STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of STEPHEN B. LEBOW 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 Administrative Code of the City of New York for the Years 1983 through 1985.	:	ORDER DTA NOS. 811252 AND 811253
In the Matter of the Petition of STEPHEN B. AND GRACIELA LEBOW 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 Administrative Code of the City of New York for the Year 1986.	:	

Default orders were mailed to petitioners, Stephen B. and Graciela LeBow, on February 17, 1994, and petitioners, by Stephen B. LeBow, Esq., made a request by written application that the default determinations be vacated.

The following facts have been established by the pleadings and other information contained in the Division of Tax Appeals file:

1. On October 9, 1992, the Division of Tax Appeals received two petitions from petitioners: one from Stephen B. LeBow for redetermination of a deficiency or for refund of personal income taxes for the years 1983 through 1985, and the other from Stephen B. and Graciela LeBow for redetermination of a deficiency or for refund of personal income taxes for the year 1986. The petitions are identical, except for the tax amounts atissue. The petition of Stephen B. LeBow ("Mr. LeBow's petition") challenges a deficiency of income tax due in the amount of $27,883.30, including penalty and interest. The petition of Stephen B. and Graciela LeBow

("joint petition") challenges a deficiency of income tax due in the amount of $12,438.26, including penalty and interest.

Petitioners assert in the petitions that the auditor disallowed almost all of Mr. LeBow's business expenses, including his rental fees (although Mr. LeBow maintained an office), purchases of professional journals, professional services, interest, dues, utilities, telephone services, and subcontracting out. Petitioners maintain, as well, that Mr. LeBow was unable to "make appointment auditor unilaterally established" because he had been "ill and hospitalized, and subsequently ill and under doctor's care . . . ."[1] Finally, petitioners request an opportunity to "clarify and rectify" the matter.

Attached to the petitions are, inter alia, copies of: (1) the conciliation orders (CMS Nos. 106466 [regarding Mr. LeBow's petition] and 107265 [regarding the joint petition]), both dated June 12, 1992, and both denying petitioners' requests and sustaining the notices; and (2) two notices of deficiency: assessment number L-001582472-7 addressed to Mr. Lebow only ("Mr. LeBow's notice"), dated March 19, 1990, for tax due in the amount of $14,243.49, plus penalty and interest, for a total of $27,883.30; and assessment number L-001643877-9 addressed to both petitioners ("the joint notice"), dated April 26, 1990, for tax due in the amount of $7,622.38, plus penalty and interest, for a total of $12,438.26.

2. On May 13, 1993, the Division of Taxation ("Division") filed identical answers to the petitions, denying petitioners' claims regarding both the auditor's disallowance of Mr. LeBow's business expenses and the appointment(s) missed. In addition, the Division affirmatively states that: (1) the audit was performed using the available records of petitioners for the periods at issue; (2) the audit procedures were "sound and consistent"; (3) the appropriate analyses were made; (4) findings were made that the records disclosed errors of omission and classification relating to personal income tax; and (5) the notices of deficiency issued against petitioners are

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[1]Petitioners refer in the petitions to "appointment" in the singular, although, as will be discussed further, infra, Mr. LeBow cancelled numerous appointments with the auditor -- for medical and non-medical reasons.

the result of such audit findings. The Division also affirmatively states that where a taxpayer's books and records are incomplete and insufficient, the Division is authorized to select an audit method "reasonably calculated to reflect the taxes due" and the burden lies upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. In this regard, the Division affirmatively states that petitioners here have the burden of proving wherein the assessment is erroneous and/or improper. The Division requests that the petitions be denied and the assessments sustained in full, together with the applicable interest.

3. On May 17, 1993, identical letters[2] were sent to petitioners advising them that the Division of Tax Appeals anticipated scheduling a hearing on the petitions during the weeks of either September 27, 1993 or October 25, 1993, and that petitioners should, by June 15, 1993, inform the Division of Tax Appeals as to any preferences they had regarding the scheduling of the hearing. Petitioners did not respond to the letter.

4. On August 23, 1993, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioners, informing them that a hearing on the petitions had been scheduled for Thursday, September 30, 1993 at 1:15 P.M.

5. On September 4, 1993, Judge Ranalli received a letter from Mr. LeBow[3] requesting an adjournment of the hearing based on the fact that Mr. LeBow was scheduled to appear in Family Court in Westchester County, New York from September 27 through October 1, 1993.

6. On September 13, 1993, Judge Ranalli sent a letter to petitioner requesting that Mr. LeBow specify what he was scheduled to do in Family Court for five days, as that seemed like

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[2]The record is replete with identical letters, regarding the two separate assessments, which were sent to and from petitioners. Where this is the case, such identical letters will hereinafter be referred to in the singular, e.g., "a letter was sent."

[3]As Mr. LeBow, an attorney, is representing his wife and himself in these matters, much of the correspondence on file is between the Division of Tax Appeals or the Division and Mr. LeBow. Where this is the case, "petitioner" will be used to indicate Mr. LeBow only, as opposed to "petitioners", which is used to indicate Mr. and Mrs. LeBow.

"an inordinately long period of time to be tied up." Judge Ranalli asked petitioner to notify him regarding the specific day or days he would be in Family Court, as the Division's attorney had indicated that he could be flexible about moving the hearing to a different date during the week in which the hearing was originally scheduled. Judge Ranalli added that, as petitioners had been given the opportunity to choose between hearing weeks, but had failed to respond, petitioners would not get "a lot of sympathy for [their] predicament under these circumstances."

7. On September 21, 1993, Judge Ranalli received a letter from petitioner in response to his September 13, 1993 letter. In this letter, petitioner outlined the substance of the Family Court matter in question, adding that the dates were set aside for the case by the presiding judge on or about the last week of May or early June 1993 (i.e., after the May 17, 1993 letter from the Division of Tax Appeals regarding possible hearing weeks was received by petitioners, but before the date by which petitioners were required to reply [see, Finding of Fact "3"]). Petitioner enclosed a copy of his Notice to Appear in (Family) Court, dated August 4, 1993, confirming Mr. LeBow's appearances in Family Court on September 27, 28, 29, 30 and October 1, 1993 at 9:00 A.M. In addition, petitioner advised Judge Ranalli that he had other, previously scheduled court appearances during that same week in September, which he would have to reschedule, due to the matter in Family Court, namely: two separate matters in Civil Court in Kings County, New York on September 30, 1993; a matter in Yonkers Criminal Court on September 28, 1993; and a matter in Rockland County Court on October 1, 1993. In view of Mr. LeBow's court dates during the week of September 27, 1993, petitioner renewed his request for an adjournment of the September 30, 1993 hearing.

8. On September 24, 1993, Judge Ranalli wrote to petitioner, informing him that, due to Mr. LeBow's extensive litigation schedule, the hearing would be adjourned to the week of December 13, 1993. However, Judge Ranalli cautioned petitioner that if he did not hear from him within one week, advising him of the date and time petitioner(s) wished to appear (all time slots, Monday through Friday, of that week were available, according to Judge Ranalli's letter), Judge Ranalli himself would pick the date of the hearing and petitioner would not be permitted an

opportunity to have the matter adjourned.

9. Nearly a month later, on October 22, 1993, Judge Ranalli received a letter from petitioner informing him that petitioner preferred to have the hearing on Friday, December 17, 1993 at 1:15 P.M.

10. On November 8, 1993, Judge Ranalli sent a Final Notice of Hearing to petitioners informing them that a hearing on the petitions had been scheduled for Friday, December 17, 1993 at 1:15 P.M.

11. On December 16, 1993, Judge Ranalli received a fax transmittal from the Division's representative, Lawrence A. Newman, Esq., advising him that, before any "last minute" adjournments were granted, Judge Ranalli should bear in mind that the Division had an auditor coming from Brooklyn, New York for the hearing in Troy, New York.

12. On December 17, 1993, the day of the hearing, Frank W. Barrie, the Administrative Law Judge assigned to the matter, received a phone call from a Mr. Clendening who was inquiring about a possible adjournment for petitioners' case. Judge Barrie refused to talk to him concerning the matter, as there was no power of attorney on file for Mr. Clendening, and he declined the invitation to fax one to Judge Barrie. As for general advice about adjournments, Judge Barrie advised Mr. Clendening to look at 20 NYCRR 3000.10(b), the section of the Rules and Regulations of the Division of Tax Appeals having to do with adjournments of administrative hearings.

13. At 11:45 A.M., about 15 minutes after Judge Barrie received the phone call from Mr. Clendening, Judge Barrie received a call from Mr. LeBow, who said that he was in Criminal Court in New York City and would not be able to get to Troy by the 1:15 P.M. hearing. Judge Barrie told Mr. LeBow that he was very uncomfortable with ex parte communications, referred Mr. LeBow to 20 NYCRR 3000.10(b), and advised him to contact the Division's representative regarding a possible adjournment. Judge Barrie then transferred the call to his secretary, who was able to locate the Division's attorney in the building. Apparently, Mr. LeBow informed this secretary that he was on his way up to Troy.

14. At 1:15 P.M. on that same date, Judge Barrie called the consolidated matter for hearing. After stating on the record what had transpired between petitioner and himself on the telephone that morning, including the fact that he had denied petitioner's adjournment request, Judge Barrie announced that it was his general practice to wait approximately 45 minutes at the start of a hearing before taking a default motion from the appearing party. At that point, the Division's representative mentioned on the record that he had spoken with Mr. LeBow that morning and had advised him that he, Mr. Newman, had no authority to approve an adjournment, nor did he join petitioner in his request for an adjournment. Thereafter, Judge Barrie suspended the proceedings until 2:00 P.M., at which time he heard the Division's motion for default.

Before actually making its default motion, however, the Division presented the testimony of the auditor who had been assigned to the case. The Division sought to use the testimony of the auditor, "not for the purpose of arguing the merits of the case, but to establish a pattern of behavior on the part of the petitioner to demonstrate that his absence this afternoon is part of a regular pattern and not an isolated occurrence as someone might assume had they not had experience with him" (tr., p. 10).

According to the testimony of the auditor, between April 6, 1987, when she sent her first appointment letter to petitioners, and April 28, 1992, the date of the Bureau of Conciliation and Mediation Services conference ("BCMS conference"), at least 23 appointments with petitioners were scheduled. Sixteen of these 23 appointments were cancelled by petitioners -- or petitioners simply did not appear at all -- with 13 having been "no-shows" or cancelled either on the day of the scheduled meeting (sometimes an hour or more after the meeting was supposed to have taken place) or on the day before the scheduled meeting. In addition, petitioners failed to respond to at least three phone calls made to them by the auditor during the assessment period. Of the six times Mr. LeBow did meet with the auditor (including at the BCMS conference), three of the times petitioners' documents were so disorganized as to be virtually useless to the auditor (and/or the BCMS conferee), and the other three times, Mr. LeBow submitted some, but

not all, of the requested documentation. One time petitioners did not show up at the meeting, but sent a messenger with some documents.

15. Mr. LeBow appeared at the offices of the Division of Tax Appeals for his hearing at 5:00 P.M. on Friday, December 17, 1993 -- nearly four hours late for the scheduled hearing. Judge Barrie had already left for the day, but a note prepared by him for Mr. LeBow was given to petitioner by another Administrative Law Judge. The note contained the following message:

> "1. Matter called at 1:15.
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> "2. Waited until 2:00 to hear Mr. Newman's motion to default.
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> "3. Mr. Newman presented testimony of auditor Murray on your lack of cooperation and pattern of missing/delaying appointments.
>
> "4. Transcript available from reporter Lillian Cunniff 518 371-3633.
>
> "5. You may submit papers to me in opposition to default motion (my card attached). Copy attorney Newman with any papers you submit to me. You may have until January 7, 1994 to submit such papers."

16. On January 7, 1994, petitioner telephoned Judge Barrie to inquire whether his papers in opposition to the default motion would be timely if postmarked on the due date, January 7, 1994, rather than received on/by that date. Judge Barrie answered in the affirmative and again counseled Mr. LeBow against ex parte communications.

17. On January 10, 1994, Judge Barrie received a letter from petitioner, dated January 7, 1994, confirming Judge Barrie's statement during the telephone conversation on that date. According to petitioner's letter, motion papers were enclosed with the letter; however, there was no such enclosure. Instead, petitioner enclosed, along with this letter, a copy of the letter petitioner had written to the Division's representative, to inform him of the fact and substance of the telephone conversation petitioner had had with Judge Barrie on January 7, 1994.

18. On January 10, 1994, Judge Barrie wrote to petitioner to inform him that, while he was in receipt of petitioner's January 7, 1994 letter, no enclosures (e.g., papers in opposition to the default motion) accompanied that letter.

19. On January 11, 1994, Judge Barrie received another letter from petitioner dated January 7, 1994. In this letter, petitioner explained that earlier on that day, he had mailed letters under

separate cover to Judge Barrie and the Division's representative, confirming the January 7, 1994 (postmarked) due date for the papers in opposition. This time, petitioner did enclose the papers in opposition.

Acknowledging in his papers in opposition that 20 NYCRR 3000.10(b)(3) provides that a default motion may be vacated only where the party opposed to the motion is able to show an excuse for the default and a meritorious case, Mr. LeBow maintains that he has demonstrated why the motion should be vacated.

As for demonstrating an excuse for the default, petitioner claims that he appeared "late" at the December 17, 1993 hearing due to two "unforseen [sic] court ordered appearances" in Criminal Court and Civil Court in New York City earlier that morning. Mr. LeBow describes his predicament on the 17th of December, 1993 as the following:

> "[t]he bottom line on the issue is that I am a sole practitioner and I was required to appear at the court proceedings that same day. Judges often do not care if you have an administrative agency proceeding. They believe that a legal proceeding in court is first priority and an administrative proceeding in an administrative agency is not. Thus, if I failed to appear in court I would have been thrust in the position where I could be held in default or my client could in those proceedings, I could be held in contempt, and I could be subject to malpractice and also disciplinary proceedings before the character and fitness committee. If I attended those proceedings I would be late for the tax hearing."

Petitioner further explains that after this tax matter was scheduled, and immediately before the date of the hearing, he was told to appear in Queens Criminal Court for the People v. Garo Alexanian, Docket No. 930000340, wherein, after a two-week trial, the parties were ordered to appear in court on three different motions. Additionally, maintains petitioner, he had to appear in Civil Court in Bronx County in SBL Apts., Inc. v. Elizabeth Crumpton and Carlos Sargenton, Index No. 83376/93, for an Order to Show Cause which "was brought unexpectedly against [his] client for that same day."

Petitioner contends that he both attempted to get another lawyer to cover for him, and tried to reach Judge Barrie the day before the hearing, but was unsuccessful. In addition, petitioner asserts that he tried to get out of the court appearances, but was not able to do so. Petitioner claims that, based on several conversations he had with secretaries at the Administrative Law

Judge Unit of the Division of Tax Appeals in which he was told that sometimes hearings begin late and go on until 8:00 P.M., and that there are adjournments and continuances, he decided to make his court appearances and then attend the administrative law judge hearing "in the afternoon albeit a little later."

On the day of the hearing, asserts petitioner, his assistant, and then he, himself, tried to obtain an adjournment from Judge Barrie in the event that being late to the hearing was not acceptable. Judge Barrie told petitioner to confer with opposing counsel and to read 20 NYCRR 3000.10. Petitioner insists that he told Judge Barrie that he would be at the hearing, but would, under the circumstances, be late. Judge Barrie apparently again advised petitioner to speak with opposing counsel, and switched him to the receptionist to try to locate Mr. Newman. Once he was able to speak to Mr. Newman, argues petitioner, Mr. Newman was "curt, rude, discourteous, [and] unprofessional," telling petitioner not to bother to come after 1:30 P.M. to the hearing, as Mr. Newman would make a default motion against him. Petitioner then told Mr. Newman that he would see him at the hearing. Petitioner claims that he and his witnesses arrived at the Division of Tax Appeals shortly past 4:30 P.M., and found a note left for him by Judge Barrie, who was gone for the day (see, Finding of Fact "15").

Petitioner notes that he has read the record of December 17, 1993, and that this opposition is filed in response to Judge Barrie's written note and the transcript.

In regard to petitioner's second hurdle, that of proving a meritorious case, petitioner maintains that the assessment was "erroneously-prepared", in that the auditor allowed petitioner "virtually no deductions that are in the normal and ordinary course for operating a business and operating and conducting a legal practice." Moreover, petitioner stresses that the auditor's testimony at the hearing was "totally self-serving, one-sided and one-dimensional, and totally irrelevant to the issues at hand." Petitioner argues that the auditor failed to read into the record the fact that, despite petitioner's protestations, the auditor always scheduled the appointments unilaterally, rather than picking a mutually agreeable date and time in which to meet.

Petitioner also points out the auditor's failure to testify to the fact that petitioner was

hospitalized three times during the audit period for operations and surgical procedures, and was otherwise ill and under a doctor's care during that time. Petitioner maintains that the auditor scheduled some of the appointments on the dates when he was undergoing medical treatments. As well, petitioner notes that his wife, son and father-in-law were ill and hospitalized during the audit period, though petitioner does not explain why this kept him from making his appointments with the auditor.

Petitioner further contends that the auditor neglected to testify regarding the books, documents and records which petitioner apparently gave to a previous auditor to photocopy and were never returned. In addition, petitioner asserts that the auditor "conveniently forgot" to testify about the "numerous telephone calls and communications made to her never succesfully [sic] reaching her and never getting a return telephone call or communication." Moreover, petitioner emphasizes that neither the Division's representative nor the auditor ever testified to the tax warrants which were docketed against him:

> "illegally, unjustifiably, and without notice . . . and unbeknownst to [him] and the illegal levies, executions, and attachments orchestrated by the Tax Department against [his] wife and [him], and which has ruined [his] name, reputation, and whatever credit standing or creditworthiness [he] had with financial institutions and other third parties."

Petitioner attached copies of the tax warrants and three Notices of Pending Warrant Vacate (see, infra).

In addition, petitioner claims that the auditor's testimony is irrelevant as the pertinent regulations govern tax hearings, including the facts and circumstances or conduct during the hearings, and her testimony does not address the subject matter of hearings.

Lastly, in relation to the merits of the case, petitioner argues that:

> "It is known that I have been active in politics and civic and community causes and civil rights in the past and that I and/or those with whom I have been active have certain detractors or enemies. It is known in certain circles that this audit was politically-motivated by those with a political agenda. Several auditors misplaced and lost records of mine. The IRS has audited me and has not seen fit to change any of my taxes."

In sum, petitioner asserts that he made "every concerted effort" to proceed with the hearing despite the circumstances, and that he was "not being dilatory in any way shape or form."

Petitioner contends that, according to section 3000.10 of the Rules and Regulations of the Division of Tax Appeals, administrative law judges may grant an adjournment in the event of an emergency, upon less notice. While petitioner acknowledges that the statute provides that a default will be rendered against a dilatory party upon continued and unwarranted delay of the proceedings, petitioner insists that he is not guilty of continued and unwarranted delay; rather, he avers that the proceedings were "delayed due to forced [sic] beyond [his] power and control and [he] still made every effort to accommodate the other parties and made it to the hearing albeit late."

Attached to petitioner's affirmation are: (1) a copy of Judge Barrie's note to petitioner, dated December 17, 1993 (see, Finding of Fact "15"); (2) a copy of the December 3, 1993 letter from petitioner to a supervisor at the Tax Compliance Division of the Department of Taxation regarding certain tax warrants against petitioners which had been vacated and certain problems which had arisen due to the warrants in the interim; (3) three separate Notices of Pending Warrant Vacate, dated November 12, 1993, regarding Warrant ID Nos: E-000044290-W001-2 ($16,544.77), E-000044290-W003-1 ($5,121.49) and E-000044290-W002-6 ($36,189.38); (4) the Final Notice of Hearing issued to petitioners by Judge Ranalli on November 8, 1993 regarding the December 17, 1993 hearing; and (5) The Tax Compliance Levy regarding Warrant ID No. E-000044290-W001-2, dated October 29, 1993 ($16,918.78 including interest).

20. On January 11, 1994, Judge Barrie sent a letter to petitioner to inform him of the fact that he had received petitioners' papers in opposition along with the second letter from petitioner dated January 7, 1994. Judge Barrie advised petitioner that, although the envelope in which the papers arrived bore a machine-metered stamp of January 7, 1994 but no postmark, he would deem them timely, since four days was not, in his opinion, later than the date that a document mailed and postmarked January 7, 1994 by the United States Postal Service would be received (citing, Matter of Harron's Electric Service, Tax Appeals Tribunal, February 19, 1988).

21. On January 14, 1994, Judge Barrie received a letter from petitioner dated that day, in response to Judge Barrie's letter of January 10, 1994. In this letter, petitioner explained that the

two letters to Judge Barrie dated January 7, 1994, and received on January 10 and January 11, 1994 were mailed at different times in the day -- one in the morning and one (with the papers in opposition enclosed) in the afternoon.

22. In response to petitioners' submission, the Division,[4] on January 24, 1994, sent a letter to Judge Barrie requesting that the motion for default be granted as petitioners had not sufficiently demonstrated an excuse for the default and a meritorious case.

23. On February 17, 1994, Judge Barrie issued a default determination against petitioners. A copy of this determination and a letter from Andrew F. Marchese, Chief Administrative Law Judge, was sent to petitioners on that same date. Judge Marchese's letter indicated that:

> "[p]ursuant to the Rules of Practice and Procedure, a default determination may be vacated upon written application to the supervising administrative law judge. The applicant must show an excuse for the default and proof of a meritorious case."

24. Petitioners, on March 21, 1994, filed an application to vacate the default determination ("application"). The application is virtually identical to petitioners' opposition to the Division's default motion, except that petitioners have added an additional paragraph to the application. This paragraph (par. 24) provides, in essence, what petitioners alleged in their petition, namely, that the auditor did not permit deductions for petitioners' normal and customary business expenses such as office rental fees, supplies, cleaning and repairs. Petitioners assert that the auditor did not recognize the office premises as such and therefore did not grant the rent deduction. Petitioners contend that they have already demonstrated and are prepared to demonstrate again that the residence and office addresses are separate, noting that Mr. LeBow has documentation in the form of personal and office bills, a voter registration card, and personal and business correspondence to prove this point.

25. On March 25, 1994, the Division received a letter from Judge Ranalli, informing Mr. Newman that the Division had until April 19, 1994 to file a response to petitioners' application.

26. In its timely response to petitioners' application, the Division argues that petitioners have

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[4]Because of the unavailability of Mr. Newman due to medical reasons, this letter was written by David C. Gannon, Esq., of counsel to the Division.

neither demonstrated a plausible excuse for the default nor a meritorious case, and that, therefore, petitioners' application should be denied. Furthermore, the Division asserts that Mr. LeBow is the "creator of his problem and not the victim that he pretends to be."

As for the excuse petitioners offered to explain the default, the Division points out that Mr. LeBow never gave any explanation regarding how he resolved the alleged conflict of the New York City court appearances on the day of the hearing, nor did he produce any documentation or corroboration of these allegations.

Turning to petitioners' attempt to demonstrate a meritorious case, the Division charges that if, in fact, petitioners are prepared to present evidence and witnesses concerning the disallowance of business expenses claimed on petitioners' tax returns, it would be incumbent on petitioners to disclose the "precise nature" of this evidence and to identify the witnesses, as none of this alleged evidence was presented during the course of the audit or at the BCMS conference.

OPINION

A. 20 NYCRR 3000.10(b)(2) provides as follows:

> "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."

B. 20 NYCRR 3000.10(b)(3) permits a default determination to be vacated if the petitioner can demonstrate both an excuse for the default and a meritorious case.

C. First I will examine petitioners' attempt to demonstrate an excuse for the default. Although in petitioners' application to vacate the default determination, Mr. LeBow maintains that the "unusual and unexpected circumstances" with which he was apparently faced on the day of the hearing were "beyond [his] control" (Petitioners' application, p. 5), petitioners have not established this to have been the case. While Mr. LeBow catalogs his frustrated attempts on the day of the hearing and the day preceding that, to have the administrative hearing adjourned or merely delayed, Mr. LeBow has never produced any evidence to corroborate his claims that he was unable to attend the administrative hearing on time due to two supposedly unexpected court

appearances in New York City.

Petitioner has not proffered any documentation whatsoever verifying either the existence or the timing of the two matters in question. While it is true that petitioners' application to vacate includes Mr. LeBow's affirmation as to the facts of this case, I find this alone to be insufficient in light of Mr. LeBow's long history of delay, in light of the vague and nonspecific nature of Mr. LeBow's statements and in light of the ease with which Mr. LeBow should have been able to provide documents substantiating his assertions.

Had this been the first time Mr. LeBow had sought an adjournment at the last moment, perhaps I would be more inclined to give weight to the statements contained in his affirmation. Here, however, the facts are incompatible with such a resolution. First, as the auditor testified, Mr. LeBow cancelled 16 out of the 23 appointments he had with her, by either not showing up at the meeting and not calling, by not showing up and then calling one or more hours after the meeting was scheduled to begin, by cancelling on the day of the meeting, or by cancelling the day before the meeting. Secondly, Mr. LeBow himself had chosen the date and time of the December hearing, having been granted an adjournment from the original hearing because of his extensive litigation schedule at that time. As noted in the Findings of Fact, this adjournment from the September hearing was not easily granted by Judge Ranalli, as petitioners had also failed to respond to the letter requesting petitioners' choice of hearing dates.

Mr. LeBow indicates in his affirmation that he was told to appear in the two court cases "immediately before the [tax appeals] hearing date". Mr. LeBow does not specify on what dates he was notified of the need to appear in the two court cases and does not indicate whether "immediately" means the day before the hearing, the week before the hearing or the month before the hearing. The record indicates that Mr. LeBow waited until two hours before the hearing to contact Judge Barrie. Mr. LeBow asserts that he attempted to contact Judge Barrie the day before the hearing but was unsuccessful. However, this assertion is not supported by anything in the record and it is unknown why he couldn't have contacted Judge Barrie. Mr. LeBow does not assert that he ever tried to contact either the Assistant Chief Administrative

Law Judge or me to seek an adjournment.

Mr. LeBow indicates in his affirmation that he tried to get another lawyer to cover for him but was unsuccessful. Mr. LeBow provides no details as to what this effort may have entailed or why it was unsuccessful. Moreover, it is unknown why it was not possible for Mr. LeBow to find anyone (e.g. his wife, an attorney, a CPA, a public accountant or an enrolled agent, see Tax Law § 2014) who could represent him before the Division of Tax Appeals. In this regard, it is noted that the June 12, 1993 BCMS Conciliation Order transmittal letter attached to Mr. LeBow's petition indicates that petitioners had been represented before BCMS by Mr. Glen Clendening (see Finding of Fact 12). It is unknown why Mr. Clendening could not represent petitioners before the Division of Tax Appeals.

Mr. LeBow indicates in his affirmation that he was required to appear in both Queens Criminal Court (regarding three motions) and in the Civil Court of the City of New York, Bronx County (regarding an order to show cause) on the date of his tax appeals hearing. It should not have been an insurmountable task for Mr. LeBow to include as part of his application to vacate a copy of the order to show cause, or a copy of the court's order scheduling the motions for argument or copies of the resulting orders disposing of the motions or, at the very least, some written communication from the courts indicating Mr. LeBow's appearance at the time in question. All of this is noticeably absent from petitioners' application to vacate.

The application of Matter of Morano's Jewelers of Fifth Avenue (Tax Appeals Tribunal, May 4, 1989), to the instant matter deserves comment even though petitioners have failed to raise it in their application to vacate. In Morano's, the Tribunal held that, while the excuse (i.e., the erroneous belief that a law clerk could obtain a continuance of the proceeding when he appeared at the hearing) was not "wholly satisfactory" on its own, it was sufficient under the circumstances and in conjunction with the petitioner's appearance later that same day to try and cure the default. Although Mr. LeBow, as well, eventually appeared at the offices of the Division of Tax Appeals for his hearing on the date of the hearing, the two situations are wholly distinguishable.

In Morano's, the Tribunal found that the eventual appearance of the petitioner indicated "the nondeliberateness of the delay and a good faith intent to carry out the proceedings (citing, Stolpiec v. Wiener, 100 AD2d 931, 474 NYS2d 820; Zaldua v. Metropolitan Suburban Bus Auth., 97 AD2d 842, 468 NYS2d 917). It is apparent from this finding, that the petitioner's default in Morano's was not symptomatic of a pattern of careless, irresponsible or dilatory behavior, for, otherwise, in view of 20 NYCRR 3000.10(b)(2), the Tribunal would certainly have considered such relevant factors and would have catalogued such factors in the Findings of Fact. It is acknowledged that in the Findings of Fact in Morano's, there is mention of a Grand Jury hearing at which the petitioner did not appear and was held in contempt. This contempt adjudication was later reversed (see, Grand Jury Subpoena Duces Tecum Served Upon Morano's of Fifth Avenue, 144 AD2d 252, 533 NYS2d 869, lv dismissed in part, denied in part 73 NY2d 1009, 541 NYS2d 762). This is the only such incident listed in the Findings of Fact (see, 20 NYCRR 3000.11[e][2]).

To the contrary, in the present matter, Mr. LeBow's default on the day of the hearing is representative of his dilatory behavior throughout the audit and since, as demonstrated in the Findings of Fact. Thus, unlike the petitioner in Morano's, Mr. LeBow's appearance in Troy on the day of the hearing at the close of business hours, 5:00 P.M., is, under the circumstances, not enough to indicate that the delay was nondeliberate and/or that petitioner was making a good faith effort to carry out the proceedings. Mr. LeBow cannot hope to erase or reverse the pattern of noncooperation and delay which he has established from the start of the audit, merely by eventually showing up for the hearing at the close of business. Moreover, unlike the situation in Morano's, Mr. LeBow's default did prejudice the Division, in that the Division's auditor had traveled to Troy from Brooklyn, New York for the hearing, presumably to testify on the merits, and was unable to do so.

In short, rather than having demonstrated a reasonable excuse for the default, Mr. LeBow, via his behavior throughout the audit and hearing process, has demonstrated a pattern of dilatory tactics resulting in continued and unwarranted delay of the audit and the entire proceedings. In

the face of the evidence regarding Mr. LeBow's repeated cancellations of meetings with the auditor, and without concrete proof (1) that the court matters which Mr. LeBow alleges to have taken place on the date of the administrative hearing actually did take place, and/or (2) that these matters came up suddenly, as petitioner alleges, it cannot be said that petitioners have demonstrated a reasonable excuse for the default. Thus, petitioners have failed to meet the first requirement of 20 NYCRR 3000.10(b)(3).

D. The second requirement which must be met before a default determination can be vacated under 20 NYCRR 3000.10(b)(3) is that petitioners demonstrate a meritorious case. The reason for analyzing whether or not petitioners have demonstrated a meritorious case before a default determination may be vacated is that, if the matter were to go to hearing, it would be petitioners' burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous, and this burden is a heavy one (see, Matter of Executive Land Corp v. Chu, 150 AD2d 7, 545 NYS2d 354, 358, appeal dismissed 75 NY2d 946, 555 NYS2d 692; Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 453). In this regard, while a determination of tax must have a rational basis in order to be sustained at the hearing (Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence or insufficient evidence is introduced challenging the assessment (Matter of Atlantic & Hudson Limited Partnership, Tax Appeals Tribunal, January 30, 1992).

In attempting to demonstrate a meritorious case, petitioners' main contention is that the assessment is erroneous because the auditor "incredibly did not permit [Mr. LeBow] any deductions for office rent, office supplies, cleaning, repairs, and the like, and many other normal and customary deductions for operating a business of the practice of law. [The auditor] would not recognize [Mr. LeBow's] office premises as such and did not grant the rent deduction" (Petitioners' application, p. 5). To emphasize petitioners' point, Mr. LeBow claims that he has

"demonstrated in earlier stages" and is again "prepared to demonstrate" -- via such documents as a voter registration card, personal and office bills, personal and business correspondence, etc. -- that his residence and office addresses are separate (Petitioners' application, p. 5). However, Mr. LeBow did not submit any evidence of the kind with petitioners' application and there is no mention in the record of Mr. LeBow's having submitted such evidence at any prior time to the auditor or the conciliation conferee. Indeed, Mr. LeBow, himself, does not specify to which "earlier stages" he refers. Thus, petitioners' offer of proof consists of nothing more than Mr. LeBow's argument that the assessment was erroneous because business deductions were disallowed.

While all that is required to demonstrate an underlying meritorious case is a prima facie showing of legal merit (Matter of Morano's Jewelers of Fifth Avenue, supra, citing D. Sanders, P.C. v. H.A. Sanders, Arch., 140 AD2d 787, 527 NYS2d 660; Tat Sang Kwong v. Budge-Wood Laundry Serv., 97 AD2d 691, 692, 468 NYS2d 110; Picotte Realty v. Aragona, 87 AD2d 955, 956, 451 NYS2d 220; Investment Corp. of Phila v. Spector, 12 AD2d 911, 210 NYS2d 668), mere conclusory statements not supported by the facts will not suffice to prove a meritorious case (Matter of Morano's Jewelers of Fifth Avenue, supra). In Morano's, the petitioner was held to have demonstrated the existence of a possible meritorious case by having asserted facts concerning the propriety of the assessment against Morano's; namely, the petitioner maintained that records were offered on audit which were complete, i.e., records which would have precluded the Division from disallowing the claimed out-of-state sales (see, Grand Jury Subpoena Duces Tecum Served Upon Morano's of Fifth Avenue, supra, 533 NYS2d at 870 [wherein the court notes that the Division's auditor had found the sales during the test period to have been documented]). On the other hand, in the present case, all that petitioners have offered, as noted, is the conclusory statement that Mr. LeBow's business deductions were disallowed, and the promise that Mr. LeBow has evidence to prove that his office and home addresses were separate. Such statements are not equivalent to the assertion that complete records were available but ignored on audit, and are, in any case, insufficient to demonstrate the

possible existence of a meritorious case.

Similarly, petitioners' contention that various books, documents and records were taken by a previous auditor to photocopy, were never returned and were apparently lost, is insufficiently specific and is, in any case, uncorroborated. As for petitioners' mention of the tax warrants which were docketed against them "illegally, unjustifiably, and without notice" and of the "illegal levies, executions, and attachments orchestrated by the Tax Department" which "ruined" them in name, reputation, and credit-worthiness, such arguments are irrelevant to whether or not the underlying liability assessed herein against petitioners is proper or not (Petitioners' application, p. 4). Also irrelevant is petitioners' assertion that "[e]ven assuming arguendo [sic] that the Tax Department were upheld, there is no way [we] could pay those amounts of money" (Petitioners' application, p. 4).

Finally, petitioners have alleged that the audit was "politically-motivated by those with a political agenda" (Petitioners' application, p. 4). While charges of selective prosecution or bias on the part of an auditor should never be taken lightly, petitioners' allegations prove nothing other than the ease with which completely unsubstantiated charges can be made. Petitioners have provided neither the slightest specificity nor any hint of substantiation for this charge. It is not explained how this charge aids petitioners in proving the merits of their case.

Absent a more detailed statement of the business deductions which petitioners claim were erroneously disallowed by the auditor, and/or corroborating evidence to support petitioners' allegations, I cannot presume that Mr. LeBow in fact has the evidence he claims to have, nor can I determine that the auditor's assessment method or result was erroneous.
In sum, petitioners have failed to demonstrate a meritorious case.

E. It is ordered that the request to vacate the default determination be, and it is hereby, denied and the Default Determination issued February 17, 1994 is sustained.

DATED: Troy, New York
June 2, 1994

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE