STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TODD EBERHARD	:	ORDER DTA NO. 819498
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 New York City Administrative Code for the Periods Ended 9/30/01, 12/31/01, 6/30/02, 9/30/02 and 12/31/02.	:	

Petitioner, Todd Eberhard, 188 East 78th Street, Apartment 9A, New York, New York 10021-0406, filed a petition 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 New York City Administrative Code for the periods ended 9/30/01, 12/31/01, 6/30/02, 9/30/02 and 12/31/02.

A hearing was scheduled before Administrative Law Judge Joseph W. Pinto at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on Tuesday, February 3, 2004 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated February 17, 2004 that the default determination be vacated. On February 19, 2004, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default.

Petitioner appeared by Laurence Keiser, Esq. The Division of Taxation ("the Division") appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On June 2, 2003, the Division of Tax Appeals received a petition from Todd Eberhard protesting notices of deficiency issued by the Division of Taxation which asserted deficiencies of personal income tax for the City and State of New York for the periods ended September 30, 2001, December 31, 2001, June 30, 2002, September 30, 2002 and December 31, 2002. The deficiencies represent penalties asserted against Mr. Eberhard individually, as a responsible officer of Eberhard Investment Associates, Inc.

2. The assistant calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated September 15, 2003 to petitioner, petitioner's representative and to the Division of Taxation advising them to contact each other to set a mutually convenient hearing date during the months of January or February, 2004. On October 8, 2003, the Division of Taxation and petitioner's representative selected the date of February 3, 2004 as the hearing date.

3. On December 29, 2003, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that the hearing was scheduled for February 3, 2004 in New York City. On January 29, 2004, during the course of a prehearing conference held with the parties by Administrative Law Judge Joseph W. Pinto, Jr., petitioner raised as an issue for the first time his involvement in a suit brought against him in U.S. District Court by the Securities and Exchange Commission accusing him of looting the accounts of the customers of his company. Petitioner asserted that it would be necessary to adjourn the February 3, 2004 hearing

because an order issued in the Federal matter froze all other pending litigation involving petitioner including the proceeding here at issue. Judge Pinto requested that petitioner furnish him with a copy of that order. Petitioner sent to Judge Pinto a "Preliminary Injunction and Order Freezing Assets and Granting Other Relief" signed by U.S. District Judge Richard M. Berman and dated February 13, 2003. In addition he included an "Order Amending Preliminary Receivership Order" dated April 18, 2003 and signed by Judge Berman. By letter dated January 30, 2004, Judge Pinto advised the parties that his review of the orders revealed nothing which would be "a basis for adjourning the hearing scheduled for Tuesday, February 3RD." Judge Pinto noted that petitioner was well aware of the existence of the two orders at the time he agreed to the February 3, 2004 hearing date. By a fax dated January 30, 2004, petitioner's representative stated his disappointment at Judge Pinto's decision and indicated that neither petitioner nor another witness included in petitioner's hearing memorandum would testify at the hearing.

4. On February 3, 2004 at 10:30 A.M., Administrative Law Judge Pinto called the ***Matter of Todd Eberhard***, involving the petition here at issue. Present was Peter B. Ostwald, Esq., as representative for the Division of Taxation. Neither petitioner nor petitioner's representative appeared at the hearing. The attorney for the Division of Taxation moved that petitioner be held in default. On February 6, 2004, Administrative Law Judge Pinto issued a determination finding petitioner in default. On March 10, 2004, Judge Pinto issued an amended determination of default to correct a typographical error in the original determination.

5. By letter dated February 17, 2004, petitioner requested that the default determination be vacated. In this request, petitioner's representative asserts that petitioner is presently under Federal criminal investigation and that a stay of all other civil litigation had been issued by U.S.

District Judge Richard Berman. Petitioner's criminal counsel advised petitioner not to appear at his tax hearing.

In fact, the February 13, 2003 order of Judge Berman provides at page 18 that no creditor or claimant against any of the defendants (including Mr. Eberhard) "shall take any action to interfere with the taking control, possession, or management of the assets, including books and records, transferred to the Receiver under this order. . . ." Petitioner has highlighted this provision of the order but does not explain how it would prohibit Mr. Eberhard from participating in his own tax hearing. Similarly, the April 18, 2003 order contains the same prohibition at page 28. Again, petitioner has highlighted this provision but has provided no explanation of the relevance of the highlighted provision to this proceeding.

6. With respect to the merits of his case, petitioner's representative indicates in his letter that he believes that the evidence will establish that "Petitioner did not willfully fail to pay over New York State withholding taxes and was not aware that the taxes were not paid over."

7. By letter dated February 19, 2004, the Division of Taxation has opposed petitioner's request. The Division of Taxation asserts that petitioner informed the administrative law judge prior to the hearing that he would not appear either in person or by representative, notwithstanding that Administrative Law Judge Pinto had found the Federal proceedings to be no bar to the instant tax proceeding.

8. With respect to petitioner's proof of a meritorious case, the Division of Taxation asserts that, "Petitioner relies upon the same unsubstantiated claim proffered throughout this matter, specifically that he is not a 'responsible person' under the law. Although given every opportunity to present his case Petitioner has failed to do so and is instead left with unverified self-serving conclusions."

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "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." (20 NYCRR 3000.15[b][2].) The rules further provide that: "Upon 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." (20 NYCRR 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioner 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 petitioner to show a valid excuse for not attending the hearing and to show that he had 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. Petitioner has failed to establish a reasonable cause for his failure to appear at his hearing. While petitioner's representative would have us believe that the February 13, 2003 and April 18, 2003 orders of Judge Berman have precluded the holding of the February 3, 2004 tax hearing, a reading of these documents makes perfectly clear that they do no such thing. The orders provide for the creation of a receivership for the purpose of the conservation of the assets of the entities which petitioner stands accused of looting for his own gain. However, it must be noted that the assessments at issue in the instant matter have been asserted against petitioner as

an individual and not against any of the entities which are the subject of the receivership. Petitioner's representative's assessment of the impact of these orders amounts to nothing more than wishful thinking.

D. Petitioner has also failed to establish a meritorious case. Petitioner has not included with his request to vacate the default any evidence whatsoever which would tend to demonstrate that there is merit to his case. He has not submitted even an affidavit explaining the circumstances surrounding his failure to pay over withholding tax. While petitioner states that the evidence will establish that he did not willfully fail to pay over withholding tax, petitioner does not specify in any way what evidence he would introduce. Accordingly, I find that petitioner has not established a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued March 10, 2004 is sustained.

DATED: Troy, New York
April 29, 2004

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE