STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTOPHER BRICKHILL	:	ORDER DTA NO. 820396
for Redetermination of Deficiencies 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 Periods Ended June 30, 2000, March 31, 2001, June 30, 2001, December 31, 2001 and March 31, 2002.	:	

Petitioner, Christopher Brickhill, Rua Antonio Massara, No. 65, Baixo Sao J Batista, Brazil 33030070, filed a petition for redetermination of deficiencies 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 periods ended June 30, 2000, March 31, 2001, June 30, 2001, December 31, 2001 and March 31, 2002.

A hearing was scheduled before Administrative Law Judge Frank W. Barrie at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on Wednesday, November 16, 2005 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated December 28, 2005 that the default determination be vacated. The Division of Taxation filed a response dated February 9, 2006 in opposition to petitioner's application to vacate the default.

Petitioner, Christopher Brickhill, appeared on his own behalf. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Michele W. Milavec, 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. The Division of Taxation audited IDS Storm, Inc., and determined that the corporation had failed to pay the appropriate New York State withholding taxes for the periods here at issue. In addition, the Division determined that petitioner was a responsible person of IDS Storm, Inc. pursuant to Tax Law § 685(n) and, as such, was liable pursuant to Tax Law § 685(g) for willful failure to collect and pay over taxes. As a result, on June 9, 2003, the Division issued five notices of deficiency, one for each of the five periods here at issue, asserting withholding tax penalty against petitioner in the amount of $36,535.85 in the aggregate.

2. Petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services which was conducted on May 6, 2004. By order dated November 19, 2004, the five notices of deficiency were sustained. According to the Conciliation Order, full payment has been applied against three of the assessments and a partial payment against another. Accordingly, only $14,504.77 remains at issue. On February 14, 2005, petitioner filed a petition challenging all amounts still outstanding with respect to the five notices of deficiency here at issue. In his petition, petitioner argued that he was not a person required to withhold and pay over taxes on behalf of the corporation. In addition, petitioner argued that the funds paid to the corporation's employees for the periods at issue were payments to independent contractors.

3. On July 14, 2005, 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 during the months of November or December 2005 and asking the parties to agree on a location for the hearing of either Manhattan or Troy, New York. A response from the Division of Taxation selected the date of November 16, 2005 and the location of Troy, New York. The Division's response also indicated that the date selected was not agreed upon by the parties because the Division's representative had been unable to contact petitioner. On August 3, 2005, petitioner requested that the hearing be held in July 2006 and that it take place in Brazil. On September 23, 2005, petitioner advised the Division of Taxation that he would be unable to attend a hearing in New York in November. Petitioner did not include the Division of Tax Appeals in this communication. On October 11, 2005, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on November 16, 2005 at the offices of the Division of Tax Appeals in Troy, New York. On October 18, 2005, Ms. Milavec advised petitioner that he should contact the Division of Tax Appeals if he wished to request an adjournment of the hearing. Petitioner never contacted the Division of Tax Appeals regarding an adjournment.

4. On November 16, 2005 at 10:34 A.M., Administrative Law Judge Frank W. Barrie called the ***Matter of Christopher Brickhill***, involving the petition here at issue. Present was Michele W. Milavec, Esq., as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. Ms. Milavec moved that petitioner be held in default. On November 29, 2005, Administrative Law Judge Barrie issued a determination finding petitioner in default.

5. On December 28, 2005, petitioner filed an application to vacate the November 29, 2005 default determination. In his application, petitioner stated that he was not advised of the hearing in a timely fashion and had asked for it to be scheduled in 2006. In addition, petitioner stated: "There is no case. Please seek payment from the company in question."

6. The Division of Taxation filed its response in opposition to petitioner's application to vacate the default determination on February 9, 2006. The Division asserted that petitioner's excuse for default, that he was not advised of the hearing in a timely fashion, was not an accurate statement. The Division pointed out all of the correspondence which had been exchanged between the parties as proof that petitioner had been adequately apprised of the hearing.

The Division has also pointed out that petitioner has provided no proof of a meritorious case.

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's complaint that he was not advised of the hearing in a timely fashion is not supported by the record in this matter. It is apparent from petitioner's own correspondence that he was aware of the hearing date several months prior to the date of the hearing. If petitioner found that he was unable to attend a hearing on the date selected, his recourse was to request an adjournment of the hearing to a more convenient date. Section 3000.15(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides:

> 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. (20 NYCRR 3000.15[b][1].)

Instead, petitioner chose not to request an adjournment and also chose to simply not attend the scheduled hearing. Accordingly, petitioner has not established that he had reasonable cause for his failure to appear at the hearing.

D. Petitioner has made the assertion without any specifics or proof whatsoever that, "There is no case." This self-serving conclusion does not amount to proof of a meritorious case and does not even enunciate a specific legal theory.

E. In addition, petitioner has requested that payment be sought from the corporation in question. It is well settled that the liability of an individual who is a person responsible for the withholding and payment of taxes under section 685(n) of the Tax Law is joint and several with that of the corporation (***Matter of Phillips,*** Tax Appeals Tribunal, May 11, 1995). Accordingly,

the Division of Taxation is free to recover the tax due from petitioner or from the corporation as it chooses or as it is able. It should be noted, however, that amounts of tax recovered from the corporation are also applied against petitioner's liability and thereby reduce petitioner's liability as has already happened in the instant matter to a significant extent. Thus, petitioner has identified no issue and has submitted no proof which would indicate that there is any merit whatsoever to his case.

F. It is concluded that petitioner has failed to demonstrate that he had reasonable cause for his failure to appear at his hearing and that he has failed to demonstrate that he has a meritorious case.

G. It is ordered that the request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on November 29, 2005 is sustained.

DATED: Troy, New York
April 6, 2006

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE