STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RONALD SAFFNER : DECISION
DTA NO. 820288

for Redetermination of a Deficiency or for Refund of :
New York State and New York City Income Taxes under
Article 22 of the Tax Law and the New York City :
Administrative Code for the Years 1995 through 1997.

Petitioner Ronald Saffner, 377 Rector Place, Suite 5B, New York, New York 10280 filed an exception to the order of the Chief Administrative Law Judge issued on January 26, 2006. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Chief Administrative Law Judge properly denied petitioner's application to vacate a default determination entered against him.

FINDINGS OF FACT

We find the facts as determined by the Chief Administrative Law Judge. These facts are set forth below.

For the years here at issue, petitioner operated a law practice in the State of New York. The Division of Taxation asserted that petitioner was a person required to collect, truthfully account for and pay over all of the tax withheld with respect to the law practice within the meaning of Tax Law § 685(n) and further asserted that petitioner had failed to properly do so. The Division of Taxation issued six notices of deficiency asserting a total of $4,160.04 in penalty pursuant to the authority of Tax Law § 685(g). Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services, and on November 19, 2004, a conciliation order was issued sustaining the notices.

Petitioner filed a petition protesting the notices on December 13, 2004. In his petition, petitioner argued that the Division of Taxation had failed to give him credit for all of the withholding payments he had made. Included with the petition are photocopies of several checks payable to the "N.Y. State Dept. Of Taxation." A review of the photocopies reveals that two of the checks are for payments of New York State unemployment insurance. Two of the checks are for payment of personal income tax and were remitted with petitioner's 1994 and 1995 income tax returns. Only two of the checks are for payment of withholding tax.

Petitioner also alleged that the amount of tax due was improperly calculated, that the Division of Taxation failed to waive penalty and interest and improperly used a taxpayer identification number instead of his correct social security number.

On June 13, 2005, this matter was scheduled for a hearing before an administrative law judge to be held on July 21, 2005. At petitioner's request, the scheduled hearing was adjourned to September 14, 2005 and was also transferred to be heard before a small claims presiding officer. On August 8, 2005, a final notice of small claims hearing was mailed to the parties advising them that a small claims hearing would be held at the New York State Housing Finance Agency, 641 Lexington Avenue, Fourth Floor, New York, NY 10022, on Wednesday, September 14, 2005 at 1:15 P.M.

On September 14, 2005 at 1:15 P.M., Presiding Officer Joseph Pinto called the ***Matter of Ronald Saffner***, involving the petition here at issue. Present was Ms. D. Sealey as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. The representative for the Division of Taxation moved that petitioner be held in default.

On September 22, 2005, Presiding Officer Pinto issued a determination finding petitioner in default.

By letter dated October 13, 2005, petitioner filed an application to vacate the September 22, 2005 default determination. In his application, petitioner indicated that he suffered a heart attack in August 2005 and since that date has been unable to fully attend to his duties. Petitioner attached to his application a note from his cardiologist, dated September 1, 2005, which states that petitioner was hospitalized from August 10, 2005 to August 23, 2005. The doctor's note also states that he had advised petitioner to reduce his work load, avoid stress and to avoid excess travel. Petitioner did not address the merits of his case in this application. By letter dated

October 18, 2005, petitioner was given a second opportunity to prove that he had a meritorious case. Petitioner submitted a letter dated November 3, 2005 containing the statements that:

> 1. The Department of Taxation has failed to credit me with all payment [sic] made (see itemization set forth in my letter of 11/15/04 annexed).
>
> 2. The Department of Taxation has improperly calculated and improperly imposed "penalties" which are unwarranted.
>
> 3. The Department of Taxation has acted arbitrarily and capriciously in denying my prior requests for a waver [sic] of penalty and interest.
>
> 4. The Department of Taxation has improperly used employee [sic] identification number XX-XXXXXXX in calculating my taxes, which is incorrect, as I solely use my social security number of XXX-XX-XXXX. Therefore any tax calculated under the incorrect employee [sic] identification number are [sic] not for my account. (Actual numbers redacted).

Petitioner has submitted no actual proof which might tend to substantiate any of the claims he made in the above-quoted statements.

The Division of Taxation submitted a November 30, 2005 affirmation in opposition to petitioner's application to vacate the default determination. The Division argued that petitioner failed to provide any evidence that he had actually suffered a heart attack or that connected his claimed heart attack with his failure to appear at the hearing. The Division also points out that petitioner failed to explain why he never notified the Division of Tax Appeals of his illness and failed to explain why he never sought an adjournment of his hearing. Finally, the Division asserts that petitioner has failed to present any evidence of merit to his case and has offered nothing more than unsupported self-serving statements.

THE ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge determined that petitioner's application to vacate the default determination issued against him should be denied because petitioner did not demonstrate a meritorious case. The Chief Administrative Law Judge noted that petitioner alleges that the Division has failed to credit him with all the payments that he has made. However, the Chief Administrative Law Judge noted that the photocopies of checks submitted with his motion did not prove his allegation. Thus, the request to vacate the default determination was denied.

ARGUMENTS ON EXCEPTION

Petitioner states in his exception that he is required to have an opportunity to testify in order to establish facts to demonstrate a meritorious case. Petitioner did not further elaborate on what he intended to prove nor did he detail what documents established his meritorious case.

In opposition, the Division points out that petitioner has had more than ample opportunities to set forth his meritorious case and never availed himself of the opportunities. The Division states that the time to submit his proof has passed and that the Chief Administrative Law Judge's order should be sustained.

OPINION

We affirm the Chief Administrative Law Judge's denial of petitioner's application to vacate the default determination issued by the presiding officer.

The Tax Appeals Tribunal's Rules of Practice, at section 3000.13(c)(4) provide as follows:

> After the petition and answer have been served, or the time for serving an answer has expired, the controversy shall be at issue and the small claims unit shall schedule the controversy for a small claims hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.

Our Rules of Practice at section 3000.13(d) provide, in pertinent part, as follows:

> *Adjournment; default*. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the presiding officer shall render a default determination against the dilatory party.
>
> (2) In 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.

The record before us clearly indicates that petitioner failed to appear at the scheduled hearing for which he had been given notice. In addition, petitioner failed to request an adjournment of the proceedings. As a result, we agree that petitioner was in default and the Presiding Officer properly rendered a default determination pursuant to 20 NYCRR 3000.13(d)(2) (***see***, ***Matter of Morano's Jewelers of Fifth Ave.***, Tax Appeals Tribunal, May 4, 1989).

The issue before us now is whether the default determination should be vacated. In order for a default determination to be vacated, the regulations at section 3000.13(d)(3) 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" (***see***, ***Matter of Capp***, Tax Appeals Tribunal, January 2, 1992; ***Matter of Franco***, Tax Appeals Tribunal, September 14, 1989).

A review of the record below and the exception filed by petitioner shows that although petitioner has established an acceptable excuse for not appearing at the scheduled hearing, he failed to submit any evidence of a meritorious case for consideration by this Tribunal.

Therefore, we find that the Chief Administrative Law Judge accurately and adequately addressed the issues presented to him and affirm his order based on the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald Saffner is denied;

2. The order of the Chief Administrative Law Judge denying the application to vacate the default determination is sustained;

3. The order of the Presiding Officer holding Ronald Saffner in default is affirmed; and

4. The petition of Ronald Saffner is denied.

DATED: Troy, New York
October 19, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner