

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
JERRY AND KATHLEEN WALSH
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 2016.

ORDER
DTA NO. 828819

Petitioners, Jerry and Kathleen Walsh, 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 2016. A small claims hearing was scheduled before Presiding Officer Jessica DiFiore in Albany, New York, on Monday, June 14, 2021 at 1:00 p.m. Petitioners failed to appear and a default determination was duly issued on July 15, 2021. Petitioners, appearing by The Holtz Group (Mark M. Glass, EA), have made a written application, received on July 27, 2021, that the default determination be vacated pursuant to 20 NYCRR 3000.13 (d) (3). The Division of Taxation, by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), submitted its written opposition on August 6, 2021. The 90-day period for rendering this order began on August 25, 2021. Upon a review of the entire case file in this matter, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, issues the following order.

ISSUE

Whether the default determination in this matter should be vacated.

FINDINGS OF FACT

1. On or about July 25, 2018, petitioners, Jerry and Kathleen Walsh, filed a petition with the Division of Tax Appeals protesting a conciliation order recomputing notice of deficiency number L-047022762 for New York State and City personal income tax for the year 2016. The conciliation order was issued on May 4, 2018. Petitioners elected to proceed in the small claims unit pursuant to 20 NYCRR 3000.13.

2. Petitioners listed their address as “45 Goodall Street Staten Island NY 10308” in their petition.

3. The petition also listed Mark M. Glass, EA, of the Holtz Group as petitioners’ representative. The address listed for Mr. Glass was “The Holtz Group 475 Park Ave South NY 10016.”

4. On November 5, 2020, Presiding Officer Jessica DiFiore sent a letter to the parties’ representatives informing them that she was assigned to the matter. In that letter, she also informed them that the hearing would be scheduled for June 14, 2021 in Albany or virtually through Cisco Webex. Presiding Officer DiFiore also asked petitioners to inform her by December 31, 2020 of their choice of a live hearing in Albany or a virtual hearing and that if no selection was received, the hearing would be held in Albany.

5. By email of December 11, 2020 to the Hearing Support Unit of the Division of Tax Appeals, Mr. Glass wrote that the hearing dates in this (and other pending matters in which he was the representative) were acceptable. He made no mention regarding the location of the hearing.

6. On May 11, 2021, the calendar clerk of the Division of Tax Appeals sent notices of hearing to petitioners and Mr. Glass at their respective addresses on the petition advising them

that a small claims hearing in the above matter was scheduled for Monday, June 14, 2021, at 1:00 p.m., at the NYS Division of Tax Appeals, Agency Building #1, 2nd Floor, Empire State Plaza, Albany, New York 12223. A copy of the notice of hearing was simultaneously sent to the Division of Taxation (Division).

7. Neither petitioners nor Mr. Glass responded to the hearing notice.

8. On Monday, June 14, 2021, at 1:00 p.m., Presiding Officer DiFiore commenced a small claims hearing as scheduled in this *Matter of Jerry and Kathleen Walsh*. The Division appeared by its representative. Neither petitioners nor their representative appeared at the hearing. Additionally, there was no written request for an adjournment of the hearing. Consequently, the representative of the Division of Taxation moved that petitioners be held in default.

9. On July 15, 2021, Presiding Officer DiFiore issued a default determination against petitioners, denying the petition in this matter.

10. Petitioners' application to vacate the default determination was received by the Division of Tax Appeals on July 27, 2021. In the unsworn, one-page letter, petitioners' representative, Mr. Glass, stated that he lives in Florida and was unable to fly to Albany due to Covid-19. Further, he stated that upon receipt of "the letter requesting a hearing," he told the person named in the letter that he was available for a remote hearing and that there must have been a "communication mix up." Petitioners did not offer any corroborating evidence to this assertion. Petitioners also did not offer any evidence on the substance of the case, but Mr. Glass stated that they had all the documents needed to verify their deductions.

11. In its opposition to the instant application, the Division states that petitioners fail to provide a reasonable excuse for the default. It points out that petitioners were notified by both

Presiding Officer DiFiore's letter of November 5, 2020 and the May 11, 2021 Notice of Hearing (both of which were attached to their response) that the hearing would be held in Albany and, yet, did not respond to either prior to the hearing. The Division adds that petitioners fail 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 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, “[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 3000.13 [d] [3]).

B. Petitioners did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly rendered a default determination pursuant to 20 NYCRR 3000.13 (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 that they had a meritorious case (20 NYCRR 3000.13 [d] [3]; *see Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006; *Matter of Zavalla*). Petitioners solely offered the unsworn letter of their representative in support of their application. That letter, without more, simply does not meet petitioners’ burden.

The record shows that Presiding Officer DiFiore’s letter of November 5, 2020 expressly informed petitioners that if they failed to choose a virtual hearing, it would be held in-person in

Albany. On this point, petitioners rely on Mr. Glass's unverified assertion that he "told the person named in the letter" that he would be available for a virtual hearing. The record is devoid, however, of any confirming letter from Mr. Glass, contemporaneous notes, or any other evidence corroborating this claim. Significantly, petitioners had a further opportunity to rectify their concern regarding location, or at least request an adjournment, following issuance of the May 11, 2021 Notice of Hearing. That notice specifically stated that the hearing would be held in Albany. Despite this notification, petitioners remained silent until after the hearing date. In sum, they had two opportunities to respond to the presiding officer and request a virtual hearing, but failed to do so.

As an additional proffered excuse for the failure to appear, Mr. Glass stated in his letter that he lives in Florida and could not have flown to Albany because of Covid-19. He did not, however, explain why Covid-19 prevented his travel, or if he even had the virus. This statement was also unverified. Accordingly, petitioners have not demonstrated an acceptable excuse for their absence at the hearing.

D. Furthermore, petitioners have 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). Petitioners' application only consists of a conclusory statement and lacks evidence in support of the substance of their case. As a result, petitioners' application fails on this prong as well.

E. The application of petitioners, Jerry and Kathleen Walsh, to vacate the default determination of July 15, 2021, is denied.

DATED: Albany, New York
November 18, 2021

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