STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GEORGE FRANICEVICH	:	DECISION DTA NO. 819647
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 1998, 1999 and 2000.	:	

Petitioner George Franicevich, 655 Beverly Drive, Lake Wales, Florida 33853, filed an exception to the order of the Chief Administrative Law Judge issued on January 27, 2005. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a letter brief in reply. 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 was a resident of the State of New Jersey who worked within and without New York State and New York City. For purposes of allocation, petitioner claimed days worked at his home in New Jersey as days worked outside of New York. Petitioner's allocation of days worked at home to days worked outside of New York was disallowed by the Division of Taxation. As a result, notices of deficiency were issued for the 1998 and 1999 tax years on March 18, 2002. A Notice of Deficiency for the 2000 tax year was issued on February 10, 2003. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services for the assessments relating to the 1999 and 2000 tax years. On June 27, 2003, the request was denied and the statutory notices sustained for both years.

Petitioner filed a petition protesting the assessments for tax years 1998, 1999 and 2000. In his petition, petitioner argued that days worked at home were not for his convenience but instead were due to the need to comply with the Federal Clean Air Act. In addition, petitioner asserted that New York State had the opportunity to present its case in his 2002 bankruptcy and failed to do so. Submitted with the petition was a single page of an order of the United States Bankruptcy Court, Middle District of Florida, Tampa Division, granting to petitioner a discharge under section 727 of the Bankruptcy Code. Finally, petitioner demanded a trial by a jury of his peers.

On May 18, 2004, the Division of Tax Appeals mailed to petitioner and to the Division of Taxation ("Division") a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing. A response from the Division

of Taxation selected the date of September 23, 2004 and the location of Troy, New York. The Division's response indicated that the Division's representative had been unable to contact petitioner. On June 24, 2004, a response was received from petitioner. On it, petitioner indicated that, "I had to declare bankruptcy due to medical expenses etc. I have no assets and no funds for travel." In addition, petitioner demanded a trial by a jury of his peers located in Polk County, Florida. On August 16, 2004, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on September 23, 2004 at 10:30 A.M. at the offices of the Division of Tax Appeals in Troy, New York.

On September 9, 2004, the Division of Tax Appeals received from petitioner a request for adjournment of the hearing due to the recent hurricanes in Florida which had left him without assets. In addition, petitioner complained about the length of time it had taken the Division to issue its assessments and once again demanded a trial by a jury of his peers to be held in Polk County, Florida.

On September 10, 2004, the Assistant Chief Administrative Law Judge advised petitioner by letter that jury trials in Florida were not permitted under the Tax Law and that if his only purpose in requesting an adjournment was to request such a jury trial then the request was denied. Petitioner was further advised that if he wished to arrange a new date for a hearing in Troy, New York, he should contact the Division's attorney to discuss possible dates for a hearing or alternate means of resolving his case. Finally, he was advised that the hearing would remain as currently scheduled until petitioner informed the Division of Tax Appeals of the results of his discussion with the Division of Taxation. Petitioner never took any steps to arrange for an alternate date for a hearing or an alternate means of resolving his case. However, on

September 23, 2004, the Division of Taxation received from petitioner a letter dated September 20, 2004 which was addressed to the Assistant Chief Administrative Law Judge and which stated:

> No Sir, I am not asking for an adjournment to reschedule a jury trial in Florida. What I was trying to say was that if I could not get an adjournment, then the only way I could attend would be if the trial or hearing was held here in Polk County. I hope this clears that matter up. (Emphasis in original.)

On September 23, 2004 at 11:30 A.M., Administrative Law Judge Gary Palmer called the ***Matter of George Franicevich***, involving the petition here at issue. Present was Ms. Murphy as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. The attorney for the Division moved that petitioner be held in default.

On September 30, 2004, Administrative Law Judge Palmer issued a determination finding petitioner in default.

On October 18, 2004, petitioner filed an application to vacate the September 30, 2004 default determination. In his application, petitioner indicated that he had no assets and was unable to travel to New York or anywhere else.

With regard to the merits of his case, petitioner asserted that he was selected by his employer to work from his home in order to comply with the Federal Clean Air Act and he did not work at home for his own convenience. Moreover, petitioner asserted that the Division intentionally waited three years to issued its assessment. Had petitioner been aware of what the Division was going to do, he would have changed the base office from which he worked. Petitioner submitted no evidence which might tend to substantiate his claims.

In addition, petitioner asserted that the taxes in question had been discharged in his 2002 bankruptcy. Again, petitioner failed to submit any evidence which might tend to substantiate his claim.

Finally, petitioner threatened to bring a lawsuit against the State of New York and bring witnesses to prove that his assertions are correct.

The Division filed a response dated November 24, 2004 arguing that petitioner has shown neither a reasonable excuse for his default nor a meritorious case. The Division asserted that petitioner chose not to appear for his hearing or to avail himself of an alternative to a hearing such as a submission by mail. In addition, the Division argued that the Federal Clean Air Act provides a tax incentive for employers not a tax exemption for employees, that petitioner's 1998 through 2000 New York State income taxes were not discharged in petitioner's 2002 bankruptcy and that the Division issued all deficiency notices within the three-year period prescribed by statute.

On December 27, 2004, the Division of Tax Appeals received a letter from petitioner stating that: "Mrs. Murphy's letter is wrought with misinformation and misstated facts which you will be able to see, if you have access to all documents and correspondence from myself to New York State." Petitioner has provided no specifics in this regard.

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 so that he could have a trial by a jury of his peers in Polk County, Florida was properly denied. The Chief Administrative Law Judge found that petitioner's request for a new hearing was nothing more than a tactic to delay the resolution of this matter.

The Chief Administrative Law Judge noted that petitioner did not offer the slightest bit of evidence which would link his work at home with the Federal Clean Air Act in order to show that his work at home was necessary in order for his employer to comply with the Federal Clean Air Act.

The Chief Administrative Law Judge also found that the Division issued the assessments at issue within the time provided for it to do so by law. The Chief Administrative Law Judge concluded that petitioner failed to show that the three assessments at issue were discharged in

bankruptcy, as claimed by petitioner, or that they were the type of indebtedness that could be discharged in bankruptcy.

As a result, the Chief Administrative Law Judge denied petitioner's request to vacate the default determination and sustained the default determination issued on September 30, 2004.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues, as he did before the Chief Administrative Law Judge, that his case is meritorious because he became a telecommuter due to the necessity for his employer to comply with the Federal Clean Air Act. Petitioner claims that he sent the State of New York information concerning who could be contacted to verify his status but he received no response from the State. Further, he asserts that it is not that he chose not to attend the hearing but that he was unable to do so based on the hurricanes that affected his home, his health and his financial situation. Petitioner argues that he was never advised by the Division of Tax Appeals that he had an alternative to appearing at a hearing until after the hearing was held. Petitioner maintains that his tax debt to New York State was discharged in bankruptcy because only a valid state tax is not discharged. Petitioner maintains that the tax asserted due is not a valid state tax because it is an attempt to tax income derived from sources outside of the State. As part of his exception, petitioner attempted to offer documents into evidence that had not been part of petitioner's application to the Chief Administrative Law Judge.

The Division, in opposition, argues that the order of the Chief Administrative Law Judge should be upheld.

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 evidence of a meritorious case for consideration by this Tribunal. Further, we have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (***see***, ***Matter of Purvin***, Tax Appeals Tribunal, October 9, 1997; ***see also***, ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). As a result, we reject petitioner's attempt on exception to assert as facts matters which were not made part of petitioner's application to vacate the default determination entered against him.

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 George Franicevich 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 George Franicevich in default is affirmed; and

4. The petition of George Franicevich is denied;

DATED: Troy, New York
November 3, 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