STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHRISTOPHER BRICKHILL	:	DECISION DTA NO. 820396
for Redetermination of Deficiencies 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 Periods Ended June 30, 2000, March 31, 2001, June 30, 2001, December 31, 2001 and March 31, 2002.	:	

Petitioner, Christopher Brickhill, filed an exception to the order of the Administrative Law Judge issued on April 6, 2006. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. No reply brief was filed. Petitioner's request for oral argument was denied.

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 motion to vacate the default determination issued on November 18, 2005.

FINDINGS OF FACT

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

The Division of Taxation ("Division") audited IDS Storm, Inc., and determined that the corporation had failed to pay the appropriate New York State withholding taxes for the periods here at issue. In addition, the Division determined that petitioner was a responsible person of IDS Storm, Inc. pursuant to Tax Law § 685(n) and, as such, was liable pursuant to Tax Law § 685(g) for willful failure to collect and pay over taxes. As a result, on June 9, 2003, the Division issued five notices of deficiency, one for each of the five periods here at issue, asserting withholding tax penalty against petitioner in the amount of $36,535.85 in the aggregate.

Petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services which was conducted on May 6, 2004. By order dated November 19, 2004, the five notices of deficiency were sustained. According to the Conciliation Order, full payment has been applied against three of the assessments and a partial payment against another. Accordingly, only $14,504.77 remains at issue. On February 14, 2005, petitioner filed a petition challenging all amounts still outstanding with respect to the five notices of deficiency here at issue. In his petition, petitioner argued that he was not a person required to withhold and pay over taxes on behalf of the corporation. In addition, petitioner argued that the funds paid to the corporation's employees for the periods at issue were payments to independent contractors.

On July 14, 2005, the Division of Tax Appeals mailed to petitioner and to the Division of Taxation a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing during the months of November or December 2005 and asking the parties to agree on a location for the hearing of either Manhattan or Troy, New York. A response from the Division of Taxation selected the date of November 16, 2005 and the location of Troy, New York. The Division's response also indicated that the date selected was not agreed upon by the parties because the Division's representative had been unable to

contact petitioner. On August 3, 2005, petitioner requested that the hearing be held in July 2006 and that it take place in Brazil. On September 23, 2005, petitioner advised the Division of Taxation that he would be unable to attend a hearing in New York in November. Petitioner did not include the Division of Tax Appeals in this communication. On October 11, 2005, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on November 16, 2005 at the offices of the Division of Tax Appeals in Troy, New York. On October 18, 2005, Ms. Milavec advised petitioner that he should contact the Division of Tax Appeals if he wished to request an adjournment of the hearing. Petitioner never contacted the Division of Tax Appeals regarding an adjournment.

On November 16, 2005 at 10:34 A.M., Administrative Law Judge Frank W. Barrie called the ***Matter of Christopher Brickhill***, involving the petition here at issue. Present was Michele W. Milavec, Esq., as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. Ms. Milavec moved that petitioner be held in default. On November 29, 2005, Administrative Law Judge Barrie issued a determination finding petitioner in default.

On December 28, 2005, petitioner filed an application to vacate the November 29, 2005 default determination. In his application, petitioner stated that he was not advised of the hearing in a timely fashion and had asked for it to be scheduled in 2006. In addition, petitioner stated: "There is no case. Please seek payment from the company in question."

The Division of filed its response in opposition to petitioner's application to vacate the default determination on February 9, 2006. The Division asserted that petitioner's excuse for default, that he was not advised of the hearing in a timely fashion, was not an accurate statement.

The Division pointed out all of the correspondence which had been exchanged between the parties as proof that petitioner had been adequately apprised of the hearing.

The Division has also pointed out that petitioner has provided no proof of a meritorious case.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Chief Administrative Law Judge noted that pursuant to § 3000.15 (b)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.), if 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." The Chief Administrative Law Judge further observed that § 3000.15 (b)(3) of such rules provides 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."

The Chief Administrative Law Judge found that petitioner did not appear at the scheduled hearing or obtain an adjournment and the Administrative Law Judge correctly granted the Division's motion for default. The Chief Administrative Law Judge concluded that petitioner had failed to demonstrate that he had a reasonable cause for his failure to appear for his hearing or that he had a meritorious case.

The Chief Administrative Law Judge found that petitioner's complaint that he was not advised of the hearing in a timely fashion is not supported by the record in this matter. It is apparent from petitioner's own correspondence that he was aware of the hearing date several months prior to the date of the hearing. If petitioner found that he was unable to attend a hearing

on the date selected, his recourse was to request an adjournment of the hearing to a more convenient date. Instead petitioner chose not to request an adjournment and also chose to simply not attend the scheduled hearing. The Chief Administrative Law Judge concluded that petitioner had not established that he had a reasonable cause for his failure to appear at the hearing.

The Chief Administrative Law Judge found that petitioner has made the assertion without any specifics or proof whatsoever that, "There is no case." The Chief Administrative Law Judge concluded that this self-serving conclusion does not amount to proof of a meritorious case and does not even enunciate a specific legal theory.

The Chief Administrative Law Judge found that petitioner has requested payment be sought from the corporation in question. The Chief Administrative Law Judge concluded that it is well settled that the liability of an individual who is a person responsible for the withholding and payment of taxes under section 685(n) of the Tax Law is joint and several with that of the corporation (***Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995).

ARGUMENTS ON EXCEPTION

Petitioner states in his exception that "Please not [sic] that I have advised you that I require a 90 day turn around time due to slowness of the mail, and thus to expect a return by March 8, 2007 is not agreeable and rejected." Petitioner further stated that, "Please be advised that I was not a responsible officer of the corporation during the period, as advise [sic], I received no income from the [sic] and further more I have provided you with a full list of employees from whom these taxes are due."

In opposition, the Division points out that petitioner is referring to language in a letter dated February 6, 2007 from the Tax Appeals Tribunal to Petitioner informing him that "If you wish to file a brief in support of your exception, it must be received by this office by March 8,

2007." The Division states that this statement by petitioner provides no excuse for his default in failing to appear for the hearing on November 16, 2005 in Troy, New York. The Division argues that petitioner did not further elaborate on what he intended to prove nor did he detail what documents established his meritorious case. The Division states that the Chief Administrative Law Judge's order should be affirmed.

OPINION

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

20 NYCRR 3000.15 provides, in pertinent part, as follows:

> (a) *Notice*. After issue is joined (***see***, § 3000.4[c] of this Part), the administrative law judge unit shall schedule the controversy for a 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.
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> (b) *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 administrative law judge 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 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.

The record before us clearly indicates that petitioner failed to appear at the scheduled hearing for which he had received notice. In addition, petitioner failed to obtain an adjournment of the proceedings. As a result, we agree that petitioner was in default and the Administrative Law Judge properly rendered a default determination pursuant to 20 NYCRR 3000.15(b)(2) (***see, Matter of Morano's Jewelers of Fifth Ave.***, Tax Appeals Tribunal, May 4, 1989).

The issue before us now is whether such default determination should be vacated. In order for a default determination to be vacated, 20 NYCRR 3000.15(b)(3) provides 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; ***see also, Matter of Franco***, Tax Appeals Tribunal, September 14, 1989).

A review of the record below and the exception filed by petitioner shows a failure to present an acceptable excuse for not appearing at the scheduled hearing as well as failure to supply evidence of a meritorious case for consideration by this Tribunal.

We find that the Chief Administrative Law Judge accurately and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Thus, we affirm the order of the Chief Administrative Law Judge denying petitioner's application to vacate the default determination entered against him.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Christopher Brickhill 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 Administrative Law Judge holding Christopher Brickhill in default is affirmed; and

4. The petition of Christopher Brickhill is denied.

DATED:Troy, New York
November 1, 2007

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

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

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