STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEORGE FRANICEVICH	:	ORDER 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 a petition 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.

A hearing was scheduled before Administrative Law Judge Gary Palmer at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on Tuesday, September 23, 2004 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request received October 21, 2004 that the default determination be vacated. By letter dated November 24, 2004, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default.

Petitioner, George Franicevich, appeared on his own behalf. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, 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. 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, petition 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.

2. 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.

3. On May 18, 2004, the Division of Tax Appeals mailed to petitioner and to the Division of Taxation 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.

4. 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 of Taxation to issue its assessments and once again demanded a trial by a jury of his peers to be held in Polk County, Florida.

5. 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.)

6. 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 of Taxation moved that petitioner be held in default.

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

8. 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.

9. 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 of Taxation intentionally waited three years to issued its assessment. Had petitioner been aware of what the Division of Taxation 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.

10. The Division of Taxation 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.

11. 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.

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 demonstrate that he had reasonable cause for his failure to appear for his hearing. Petitioner requested an adjournment of his hearing so that he could have a trial by a jury of his peers in Polk County, Florida. Petitioner's request for adjournment on that basis was properly denied.

It is understandable that, because of his present financial circumstances, petitioner is unable to travel to Troy, New York for his hearing. However, petitioner was also offered an adjournment so that he could explore alternatives to a hearing such as a submission by mail. Petitioner chose to ignore this offer. If the Division of Tax Appeals were to now reschedule petitioner's hearing, he would still be unable to attend the hearing due to his financial circumstances. Thus, it appears that petitioner is asking for a new hearing so that he can once again default on the hearing. I can only conclude that petitioner's request is nothing more than a tactic to delay the resolution of this matter.

D. Petitioner has also failed to demonstrate that he has a meritorious case. While petitioner asserted that his work at home was due to compliance by his employer with the Federal Clean Air Act, he has not offered the slightest bit of evidence which would link his work at home with the Federal Clean Air Act. At the very least, he must have received some written directive from his employer authorizing him to work at home. If he did not retain such written documentation, he could have obtained a current affidavit from his former employer attesting to his work at home at the direction of the employer.

E. Section 683 of the Tax Law requires that any tax under Article 22 of the Tax Law be assessed within three years after the return was filed. In assessing petitioner for three tax years, the Division of Taxation was merely following the statute. Petitioner's claim that he was prejudiced by this is at best speculative. However, even if petitioner could somehow prove that the Division of Taxation delayed issuing the assessment, the fact remains that the Division of Taxation complied with the statute by issuing the assessments within three years of the filing of the returns.

F. It is undisputed that petitioner filed a Chapter 7 petition in bankruptcy on June 26, 2002 and was granted a discharge in bankruptcy under section 727 of Title 11 of the United States Code on October 4, 2002. It is also undisputed that the taxes here at issue were listed as an unsecured priority claim in the bankruptcy. However, the Division has asserted that the taxes here at issue were not discharged in the bankruptcy. Section 523 of the Bankruptcy Code, which is entitled *Exceptions to Discharge,* provides that certain taxes cannot be discharged under section 727 of the Bankruptcy Code. This is true whether or not a claim for such taxes was filed or allowed in the bankruptcy and would include, but is not limited to, taxes of the kind and for the periods specified in section 507(a)(8) of the Bankruptcy Code. That section includes:

> a tax on or measured by income or gross receipts–
>
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition [in bankruptcy];
>
> (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
>
> (iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case. (11 USCS 507[a][8].)

The three assessments here at issue are taxes which could not be discharged because of the operation of section 523 of the Bankruptcy Code. The returns for tax years 1999 and 2000 were due on April 15, 2000 and April 15, 2001, respectively. They clearly fall within the provisions of section 507(a)(8)(i) since the returns were due within three years of the filing of the petition in bankruptcy. The assessment for tax year 1998 was issued on March 18, 2002. It was issued less than 240 days before the filing of the petition on June 26, 2002 and thus comes within the provisions of section 507(a)(8)(ii). Although petitioner argues that the taxes were discharged in bankruptcy, he has provided no explanation and no evidence which might tend to show that the taxes at issue were of a type which could be discharged under section 727 of the Bankruptcy Code or were in fact discharged in the bankruptcy. Accordingly, I find that petitioner has not established a meritorious case.

G. It is ordered that the October 21, 2004 request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on September 30, 2004 is sustained.

DATED: Troy, New York
January 27, 2005

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE