected the parties agreement to divide the difference between the federal notice of deficiency and petitioner's 2012 federal amended return.

14. The petition contained a copy of a decision dated August 17, 2016, in the Tax Court case. The decision stated that "it is ORDERED AND DECIDED: That there is a deficiency in income tax due from petitioner for the taxable year 2012 in the amount of \$5,500.00." The document also stated that no penalty was due. There were no further specifics regarding the nature of the settlement on the document.

15. Attached to Mr. Mondragon's affidavit were several documents offered in support of the substance of the petition. None of these documents directly explains the settlement in the Tax Court case.

16. Mr. Mondragon has appeared before the Division of Tax Appeals on other occasions over the past four years (*see e.g. Matter of Hernandez*, Division of Tax Appeals, April 2, 2015; *Matter of Oliva*, Division of Tax Appeals, August 15, 2019). No record was presented, however, of any mention of Mr. Mondragon's claimed disability in those cases. Similarly, Mr. Mondragon did not mention a disability during the two pre-hearing conference calls or in the correspondence associated with this case prior to the default.

17. Petitioner argued in support of his application that Mr. Mondragon's workload and disability prevented him from attending the March 19, 2019, hearing and constitutes good cause to vacate the default. He added that his right to representation would be infringed upon should the motion be denied. As to the merits of his case, petitioner, in his application, reiterated the same arguments raised in his petition. In essence, petitioner asserted that the settlement with the IRS and ensuing Tax Court order was based on the adjustments from his federal amended return.

18. In its opposition to the instant application, the Division noted that petitioner failed to

provide evidence in support of Mr. Mondragon's claim that he suffered from stress or anxiety or that the disability caused him to fail to appear at the hearing or request an adjournment. Thus, according to the Division, petitioner did not provide a reasonable excuse for the default. Moreover, the Division stated that petitioner's motion papers did not introduce proof of 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. Petitioner 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 petitioner to show an acceptable excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.15 [d] [3]; *see Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006; *Matter of Zavalla*). Simply put, petitioner has not established an acceptable excuse for his failure to appear at the hearing. As the Division points out, petitioner failed to substantiate Mr. Mondragon's claimed disability or how he was prevented from appearing at the hearing on

March 19. Additionally, and critically, Mr. Mondragon did not raise any concern until after a default determination was issued. As noted in finding of fact 16, Mr. Mondragon has appeared before the Division of Tax Appeals numerous times over the past few years without any suggestion on his part of a disability. Likewise, Mr. Mondragon participated in two pre-hearing conference calls in this case without mentioning such a concern. The mere fact that Mr. Mondragon may have a significant workload did not excuse him from attending a hearing on a date that he selected. Moreover, there has been no excuse whatsoever offered for petitioner's failure to appear himself.⁴ The proper course of conduct in the event of a conflict would have Mr. Mondragon make a timely request for an adjournment, a step he ignored here. Accordingly, petitioner has not met the first criterion to have the default determination vacated.

D. Furthermore, petitioner has not 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). Indeed, petitioner's motion to vacate consists of conclusory statements by Mr. Mondragon. The documents offered with petitioner's application do not establish the claimed specific federal audit changes and, thus, he fails to meet his burden on the substantive issues. As a result, petitioner's motion fails on this prong as well.

E. The application of petitioner, Manuel Frias, to vacate the default determination of May 30, 2019, is denied.

DATED: Albany, New York
October 24, 2019

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

⁴ It is well-settled that petitioner was not entitled to counsel before the Division of Tax Appeals (*see Matter of Hirschfeld*, Tax Appeals Tribunal, April 5, 2007).

