

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HUI CHEN : ORDER
for Revision of a Determination or for Refund of Cigarette : DTA NO. 828766
Tax under Article 20 of the Tax Law for the Period ending :
on August 30, 2016. :

Petitioner, Hui Chen, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period ending on August 30, 2016. A hearing was scheduled before Administrative Law Judge Nicholas A. Behuniak at the Division of Tax Appeals in Albany, New York, on Friday, December 3, 2021 at 10:30 a.m. Petitioner failed to appear, and a default determination was duly issued on March 3, 2022. Petitioner, by Law Offices of Timothy K. Wong, PLLC (Timothy K. Wong, Esq.), brought a written application on April 22, 2022 to vacate the default determination. On May 17, 2022, the Division of Taxation, by Amanda Hiller, Esq., (Bruce Lennard, Esq., and Melanie Spaulding, Esq., of counsel) filed a written opposition to petitioner’s application. Upon a review of the entire case file in this matter, Herbert M. Friedman, Jr, Supervising Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner’s application to vacate a default determination should be granted.

FINDINGS OF FACT

1. Following an audit conducted on August 30, 2016, petitioner was found to be in possession of 99.3 cartons of untaxed cigarettes. Accordingly, the Division of Taxation (Division) issued petitioner a notice of determination, notice number L-046689363, for the period ending August 30, 2016, for a penalty in the amount of \$56,580.00.

2. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) which was conducted on February 7, 2018. The conferee sustained the notice of determination by a conciliation order dated May 25, 2018.

3. On June 12, 2018, petitioner filed a petition with the Division of Tax Appeals in protest of the May 25, 2018 conciliation order.

4. Until November 30, 2021, petitioner was represented by Robert N. Lerner, Esq.

5. This matter was originally scheduled for hearing in New York City on March 4, 2020. The hearing was then adjourned to June 4, 2020, at the request of petitioner's representative, Mr. Lerner, who was suffering from health problems and stated his intention to utilize the adjournment period to either recover or to help petitioner secure new representation. The hearing was subsequently adjourned five additional times to accommodate petitioner and Mr. Lerner.

6. On October 26, 2021, the parties were issued a notice of hearing informing them that the hearing would take place on December 3, 2021 in Albany, New York. The hearing was then held as scheduled, on December 3, 2021. Petitioner failed to appear at the December 3, 2021 hearing and the Division moved that he be held in default. Neither petitioner nor anyone acting on his behalf contacted the Division of Tax Appeals prior to the hearing to seek further adjournment, or for any other reason. On March 3, 2021, the administrative law judge granted

the Division's motion, found petitioner in default and denied his petition.

7. On April 22, 2022, petitioner's new representative Timothy K. Wong, Esq., filed this application to vacate the default determination. In the unsworn application, petitioner states that he is "seeking a new payment plan and reduction of penalties" and that "[i]t has taken some time for petitioner to find a bilingual tax counsel" to replace Mr. Lerner. Petitioner does not state any other grounds for vacatur, nor did petitioner provide documentation of any kind with the application.

8. In its opposition to petitioner's application, the Division asserts that petitioner fails to demonstrate a valid excuse for his failure to appear at the hearing and that an unexcused failure to appear at a hearing requires the issuance of a default determination. The Division further argues that this case was adjourned multiple times since early 2020 to allow petitioner to secure new representation. Moreover, the Division asserts that petitioner merely requests a payment plan and reduction of penalties, thus failing to make any showing that would demonstrate a meritorious case.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules), "[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 December 3, 2021 hearing or obtain further adjournment. Therefore, the administrative law judge correctly granted the Division of Taxation's motion for default pursuant to 20 NYCRR 3000.15 (b) (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 both a reasonable excuse for not attending the hearing and that he had a meritorious case (20 NYCRR 3000.15 [b] [3]; *see Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006; *Matter of Zavalla*).

D. Mr. Lerner initially stated his intention to find replacement counsel for petitioner in February of 2020. The hearing was then adjourned numerous times over the course of nearly two years to accommodate petitioner's need to secure new representation. Thus, petitioner's statement that "[i]t has taken some time to find a bilingual tax counsel" cannot be held as a reasonable excuse. Accordingly, petitioner has not met the first criterion to have the default determination vacated.

E. 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). In his application, petitioner merely requests that he is "seeking a new payment plan and reduction of penalties." This statement fails to offer any factual basis as to why such a request should be granted. The application makes no further statements to otherwise demonstrate the merits of petitioner's case and does not include evidentiary support or documentation. Therefore, it is concluded that petitioner has also failed

to establish a meritorious case.

F. The application of petitioner, Hui Chen, to vacate the default determination of March 3, 2021, is denied.

DATED: Albany, New York
August 18, 2022

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