STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
J. DAVID GOLUB	:	DECISION DTA NO. 819552
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 1991, 1992 and 2001.	:	

Petitioner J. David Golub, P.O. Box 131721, Staten Island, New York 10313, filed an exception to the order of the Chief Administrative Law Judge issued on August 26, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. 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 reopen 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.

In 1989, petitioner commenced litigation against Kidder, Peabody & Co., Inc. in the United States District Court for the Southern District of New York. Petitioner alleged that Kidder Peabody had engaged in unauthorized trades in his account with Kidder Peabody. Kidder Peabody asserted that positions in petitioner's account were liquidated to satisfy margin maintenance calls. In 1990, the District Court ordered the parties to arbitrate their differences. Petitioner sought an appeal of this order in the Court of Appeals for the Second Circuit. However, the Court of Appeals dismissed the appeal because the arbitration order was not appealable. Notwithstanding the District Court's order that petitioner submit his claim to arbitration, he did not do so. Instead, he filed numerous motions and appeals attempting to overcome the order to arbitrate. On September 29, 1992, the District Court enjoined petitioner from any further filings in that court until he submitted to the ordered arbitration.

Ultimately, petitioner's account with Kidder Peabody was liquidated and the net proceeds paid over to petitioner. On his 1991 Federal income tax return, petitioner failed to claim any portion of the proceeds as income. In addition, on his 1991 and 1992 returns, petitioner claimed certain Schedule C deductions as well as net operating loss carryovers. Petitioner was audited by the Internal Revenue Service and assessed additional tax with respect to several items on his Federal returns for the years 1991 and 1992 based upon, as relevant to the instant proceeding, failure to report income from the liquidation of the Kidder Peabody account and disallowance of Schedule C deductions and NOL carryovers.

Petitioner challenged the assessments in the Tax Court. However, the court found against petitioner on the issues of the gain on the liquidation of his Kidder Peabody account. The court held that:

> Despite repeated invitations by respondent and by the Court to prove his basis in the stock sold, petitioner has failed to do so. He has left the Court with no choice but to hold him liable on all the proceeds from the sale of the stock [citation omitted]. Petitioner thus may end up paying more in capital gains taxes than he would have if he had provided evidence of basis. But if so, he has only himself to blame. (***Golub v. Commissioner,*** 78 TCM 367 [1999].)

Similarly, the court found against petitioner with respect to the issues of his business deductions and net operating loss carryovers, again finding that petitioner had failed to prove that he was entitled to claim the various deductions that he had claimed and, with respect to the net operating loss carryovers, to even address their disallowance at trial. In addition, the court found petitioner's position on these issues to be frivolous and wholly without merit. Accordingly, the court assessed petitioner a $10,000.00 penalty under section 6673(a) of the Internal Revenue Code. Petitioner's appeal of the Tax Court's decision was dismissed and his motions to vacate the Tax Court's decision and for rehearing were denied (***Golub v. Commissioner***, 2001 WL 376501 [DC Cir 2001]).

Petitioner failed to report these Federal changes as required by section 659 of the Tax Law. However, the Division of Taxation ("Division") became aware of the changes due to a notification from the Internal Revenue Service. As a result, the Division issued notices of additional tax due for the 1991 and 1992 tax years asserting that petitioner owed additional New York State and New York City personal income tax.

Petitioner filed a New York State personal income tax return for the 2001 tax year. On said return, petitioner claimed estimated tax payments in an amount which exceeded the amount in petitioner's estimated tax account. As a result, the Division issued a Notice and Demand for Payment of Tax Due asserting that petitioner owed additional tax, penalty and interest for the 2001 tax year.

Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services. A conference was scheduled for October 16, 2002 but petitioner failed to appear and a default order was issued. At petitioner's request, the default order was vacated and a new conference scheduled. Petitioner again failed to appear and a second default order was issued.

On July 7, 2003, the Division of Tax Appeals received a petition from petitioner protesting the notices of additional tax due issued by the Division for the years 1991 and 1992 and the Notice and Demand for Payment of Tax Due for the year 2001.

The calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated November 18, 2003 to petitioner and to the Division advising them to contact each other to set a mutually convenient hearing date during the months of March or April 2004. The Division selected the date of April 20, 2004. Petitioner did not respond to the notice.

On March 15, 2004, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that the hearing was scheduled for April 20, 2004 in Manhattan. By motion dated April 2, 2004, petitioner sought an adjournment of the April 20, 2004 hearing on the grounds that:

> 1) Material Related Federal Court Proceedings are Pending - See USDC-SDNY *Golub v. GE-Kidder, Peabody & Co., Inc.* [Docket Number 89 Civ. 5903 (CSH)]
>
> 2) Material related proceedings brought by IRS District Counsel are pending and adjourned until such time as constitutional right to confrontation and in-court direct examination of hostile witnesses pursuant to court ordered subpoenas are completed. See attached service of legal process.
>
> 3) Prospective motion to vacate the U.S. Tax Court Opinion 78 TCM 367 (Gale) is forthcoming, with concurrent motions for monetary compensatory and punitive damages including a request and demand for declaratory relief before the Second Circuit Court of Appeals. Petitioner's statement, legal argument and attached article are filed in support of this motion and the prospective motions.

Petitioner's motion for adjournment was denied on April 6, 2004.

On April 20, 2004 at 10:30 A.M., Administrative Law Judge Dennis M. Galliher called the ***Matter of J. David Golub***, involving the petition here at issue. Present was Ms. Neri as representative for the Division. Petitioner did not appear, and no representative appeared on his behalf. The attorney for the Division moved that petitioner be held in default.

On May 20, 2004, Administrative Law Judge Galliher issued a determination finding petitioner in default and imposing a $500.00 frivolous petition penalty pursuant to the provisions of section 3000.21 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.21).

On June 10, 2004, petitioner filed an application to vacate the May 20, 2004 default determination. In his application, petitioner neither set forth reasonable cause for his failure to appear at his hearing nor demonstrated that he has a meritorious case. Instead, petitioner stated that he has filed yet another motion with the Tax Court, this time to vacate the United States Tax Court Memorandum Decision 1999-288 in its entirety on the grounds of fraud.

On July 14, 2004, the Division filed a letter in opposition to the application to vacate the default determination. In its letter, the Division points out that petitioner has demonstrated neither an excuse for his failure to appear at hearing nor a meritorious case.

THE ORDER OF THE CHIEF 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 reasonable cause for his failure to appear for his hearing or that he had a meritorious case.

The Chief Administrative Law Judge held that petitioner's request for adjournment was merely for the purpose of filing a frivolous motion in the Tax Court and it was his own choice to fail to appear at the hearing.

The Chief Administrative Law Judge noted that pursuant to Tax Law § 659, taxpayers must report final Federal changes to their income within 90 days. The Chief Administrative Law Judge concluded that all of petitioner's Federal appeal rights had expired and although petitioner continued to make a frivolous motion, it did not extend his time to appeal. Further, the Chief Administrative Law Judge found that petitioner had failed to take advantage of the opportunity provided by Tax Law § 659 to demonstrate wherein the Federal changes made to his income were erroneous. Instead, petitioner argued that the New York assessments should be canceled simply because he intended to file a motion to vacate the Tax Court's decision.

As a result, the Chief Administrative Law Judge denied petitioner's request to vacate the default determination and sustained the default determination issued on May 20, 2004.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues, as he did to the Chief Administrative Law Judge, that the New York administrative proceeding must be vacated and dismissed in its entirety because there has been no decision or settlement in the pending Federal proceedings and said proceedings have been tainted by fraud.

The Division, in opposition, argues that the Chief Administrative Law Judge correctly denied petitioner's motion to vacate the default determination entered against him in this proceeding.

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.
>
> (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 J. David Golub 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 J. David Golub in default is affirmed;

4. The petition of J. David Golub is denied; and

5. Penalty in the amount of $500.00 for filing a frivolous petition is sustained.

DATED: Troy, New York
September 8, 2005

/s/Donald C. DeWitt
Donald C. DeWitt
President

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

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