STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Manuel Frias, filed a petition redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the New York City Administrative Code for the Year 2012.

Petitioner, by his representative Jhonatan Mondragon, E.A., filed a motion for reargument pursuant to 20 NYCRR 3000.16; a motion to recuse Supervising Administrative Law Judge Herbert M. Friedman, Jr., from this matter pursuant to sections 3000.8 and 3000.9 (b); and a motion to strike the refund denial at issue in this proceeding. On December 11, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel) submitted a letter in opposition to petitioner's motions. The 90-day period for issuance of this order commenced on December 23, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioner's motion for reargument of an application to vacate a default determination should be granted.

II. Whether Supervising Administrative Law Judge Herbert M. Friedman, Jr., should be recused from all proceedings involving this matter.

III. Whether the notice of refund denial should be stricken from the record.

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 (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 ***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 an application to vacate the default determination.[1] 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.[2] 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

[1] 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.

[2] 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 application to vacate the default determination, 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 1), but not submitted with petitioner's papers on the motion to vacate the default determination, are part of a separate proceeding and not part of the record on this application to vacate the default determination.

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. Mondragon stated that the settlement reflected the parties agreement to divide the difference between the federal notice of deficiency and petitioner's 2012 amended federal 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 application 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. On October 24, 2019 Supervising Administrative Law Judge Herbert M. Friedman, Jr. (Judge Friedman) issued an order denying petitioner's application to vacate the default determination, holding that petitioner failed to show an acceptable excuse for failure to appear and failed to show the existence of a meritorious case.

CONCLUSIONS OF LAW

A. Turning first to petitioner's motion to reargue his application to vacate the default determination, section 3000.16 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (the Rules) sets forth the standards governing a motion to reargue. A motion to reargue is not provided for in the Division of Tax Appeals enabling legislation and thus is limited and must be exercised with great care (***Matter of Trieu***, Tax Appeals Tribunal, June 2, 1994, ***confirmed Matter of Trieu v Tax Appeals Trib.***, 222 AD2d 743 [3d Dept 1995], ***appeal dismissed*** 87 NY2d 1054 [1996] ***lv denied*** 88 NY2d 809 [1996]; ***Matter of Jenkins Covington, N.Y. v Tax Appeals Trib.***, 195 AD2d 625 [3d Dept 1993], ***lv denied*** 82 NY2d 664 [1994]). A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221 [d] [2]). It is not designed as a vehicle to

afford the unsuccessful party an opportunity to argue once again the very questions previously decided (***Gellert & Rodner v Gem Community Mgt., Inc.***, 20 AD3d 388 [2d Dept 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (***Amato v Lord & Taylor, Inc.***, 10 AD3d 374, 375 [2d Dept 2004]) or argue a new theory of law or raise new questions not previously advanced (***Levi v Utica First Ins. Co.***, 12 AD3d 256, 258 [1st Dept 2004]; ***Frisenda v X Large Enterprises, Inc.***, 280 AD2d 514, 515 [2d Dept 2001]). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked (***Hoffmann v Debello-Teheny***, 27 AD3d 743 [2d Dept 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (***Barrett v Jeannot***, 18 AD3d 679 [2d Dept 2005]).

B. After reviewing the record on petitioner's application to vacate the default determination, there is nothing exceptional that would require the Division of Tax Appeals to exercise its limited authority to reconsider its October 24, 2019 order (***see Matter of Sungard Securities Finance LLC***, Tax Appeals Tribunal, September 25, 2015). In his motion, petitioner has not articulated with any specificity how the order denying his application to vacate the default determination overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. While petitioner has taken issue with all of the facts set forth in Judge Friedman's October 24, 2019 order, careful review of the order leads to the conclusion that the facts were accurate as written. Petitioner is simply rearguing that the default determination should be vacated based upon his representative's alleged disability[3] and his claim of a meritorious case. Accordingly, petitioner's motion to reargue is denied.

[3] It is noted that petitioner's representative's alleged disability appears to only manifest itself during tax season. Mr. Mondragon, and by extension, petitioner, seek a "free pass" to excuse their failure to appear at the scheduled hearing. The reasons cited by Mr. Mondragon do not constitute good cause (***see Knapp v Evgeros, Inc.***, 322 FRD 312 [ND Ill. 2017] [where court held that an attorney, who suffered from Attention Deficit Disorder

C. Petitioner also seeks to have Judge Friedman recused from this matter pursuant to section 3000.8 (a) of the Rules which provides that:

> "(1) Either party may move before the supervising administrative law judge to recuse the administrative law judge or presiding officer assigned to its case on the basis that the administrative law judge or presiding officer has a personal bias with respect to the case or that the administrative law judge or presiding officer is otherwise disqualified to hear and decide the case.
>
> (2) The motion to recuse the administrative law judge or presiding officer must be accompanied by an affidavit setting forth the facts upon which the assertion of bias or other disqualification is based. . . ."

D. Petitioner's motion for recusal is denied. First, petitioner failed to submit the required affidavit with his motion setting forth the facts upon which the assertion of bias or other disqualification is based (***see*** 20 NYCRR 3000.8 [a] [2]). Instead, petitioner's basis for asking for the recusal of Judge Friedman is based upon the reasoning for the denial of his application to vacate the default determination. Although it is clear Mr. Mondragon, and by extension, petitioner, are unhappy with Judge Friedman's order, they have failed to demonstrate any facts that would support a finding of bias. The rendering of an adverse order hardly compels recusal. Petitioner's motion for recusal cannot be based on speculation or petitioner's representative's subjective impression that the Administrative Law Judge is biased (***see Manhattan & Queens Fuel Corp.***, Tax Appeals Tribunal, May 22, 1997).

E. Finally, petitioner moves to have the refund denial stricken from the record. This motion is clearly absurd. Petitioner seeks to have excluded from the record the very document upon which jurisdiction in this forum rests. If the refund denial is "stricken" from the record, the Division of Tax Appeals does not have jurisdiction to hear petitioner's case (***see Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom New York***

[ADD] and who had a high caseload, failed to demonstrate good reason for missing deadlines, although ADD caused extreme difficulty with time management]).

State Dept. of Taxation & Fin. v Tax Appeals Trib., 151 Misc 2d 326 [1991]). To the extent this motion seeks to have the notice of refund denial cancelled, it was incumbent upon petitioner (and/or Mr. Mondragon) to appear at the scheduled hearing and present evidence and/ or testimony that the petitioner was entitled to a refund. Having failed to appear at the hearing, petitioner cannot now be heard to complain about the substance of the refund denial.

F. Based upon the foregoing, petitioner's motions to reargue his application to vacate the default determination, to recuse Supervising Administrative Law Judge Friedman, and to strike the refund denial from the record are denied.

DATED: Albany, New York
March 16, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE