STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL SCARLATOS	:	ORDER DTA NO. 822578
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Tax Year 2003.	:	

Petitioner, Michael Scarlatos, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the tax year 2003. A hearing was scheduled before Presiding Officer Barbara Russo at the offices of the New York State Department of Taxation & Finance, 1740 Broadway, New York, NY 10019, on Tuesday, January 12, 2010 at 1:15 PM. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written application dated March 3, 2010 that the default determination be vacated. Petitioner appeared pro se. Upon a review of the entire case file in this matter, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. The Internal Revenue Service made changes to petitioner's 2003 federal income tax return on or about December 5, 2005. Petitioner failed to report these changes to New York State as required by Tax Law § 659. However, pursuant to the authority of section 6103(d) of the Internal Revenue Code, the Internal Revenue Service notified the New York State Department of Taxation & Finance of these federal changes at some point in 2006. The Department of Taxation

& Finance issued Notice of Additional Tax Due L-028680198 to petitioner on June 4, 2007 in the amount of $760.00 plus interest of $202.32. Petitioner paid the full amount due but then claimed a refund of the interest paid in the amount of $202.32. On April 11, 2008, a Notice of Disallowance was issued to petitioner denying in full his requested refund. A Conciliation Order was issued by the Bureau of Conciliation and Mediation Services on October 10, 2008 sustaining the disallowance of the claimed refund.

2. Next, petitioner filed a petition with the Division of Tax Appeals arguing that the Division of Taxation (Division) had an obligation to notify petitioner promptly of the additional tax due and that interest should be refunded because of the Division's failure to do so. On December 7, 2009, a Notice of Small Claims Hearing was mailed to petitioner advising him of a hearing scheduled in the instant matter for January 12, 2010 at the Manhattan District Office of the Department of Taxation and Finance, 1740 Broadway, New York, NY 10019.

3. On January 12, 2010, Presiding Officer Barbara Russo called the ***Matter of Michael Scarlatos*** involving the petition here at issue. Petitioner failed to appear at the hearing either in person or by a duly authorized representative. Neither petitioner nor anyone representing petitioner attempted to contact the Division of Tax Appeals in any manner. The representative of the Division of Taxation moved that petitioner be held in default. On January 28, 2010, Presiding Officer Russo found petitioner in default and denied his petition.

4. Petitioner filed an application dated March 3, 2010 to vacate the January 28, 2010 default. In his application, petitioner claimed that his child was sick. No specifics were provided. In addition, petitioner argued that New York State is obligated to notify a taxpayer promptly when the taxpayer owes additional state tax because of federal changes so that interest charges do not accumulate.

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 presiding officer 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 3000.13[d][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 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the hearing scheduled in this matter or obtain an adjournment. Therefore, the small claims presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (***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 3000.13[d][3]; ***Matter of Zavalla***; ***Matter of Morano's Jewelers of Fifth Avenue***).

C. Unfortunately, I must conclude that petitioner has failed to establish a valid excuse for not attending the scheduled hearing. A vague statement, devoid of any detail, that a child was ill does not amount to a valid excuse. Moreover, even if petitioner had been unexpectedly prevented from attending the hearing, it is not unreasonable to expect him to telephone the Division of Tax Appeals to say he could not attend the hearing. Petitioner made no effort whatsoever to do so.

D. Moreover, petitioner has failed to establish that he has a meritorious case. Petitioner has stated that he should not have to pay interest because the Division of Taxation failed to promptly

notify him of his liability due to the federal changes. However, petitioner has it exactly backwards. Tax Law § 659 provides that:

> If the amount of a taxpayer's federal taxable income . . . is changed or corrected by the United States internal revenue service or other competent authority . . . the taxpayer or employer shall report such change or correction or disallowance within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous.

Thus, the law requires that petitioner notify the Division of Taxation of his federal changes within 90 days. This he failed to do. Had petitioner reported his federal changes, the Division would have been required to issue its assessment within two years of the date of petitioner's report. However, Tax Law § 683(c)(1)(C) specifically allows the Division to assess a tax at any time if a taxpayer fails to comply with section 659. Accordingly, the Division was well within its rights in issuing the Notice of Additional Taxes Due at the time that it did. Petitioner cannot complain about the Division's delay in assessing him when it was petitioner's failure to follow the law which caused the delay.

E. It is ordered that the application to vacate the default determination be, and it is hereby, denied and the Default Determination issued on January 28, 2010 is sustained.

DATED: Troy, New York
June 3, 2010

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE