STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN LASSOFF	:	ORDER DTA NO. 819919
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, Martin Lassoff, 429 East 52nd Street, Apt. 36-C, New York, New York 10022, 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 Joseph Pinto at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on Wednesday, April 13, 2005 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated September 29, 2005 that the default determination be vacated. Petitioner's representative supplemented that request by letter dated December 1, 2005. The Division of Taxation filed responses in opposition to petitioner's application to vacate the default dated November 3, 2005 and December 14, 2005.

Petitioner, Martin Lassoff, appeared by David J. Silverman, EA. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., and Robert A. Maslyn, 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 operated a law practice in the State of New York. In 2001, the Division of Taxation ("Division") commenced an audit of petitioner's income tax returns for the years 1998, 1999 and 2000. The Division determined that petitioner had failed to present sufficient documentation to substantiate his claimed expenses and itemized deductions and accordingly disallowed them. As a result, a notice of deficiency was issued for the 1998, 1999 and 2000 tax years on December 15, 2003 in the amount of $454,593.16 in New York State and New York City personal income tax, plus penalty and interest, for a total amount due of $709,095.34. Pursuant to this notice of deficiency, the Division of Taxation assessed petitioner $87,461.11 in tax for the 1998 tax year; $272,093.44 in tax for the 1999 tax year; and $95,038.61 in tax for the 2000 tax year.

2. Petitioner filed a petition protesting this assessment on March 13, 2004. In his petition, petitioner argued that the funds that he received in contingency cases were deposited into a trust account and then disbursed two-thirds to the client and one-third to petitioner as his contingency fee. Petitioner argued that the auditor had incorrectly attributed the entire amount of the recovery as income to petitioner instead of the one-third to which petitioner was entitled. Petitioner also disagreed with the disallowance by the auditor of many of the business deductions claimed by him on his return.

3. On May 26, 2004, the Division filed its answer in which it asserted that petitioner had failed to substantiate the deductions to which he claimed to be entitled.

4. On July 15, 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 selected the date of November 18, 2004 and the location of Troy, New York. The Division's response also indicated that petitioner was in agreement as to the date but preferred New York City as the location. On October 12, 2004, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on November 18, 2004 at the offices of the Division of Tax Appeals in New York City.

5. On October 28, 2004, the hearing scheduled for November 18, 2004 was adjourned for 90 days to allow the parties to attempt to resolve this matter without the need for a hearing. The adjournment was granted with the understanding that if the matter could not be resolved, then petitioner would sign a waiver of hearing and the matter would proceed as a submission. This was done because petitioner suffers from a variety of illnesses which would have made it difficult if not impossible for him to appear at a hearing. On December 13, 2004, the auditors assigned to this matter met with petitioner and his wife in a courtesy conference to review additional substantiation supplied by petitioner. As a result of documentation supplied at the courtesy conference, the auditors amended the notice of deficiency adjusting the tax asserted for the 1998 tax year from $87,461.11 to $90,649.96; for the 1999 tax year from $272,093.44 to $85,002.09 and for the 2000 tax year from $95,038.61 to $100,638.81 for a reduction of tax of $178,302.30 for the three years under audit.

6. On February 16, 2005, the Division of Tax Appeals sent waiver of hearing forms to petitioner as previously agreed. Petitioner would not sign the waivers. Accordingly, the matter was again scheduled for hearing. The new hearing date was to be March 29, 2005 in the Troy

offices of the Division of Tax Appeals. This hearing was also adjourned to again give the parties time to sign a stipulation settling the case. However, petitioner refused to sign the stipulation and the matter was then scheduled for hearing on April 13, 2005. On April 4, 2005, David J. Silverman, EA, made a request on behalf of petitioner for an adjournment of the April 13, 2005 hearing. Mr. Silverman wanted more time to organize petitioner's records and to make a Freedom of Information request. The request for adjournment was denied on April 4, 2005. On April 5, 2005, Mr. Silverman sent a letter indicating that it would be pointless for either Mr. Silverman or his client to appear at the hearing.

7. On April 13, 2005 at 10:30 A.M., Administrative Law Judge Joseph Pinto called the ***Matter of Martin Lassoff***, involving the petition here at issue. Present was Justine Clarke Caplan, Esq., as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. Ms. Clarke Caplan moved that petitioner be held in default. On May 13, 2005, Administrative Law Judge Pinto issued a determination finding petitioner in default.

8. On September 29, 2005, petitioner filed an application to vacate the May 13, 2005 default determination. In his application, petitioner explained that he was unable to appear at his hearing because he suffers from Parkinson's disease and multiple sclerosis, as well as several other conditions. Petitioner did not address the merits of his case in any manner.

9. On November 8, 2005, petitioner was given a second opportunity to establish that he had a reasonable excuse for his failure to appear at hearing as well as a meritorious case. On December 1, 2005, David J. Silverman, E.A., submitted an application to vacate petitioner's default which included a letter from Dr. Leonard M. Mattes detailing petitioner's multiple illnesses. Dr. Mattes explained that petitioner suffers from severe progressive Parkinson's

disease, severe progressive multiple sclerosis, coronary artery disease, asthma, chronic renal failure and gout. It is apparent from Dr. Mattes's description of petitioner's physical condition that he is not and will not be capable of attending a hearing and participating in a meaningful way due to his illnesses and due to the many medications which petitioner must take to treat his illnesses.

10. Petitioner's representative has stated that he failed to appear at the hearing on petitioner's behalf because he needed more time to organize petitioner's records. The representative asserts that petitioner's illness is the reason for the representative's inability to organize the records in a timely fashion.

11. With regard to the merits of his case, petitioner has asserted that the auditor failed to take into account that two-thirds of the money paid into the trust account was paid out to clients and should not be considered income of petitioner. In addition, petitioner asserts that the auditor erred in disallowing many of petitioner's business deductions. Mr. Silverman states that he has now computerized petitioner's records to present them in an orderly manner. Petitioner has not submitted any evidence which might tend to prove that there is merit to his arguments.

12. The Division of Taxation filed two responses in opposition to petitioner's applications to vacate the default determination. The Division pointed out that even if petitioner had an excuse for failing to appear at the hearing, petitioner's representative had no such excuse and failed to appear at the hearing by his own choice. In addition, the Division points out that this case involves the substantiation of deductions claimed on petitioner's return, and Mr. Silverman's promise to present a computerized compilation of petitioner's records is not the same as providing substantiation for the expenses claimed.

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. No one disputes that petitioner was and continues to be too ill to appear at a tax appeals hearing. The Division of Tax Appeals has attempted to provide petitioner with an alternative to having to appear at a hearing including proceeding by submission or appearing at a hearing through a representative. Since this matter involves substantiation of deductions, either option appears viable. Petitioner's physical presence is not necessary to submit expense receipts. Petitioner chose to be represented at the hearing by Mr. Silverman. Mr. Silverman chose

knowingly and intentionally not to appear at the hearing because he wanted more time to organize petitioner's records. However, it does not seem entirely fair to punish petitioner for his representative's unprofessional behavior under these circumstances. Accordingly, I find that petitioner has established reasonable cause for his failure to appear due to the severity of the illnesses from which he suffers.

D. Petitioner had an opportunity during the audit process to submit receipts to substantiate the expenses claimed on his returns. Petitioner failed to take advantage of that opportunity and the Notice of Deficiency ensued. Petitioner then had a second opportunity to substantiate his deductions at the courtesy conference on December 13, 2004. Petitioner submitted substantiation at the courtesy conference and, as a result, the auditor reduced the assessments for the three years by a total of $178,302.30. Mr. Silverman has not submitted or even offered to submit any additional substantiation to demonstrate that this case has merit and that it would be worthwhile to reopen this hearing. In fact, he does not even allege that he has additional substantiation to submit. In the absence of such substantiation, Mr. Silverman's "reorganization" of petitioner's records is essentially worthless.

E. Nevertheless, I am troubled by petitioner's assertion that the auditor included in petitioner's income the entire amount of funds deposited into his attorney trust account rather than only the portion which would represent petitioner's contingency fee for representing his clients. The Division of Taxation does not deny this assertion in its responses.

Disciplinary Rule DR 9-102 (B) of the Lawyer's Code of Professional Responsibility of the New York State Bar Association requires every attorney who receives funds belonging to a client to maintain such funds in a special account in a banking institution in such attorney's own name. Such special bank account shall be identified as an "Attorney Trust Account" or

"Attorney Escrow Account" and shall be separate from any business or personal account of the attorney. Funds belonging in part to a client and in part to the attorney must be kept in such special account until such time as they are disbursed to the client and to the attorney in their proper shares. Thus, even though the trust account is in the name of the attorney, funds in the account do not necessarily belong to the attorney. Giving petitioner the benefit of the doubt, I find that there is some merit to petitioner's case since it should not be automatically assumed that all of the funds deposited into petitioner's attorney trust account are income to petitioner even though petitioner has not come forward with substantiation as to ownership of the funds in the account.

F. Disciplinary Rule DR 9-102 (D)(1) requires an attorney to maintain for seven years after the events which they record:

> 1. The records of all deposits in and withdrawals from the accounts specified in DR 9-102 (B) and of any other bank accounts which concerns or affects the lawyer's practice of law. These records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement.

In light of this requirement, petitioner should have no difficulty in substantiating the amounts belonging to his clients. Petitioner will be afforded one last opportunity to do so.

G. It is ordered that the request to vacate the default determination be, and it is hereby, granted and the Default Determination issued on May 13, 2005 is vacated.

DATED: Troy, New York
March 2, 2006

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE