STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRENT W. AND ARLENE C. MUSBURGER	:	ORDER DTA NO. 817732
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1989 and 1990.	:	

Petitioners, Brent W. and Arlene C. Musburger, PO Box 2349 Jupiter, Florida 33468-2349, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1989 and 1990. A hearing on the petition was scheduled before Administrative Law Judge Thomas Sacca at the offices of the Division of Tax Appeals, New York State Housing Finance Agency, 641 Lexington Avenue, New York, New York 10022 on Tuesday, June 12, 2001 at 10:30 A.M. Petitioners did not appear at the hearing. On July 19, 2001, a default determination denying the petition was issued by Administrative Law Judge Sacca.

On August 16, 2001, petitioners, appearing by Todd W. Musburger, Esq., filed a request that the July 19, 2001 default determination be vacated. The Division of Taxation appearing by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel) filed a response in opposition to petitioners' request on September 18, 2001. Based upon the record in this matter as well as the submissions of the parties, Chief Administrative Law Judge Andrew F. Marchese renders the following order.

FINDINGS OF FACT

1. On May 5, 2000, petitioners filed a petition challenging an assessment of personal income tax under Article 22 of the Tax Law for tax years 1989 and 1990. The petition does not include a copy of the assessment. However, it is apparent from the petition that the assessment is related to petitioners' ownership and operation of personal services corporations.

2. A hearing in this matter was scheduled for February 22, 2001 in New York City. This hearing date was selected by the parties. A Notice of Hearing was mailed on January 16, 2001 to advise the parties of the impending hearing.

3. By letter dated February 7, 2001, petitioners' representative requested an adjournment of the scheduled hearing due to his "travel schedule and unavoidable local conflicts." In his response dated February 12, 2001, Assistant Chief Administrative Law Judge Daniel Ranalli denied the request for adjournment inasmuch as petitioners had "not provided a basis on which to conclude that good cause for an adjournment exists." However, after additional correspondence and telephone conferences, Judge Ranalli adjourned the hearing as requested and ordered the parties to set a new date for the hearing.

4. On April 10, 2001, Assistant Chief Administrative Law Judge Ranalli wrote to petitioners' representative because he had not heard from the parties regarding a new hearing date. Judge Ranalli gave the parties until April 24, 2001 to set a new hearing date and advised "[i]f I have not heard from you by then, I will set the date and the location and notify the parties."

5. The parties did not agree to a new hearing date and, as a result, on May 7, 2001 Assistant Chief Administrative Law Judge Ranalli issued a final notice of hearing scheduling the hearing for June 12, 2001 at 10:30 AM at the New York State Housing Finance Agency, 641 Lexington Avenue, New York, New York 10022. On May 13, 2001, petitioners' representative

requested that the June 12, 2001 hearing date be adjourned because he would be in California on business. By letter dated May 15, 2001, Judge Ranalli denied the adjournment request and advised petitioners' representative that

> [h]aving given you every opportunity to set a date for this hearing and you having failed to do so, I cannot now grant a second adjournment of the hearing. At the time of the first adjournment, when we spoke, you assured me that there would not be a repeat of that situation, and that you would be prepared to go forward when the hearing was next scheduled. I now expect you to stand by your statement.

On May 16, 2001, petitioners' representative wrote to Judge Ranalli seeking an adjournment and complaining that he had not been consulted before the June 12, 2001 hearing date was set. On May 17, 2001, Judge Ranalli again denied the request for adjournment.

6. On June 1, 2001, Jennifer L. Hink, Esq., the representative of the Division of Taxation, filed her Hearing Memorandum as required by section 3000.14 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.14). Petitioners did not file a hearing memorandum in this case.

7. On the morning of June 12, 2001, petitioners' representative called the offices of the Division of Tax Appeals in Troy, New York in an attempt to speak to Administrative Law Judge Thomas Sacca who was the administrative law judge assigned to hear and decide petitioners' case. Administrative Law Judge Sacca was unavailable to speak to the representative since he was en route to New York City to preside over the hearing. Instead, the representative left a message for Administrative Law Judge Sacca on his voice mail.

8. After waiting one-half hour from the scheduled starting time, Administrative Law Judge Thomas C. Sacca called the ***Matter of Brent W. and Arlene C. Musburger*** for hearing. Petitioners did not appear at the hearing. Neither petitioners' representative nor any other

individual appeared on behalf of petitioners. On the record, the representative of the Division of Taxation indicated:

> I spoke to Mr. Thomas [sic] Musburger yesterday. He indicated that he would not be at the hearing today. He said he may attempt to call in and ask for an adjournment, which he has already been denied. He also said that someone from the New York firm may attend, but he wasn't sure.
>
> So at this point, the division is under the impression that he has no intention of appearing today and at this point the division makes a motion for default.

Administrative Law Judge Sacca took the Division's motion for default under advisement whereupon the hearing was concluded.

9. On June 25, 2001, petitioners filed a written response to the Division's motion for default. In this response, petitioners' representative indicated that:

> On June 12, I had both personal and professional conflicts which made it a physical impossibility for me to be in New York City. As you know, the date of June 12 was not of my choosing. I am a solo practitioner, and I do not feel that I was given professional consideration in the selection of the hearing date. Nevertheless, I did make a good faith effort to be present and was unable to do so.

On July 9, 2001, the Division of Taxation filed its response to petitioners' response. The Division's representative reiterated her statement that she had spoken to petitioners' representative on June 11, 2001 in advance of the hearing and that he had indicated that he would not be attending the hearing.

On June 24, 2001, petitioners filed a letter commenting upon the Division of Taxation's response.

10. On July 19, 2001, Administrative Law Judge Thomas C. Sacca issued a default determination which denied the petition of Brent W. and Arlene C. Musburger.

11. On August 16, 2001, petitioners filed a request to vacate the default determination. The request stated that:

> In May of 2001, when the Supervising Administrative Law Judge set the date for the June 12 hearing, Department rules state that it was to be set for Troy, New York. Initially, all preparations were made for an appearance at that location. Plane reservations were made as well as arrangements for lodging. Petitioner's case involves the testimony of many different witnesses and attempts were made for their attendance as well. Only after preparations had begun was Musburger informed that the hearing was to take place in Manhattan.

It is noted that the hearing notice sent to petitioners on May 7, 2001 specified in bold letters that the location of the hearing was 641 Lexington Avenue, New York, New York. Moreover, petitioners provide no citation for a rule that would have set the hearing in Troy, New York. A review of the Rules of Practice and Procedure of the Tax Appeals Tribunal reveals that no such rule exists.

In addition, petitioners' representative stated that:

> The reasons for Musburger not being in attendance are legitimate and reasonable. During construction work to Musburger's home, an accident occurred on the morning of June 12 which took out power and telephone service. The accident and its remedy required that Musburger remain at the home until proper repairs were made. This prevented him from traveling to Chicago's O'Hare airport in time to meet his scheduled flight which would have placed him in New York City in time for the hearing.

Finally, petitioners' representative asserted that:

> The Supervising Administrative Law Judge is urged to ignore Hick's [sic] gratuitous and false representations contained in her June 9, 2001 letter as well as what most likely occurred in her presence without Musburger being present. The purpose of Musburger's conversation with Hicks [sic] was to explore the possibility of a settlement, and as such, remarks made by either side are private and inadmissible. Hicks [sic] had no right to refer to her conversations with Musburger without his consent. Additionally, all ex parte communications with the Supervising Administrative Law Judge without Musburgers [sic] presence are strictly prohibited.

12. In order to demonstrate a meritorious case, petitioners' representative asserted that:

> Since the time of the initial audit, Petitioner has consistently presented facts and law sufficient to overturn the judgement of the auditor in this matter. The record is voluminous concerning Petitioner's objections to the auditor's findings, methods and misstatement of the law that has up to this point been applied.

13. In its response, the Division of Taxation argued that petitioners have shown neither an excuse for their default nor a meritorious case. The Division asserted that petitioners' representative never had any intention of attending the hearing. The Division also pointed out that in their application to vacate the default petitioners have made no attempt whatsoever to demonstrate a meritorious case.

CONCLUSIONS OF LAW

A. Section 3000.15(b)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15[b][2]) provides: "[i]n 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."

Section 3000.15(b)(3) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15[b][3]) provides: "[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."

B. There is no doubt on the record presented in this matter that petitioners did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(2) (***see***, ***Matter of Zavalla***, Tax Appeals Tribunal, August 31, 1995; ***Matter of Morano's Jewelers of***

Fifth Avenue, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that they have a meritorious case (20 NYCRR 3000.15[b][3]; ***see also***, ***Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Avenue***, ***supra***).

C. Petitioners were given the opportunity to select the date and location of their hearing. When they failed to reach agreement with the representative of the Division of Taxation, Assistant Chief Administrative Law Judge Daniel Ranalli gave them a second opportunity to pick a date with the clear advice that if they did not agree to a date, Judge Ranalli would pick one for them. After Judge Ranalli selected the date of June 12, 2001 for the hearing, petitioners twice requested adjournments. Their requests were twice denied.

Ms. Hink has affirmed under penalty of perjury that petitioners' representative informed her on June 11, 2001 that he would not be attending the hearing the next day and would instead seek an adjournment from Judge Sacca. I find Ms. Hink's statement to be entirely credible. Petitioners' representative has stated that the reason for his failure to appear at the hearing was a construction accident at his home on the morning of the hearing. I believe this excuse is a fabrication intended to avoid the consequences of wilfully and intentionally disregarding the scheduled hearing date.

It is noted that in his several communications with Administrative Law Judge Sacca, petitioners' representative made no mention of the supposed construction accident. This excuse was proffered for the first time in petitioners' application to vacate their default. In fact, in his letter of June 25, 2001 to Administrative Law Judge Sacca, petitioners' representative states that he "had both personal and professional conflicts which made it a physical impossibility for [him] to be in New York City." Moreover, the objection of petitioners' representative that his

conversation with the representative of the Division of Taxation was in the nature of a settlement and therefore inadmissible is rejected. The representative's stated intention to default at hearing can hardly be considered in the nature of settlement negotiations.

Petitioners' representative was well aware even before filing the application to vacate the default that the veracity of his claimed excuse was being questioned by the Division of Taxation. In spite of this, petitioners introduced no evidence whatsoever to prove their claim of reasonable cause other than the unsubstantiated claim of petitioners' representative. If petitioners' representative had made arrangements to fly from Chicago to New York City as he claims, he would have had reservations and unused airplane tickets to prove those arrangements. Petitioners introduced no such proof. Similarly, if petitioners had made arrangements with "many different witnesses" to testify at the hearing, petitioners could have introduced proof of the witnesses' travel arrangements as well as statements from the many witnesses regarding their intention to testify at the hearing, as well as what they would have testified about. Petitioners introduced no such proof.

Section 3000.14 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.14) requires each party to prepare a hearing memorandum and submit it not less than 10 days before the date of the hearing. The memorandum is required to include a list of witnesses to be called and a brief summary of their testimony, a list of all exhibits, a statement of the issues and the legal authorities relied on as well as a copy of any stipulation. Petitioners did not submit a hearing memorandum as required by the regulations. Petitioners did not provide any excuse for their failure to submit a hearing memorandum. I can only infer that petitioners did not submit a hearing memorandum because petitioners had no intention of appearing for a hearing on June 12, 2001.

Finally, petitioners' representative apparently assumes that had he only been able to contact Administrative Law Judge Sacca on June 12, 2001 he would have been able to obtain an adjournment. This assumption is misplaced. No party may assume that they will receive an adjournment. That decision lies solely within the discretion of the administrative law judge. Moreover, petitioners' request for adjournment had already been denied twice. Had Administrative Law Judge Sacca found petitioners' excuse that compelling, he would not have granted the motion for default made by the Division of Taxation.

Accordingly, I find that petitioners have failed to demonstrate a reasonable excuse for their failure to appear on the scheduled hearing date.

D. Petitioners' request to vacate the default determination does not demonstrate that they have a meritorious case. With respect to the merits of their case, petitioners' request consists merely of unsupported statements made by petitioners' representative that abundant evidence exists. The request to vacate does not identify even a single piece of evidence which petitioners intended to introduce at hearing or what such evidence would prove. Similarly, the request to vacate does not identify a single witness whom petitioners intended to call or to what any such witness would testify. The request refers to no provision of law, either statutory or case law, which supports petitioners' position.

E. While petitioners' representative has complained of *ex parte* communications on the part of the representative of the Division of Taxation, a review of the record does not reveal any such instance. Specifically, the representative's contact with the calendar clerk regarding scheduling matters does not constitute an *ex parte* communication.

F. It is ordered that the request of Brent W. and Arlene C. Musburger to vacate the default determination be, and it is hereby denied and the default determination issued July 19, 2001 is sustained.

DATED: Troy, New York
November 8, 2001

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE