

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOHN P. DEMAIO : DECISION
 : DTA NO. 825913
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Years 1997 through 2000, 2003, 2007 through :
2008, and 2010 through 2012 and for Review of a :
Notice of Proposed Driver License Suspension Referral :
under Tax Law § 171-v. :

Petitioner, John P. DeMaio, filed an exception to the determination of the Administrative Law Judge issued on April 2, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on September 14, 2015, the date that petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

- I. Whether petitioner filed a timely petition with the Division of Tax Appeals.
- II. Whether the notice of proposed driver license suspension referral should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 2, and 3, which have been modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) issued a notice of proposed driver license suspension referral, collection case ID number E-010718309, dated August 9, 2013, to petitioner, John P. DeMaio, at 75 Maiden Lane, #205, New York, New York, advising of the possible suspension of petitioner's driver's license because personal income tax assessments issued to him remained unpaid, with a current total balance due in the amount of \$31,756.26. The notice of proposed driver license suspension referral included a consolidated statement of tax liabilities setting forth bills issued to petitioner that are subject to collection action, including the following assessment ID numbers and amounts due: L-039572485 with current balance due of \$512.89, L-038435221 with current balance due of \$534.16, L-034130849 with current balance due of \$125.75, L-030574366 with current balance due of \$3,839.95, L-029573330 with current balance due of \$11,158.93, L-020134778 with current balance due of \$1,434.87, L-018298873 with current balance due of \$1,726.24, L-016939537 with current balance due of \$298.91, and L-015663803 with current balance due of \$12,124.56.

The notice also indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles (DMV) and petitioner's driver's license would be suspended. The front page of the notice informed petitioner that unless one of the exemptions on the back page of the notice applied to him, he was required to pay the tax due, or set up a payment plan, in order to avoid suspension of his license.

The back page of the notice is titled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that "[I]f any of the following apply," he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim. The first two headings under the title, "How to respond to this notice" are "Child support exemption" and "Commercial driver's license exemption." The third heading, "Other grounds," states that the recipient's driver's license will not be suspended if any of the following apply: "You are not the taxpayer named in the notice. The tax debts have been paid. The Tax Department [Division] is already garnishing your wages to pay these debts. Your license was previously selected for suspension for unpaid tax debts *and*: you set up a payment plan with the Tax Department [Division], *and* the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period." Also under "Other grounds" is the statement that the recipient may contact the Division to establish that he or she is eligible for innocent spouse relief under Tax Law § 654, or that enforcement of the underlying tax debts has been stayed by the filing of a bankruptcy petition.

Under the heading, "Protests and legal actions," it is explained that if the recipient protests with the Division, or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, "If you do not respond within 60 days," the recipient is informed that the Division will provide DMV with the information necessary to suspend the recipient's driver's license, unless the recipient does one of the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or

her license by either: filing a request for a conciliation conference with the Division, or filing a petition with the Division of Tax Appeals.

2. On October 5, 2013, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the following notices of deficiency and notices and demands, which were attached to the petition:

Notice Number	Notice Type	Date Issued	Tax, Interest and Penalty Asserted	Petitioner's Address Listed on Notice
L-039572485	Notice and Demand	June 25, 2013	\$507.58	75 Maiden Ln #203 New York, NY 10038-4810
L-038435221	Notice of Deficiency	October 3, 2012	\$502.09	75 Maiden Ln #203 New York, NY 10038-4810
L-034130849	Notice and Demand	June 17, 2010	\$99.56	75 Maiden Ln 203 New York, NY 10038-4810
L-030574366	Notice and Demand	August 14, 2008	\$2,276.73	75 Maiden Ln 203 New York, NY 10038-4810
L-029573330	Notice of Deficiency	February 25, 2008	\$7,485.35	225 Broadway 1401 New York, NY 10007-3001
L-020134778	Notice and Demand	October 12, 2001	\$514.04	225 Broadway 1401 New York, NY 10007-3001
L-018298873	Notice and Demand	July 27, 2000	\$558.10	225 Broadway 1401 New York, NY 10007-3001
L-016939537	Notice and Demand	September 20, 1999	\$98.84	225 Broadway 1401 New York, NY 10007-3001
L-015663803	Notice and Demand	November 2, 1998	\$3,888.79	888 7 Ave 1809 New York, NY 10019-5841

L-039806861	Notice and Demand	July 30, 2013	\$448.71	75 Maiden Ln #205 New York, NY 10038-4810
L-040365544	Notice and Demand	November 14, 2013	\$528.62	75 Maiden Ln #205 New York, NY 10038-4810

Petitioner did not attach a copy of the notice of proposed driver license suspension referral to his petition. Petitioner argues in the petition that:

“All calculations, interest and assessments are wrong. All legal notices are legally insufficient. All amounts have by [sic] waived by inter-alia failure to take all legal prerequisites. The statute violates both the U.S. Constitution and the N.Y.S. Constitution in that, inter-alia, both notice and opportunity to be heard have been denied. Every other legal basis asserted, including passage of a retroactive law.”

On February 21, 2014, Supervising Administrative Law Judge, Daniel J. Ranalli, issued a notice of intent to dismiss petition. By order dated July 10, 2014, with regard to the notice of intent to dismiss petition, Administrative Law Judge Barbara J. Russo held that:

- the petition was dismissed regarding notices and demands L-040365544 (dated November 14, 2013), L-039806861 (dated July 30, 2013), L-039572485 (dated June 25, 2013), L-034130849 (dated June 17, 2010), and L-030574366 (dated August 14, 2008), because the Division of Tax Appeals lacked jurisdiction to review such notices;
- petitioner had a right to a hearing regarding notices and demand numbers L-020134778 (dated October 12, 2001), L-018298873 (dated July 27, 2000), L-016939537 (dated September 20, 1999), and L-015663803 (dated November 2, 1998) based upon *Matter of Meyers v Tax Appeals Trib.* (201 AD2d 185 [1994], *lv denied* 84 NY2d 810 [1994]);¹

¹ The Division conceded that petitioner had a right to a hearing regarding these notices and demands in the supporting papers filed with its motion for summary determination. Accordingly, the Administrative Law Judge, in the April 2, 2015 determination, ordered that the notices be given a separate DTA number and that such case proceed to hearing in due course.

- with regard to notices of deficiency numbers L-038435221 (dated October 3, 2012) and L-029573330 (dated February 25, 2008) the Division had not proven proper mailing; and
- the Division had 75 days from the date of the order to file its answer on the open issues.

3. The Division filed its answer on September 10, 2014. The Division, in turn, filed a notice of motion and supporting papers on October 14, 2014, seeking an order dismissing the petition, or, in the alternative, granting summary determination in favor of the Division pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.5 and 3000.9 (a) and (b). In its supporting papers, the Division notes that petitioner is clearly protesting the notice of proposed driver license suspension even though he did not attach a copy of such notice to his petition.

In support of its motion and to prove mailing of the notices of deficiency dated October 3, 2012 and February 25, 2008, the Division submitted, in part, the following: (i) an affidavit, dated October 8, 2014, of Matthew McNamara, Business Systems Analyst 1 in the Division's Civil Enforcement Division (CED); (ii) two affidavits, dated October 7, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR), postmarked October 3, 2012; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR), postmarked February 25, 2008; (v) two affidavits, dated October 7, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (vi) a copy of petitioner's 2007 form IT-201 resident income tax return, filed on March 21, 2008, which reports the same New York, New York, address for petitioner as that listed on the October 3, 2012 notice of deficiency; (vii) a copy of petitioner's form IT-201 income tax transcript for the year 1998, filed on August 18, 1999, which reported the same New York, New

York, address for petitioner as that listed on the February 25, 2008 notice of deficiency; and (viii) a notice of proposed driver license suspension referral dated August 9, 2013.

4. The affidavit of Matthew McNamara details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law, Article 8, § 171-v. Mr. McNamara's duties involve maintenance of the CED internal website, and include creation and modification of pages on the site itself. His duties further involve the creation and maintenance of programs and reports run on a scheduled basis that facilitate and report on the movement of cases, including the creation of event codes based on criteria given by end users. Mr. McNamara's affidavit details four sequential actions or steps taken by the Division in carrying out the license suspension program, to wit: the "Initial Process," the "DMV Data Match," the "Suspension Process," and the "Post-Suspension Process." These steps are summarized as follows:

a) The "Initial Process" involves the Division's identification of taxpayers who may be subject to the issuance of a 60 notice of proposed driver license suspension referral under Tax Law § 171-v. This process involves first reviewing internally set selection criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00, and then reviewing additional data to determine whether any of such taxpayers are excluded from application of the driver's license suspension provisions of Tax Law § 171-v (5) under the following exclusion criteria:

- the taxpayer is deceased;
- the taxpayer is in bankruptcy;
- a formal or informal protest has been made with respect to any assessment(s) included in the cumulative balance of tax liability where the elimination of such assessment(s) would leave the balance of such liability below the \$10,000.00 threshold for license suspension;

- the taxpayer is on an active approved payment plan.

b) The “DMV Data Match” involves reviewing information on record with DMV for a taxpayer not already excluded under the foregoing criteria to determine whether the taxpayer has a qualifying driver’s license potentially subject to suspension per Tax Law § 171-v. This review examines the following data:

- (1) social security number
- (2) last name
- (3) first name
- (4) middle initial
- (5) name suffix
- (6) DMV client ID
- (7) gender
- (8) date of birth
- (9) mailing address street
- (10) mailing address city
- (11) mailing address state
- (12) mailing address zip code
- (13) license class
- (14) license expiration date.

If, upon this review, the Division determines that a taxpayer has a qualifying driver’s license, that taxpayer is put into the suspension process.

c) The “Suspension Process” commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension detailed above in finding of fact 4 (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver license suspension referral will be issued to the taxpayer. In describing the process of issuance of the 60-day notice, Mr. McNamara states:

“The date of the correspondence trigger will be stored on the database as the day that the 60 Day notice was sent, but an additional 10 days will be added to the date displayed on the page to allow for processing and mailing. Additionally, the status will be set to ‘Approved’ and the clock will be set for seventy-five (75) days from the approval date.

The taxpayer(s) is sent the 60 day notice (Form DTF-454) via regular U.S. mail to the taxpayer's mailing address."

After 75 days with no response from the taxpayer, and no update to the case such that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed), the case will be electronically sent by the Division to DMV for license suspension.²

Data is exchanged daily between the Division and DMV. If an issue of data transmission arises, an internal group with the Division (DMV-Failed-Suspensions) will investigate and resolve the issue. Upon successful data procession and transfer, DMV will send a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the taxpayer, and DMV does not receive a cancellation record from the Division, the taxpayer's license will be marked as suspended on the DMV database.

d) The "Post-Suspension Process" involves monitoring events subsequent to license suspension so as to update the status of a suspension that has taken place. Depending upon the event, the status of a suspension may be changed to "on-hold" or "closed." A change to "on-hold" status can result from events such as those set forth above in finding of fact 4 (a) (e.g., the filing of a protest, a bankruptcy filing, the creation and approval of an installment payment agreement). Where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Division for re-suspension until resolution of the "on-hold" status (the 60-day notice of proposed

² Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer "fails" the compliance criteria check, the case status will be updated to "on-hold," or "closed" (depending on the circumstances) and the suspension will be stayed. If the status is "on-hold," the 60-day notice of proposed driver license suspension referral remains on the Division's system but the suspension will not proceed until the "on-hold" status is resolved. If the suspension is "closed," then the 60-day notice will be canceled. If the taxpayer "passes" this final compliance check, the suspension by DMV will proceed.

driver license suspension referral would remain in the Division's system). If the status is changed to "closed," the 60-day notice of proposed driver license suspension referral is canceled.

5. A copy of the 60-day notice of proposed driver license suspension referral, the consolidated statement of tax liabilities described in finding of fact 1, and a payment document (Form DTF-968.4), by which petitioner could remit payment against the liabilities in question, were included with Mr. McNamara's affidavit. Mr. McNamara avers, based upon his knowledge of Division policies and procedures regarding driver's license suspension referrals, and upon his review of the Division's records, that on August 9, 2013 the Division issued to petitioner a notice of proposed driver license suspension referral. Mr. McNamara states that such 60-day notice of proposed driver license suspension referral comports with statutory requirements, that petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5), and that therefore the 60-day notice of proposed driver license suspension referral has not been and should not be canceled.

The Notice of Deficiency Dated October 3, 2012

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "10/3/12." In addition,

as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

8. The CMR in the present matter consists of 2,439 pages and lists 26,822 certified control numbers along with corresponding assessment numbers, names and addresses.³ Each page of the CMR includes 11 such entries with the exception of pages 2,278 and 2,284, which contain 10 entries (one of the original 11 entries is crossed out on each of these pages), and page 2,439, which contains 6 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated October 3, 2012 to each page of the CMR, wrote and circled 26,822 on page 2,439 and

³ The CMR originally listed 26,824 certified control numbers. As noted in the findings of fact herein, the preprinted number of total pieces received at the post office is crossed out and "26,822" is handwritten on the last page of the CMR.

initialed or signed page 2,439. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 26,822.

9. Page 302 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 1325 1693 and reference number L-038435221 was mailed to petitioner at “75 Maiden Ln #203, New York, NY 10038-4810.” The corresponding mailing cover sheet and notice of deficiency, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

11. As noted, each page of the CMR contains a USPS postmark of October 3, 2012. On page 2,439, corresponding to “Total Pieces and Amounts,” is the preprinted number 26,824.

This number is crossed out and next to “Total Pieces Received At Post Office” is the handwritten entry “26,822” along with initials or a signature. According to Mr. Peltier, the number of pieces received was changed from 26,824 to 26,822 to reflect that two pieces of certified mail had been “pulled” from the mailing record. The affixation of the postmarks and the Postal Service employee’s initials and handwritten number indicate that a total of 26,822 articles of mail listed on the CMR were delivered to the USPS on October 3, 2012.

12. Mr. Peltier further explains that a piece of mail may be “pulled” for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pieces of mail “pulled” will be segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the CMR in this instance reflects that two pieces of mail were “pulled.” The pieces that were pulled are listed on pages 2,278 and 2,284 of the CMR. These pieces of mail had been assigned certified control numbers 7104 1002 9730 1346 9036 and 7104 1002 9730 1346 9791. A line was placed through the entries for these taxpayers after the statutory notices were “pulled.” These deletions are reflected in the change of the total pieces received at the post office on page 2,439 of the CMR. No such mark is made on or near the listing for petitioner.

13. According to both the Nagengast and Peltier affidavits, a copy of the subject notice was mailed to petitioner on October 3, 2012, as claimed.

14. Petitioner’s New York State personal income tax return (form IT-201) for the year 2007, filed on March 21, 2008, reported petitioner’s address as 75 Maiden Lane, Apt. 203, New York, NY 10038. This was the last return filed by petitioner prior to the issuance of the October 3, 2012 notice of deficiency. This address corresponds with the address on the October 3, 2012 CMR and the notice dated October 3, 2012 that was sent to petitioner.

The Notice of Deficiency Dated February 25, 2008

15. The affidavit of Ms. Nagengast, submitted in support of the Division's mailing of the notice dated February 25, 2008, sets forth the Division's general practice and procedure for processing statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page of the CMR in the present case to the actual mailing date of "2/25/08." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

16. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

17. The CMR in the present matter consists of 1,214 pages and lists 13,346 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 1,214, which contains three entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved

in this proceeding. A USPS representative affixed a postmark dated February 25, 2008 to each page of the CMR, wrote "13,346" on page 1,214 and initialed or signed page 1,214. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 13,346.

18. Page 66 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0599 4416 and reference number L-029573330 was mailed to petitioner at "225 Broadway 1401, New York, NY 10007-3001." The corresponding mailing cover sheet and notice of deficiency, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

19. The affidavit of Bruce Peltier describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

20. Each page of the CMR contains a USPS postmark of February 25, 2008. On page 1,214, corresponding to "Total Pieces and Amounts," is the preprinted number 13,346. Below

this number and next to “Total Pieces Received At Post Office” is the handwritten entry “13,346” along with initials or a signature. According to Mr. Peltier, the affixation of the postmarks and the Postal Service employee’s initials indicate that a total of 13,346 articles of mail listed on the CMR, including the article addressed to petitioner, were delivered to the USPS on February 25, 2008.

21. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on February 25, 2008, as claimed.

22. The transcript of petitioner’s New York State personal income tax return (form IT-201) for the year 1998, filed on August 18, 1999, reported petitioner’s address as 225 Broadway 1401, New York, NY 10007-3001. This was the last return filed by petitioner prior to the issuance of the February 25, 2008 notice of deficiency. This address corresponds with the address on the February 25, 2008 CMR and the notice dated February 25, 2008.

The Notices and Demands

23. As noted above, the portion of the petition with regard to notices and demands numbers L-040365544, L-039806861, L-039572485, L-034130849, and L-030574366 was previously dismissed by order dated July 10, 2014. The Division concedes in its motion that petitioner has a right to a hearing on the merits with regard to notices and demands numbers L-020134778, L-018298873, L-016939537, and L-015663803. These notices will be given a separate Division of Tax Appeals case number and will proceed to a hearing on the merits in due course. The Administrative Law Judge’s determination and this decision address notices of deficiency numbers L-038435221 and L-029573330.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Notices of Deficiency

The Administrative Law Judge explained that a taxpayer may protest a notice of deficiency by filing either a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days of the issuance of the notice. The Administrative Law Judge further explained that once the 90-day statutory limit has passed, the notice of deficiency becomes a fixed and final assessment and the Division of Tax Appeals is without jurisdiction to entertain the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

The Administrative Law Judge expounded upon the issue by pointing out that where, as here, there is an issue regarding the timely filing of a petition, the Division has the burden of proving that it properly mailed the notice of deficiency by certified or registered mail to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Administrative Law Judge noted that to do this, the Division must show that it has standard procedures for the mailing of notices of deficiency and that those procedures were followed in the mailing of the notices of deficiency at issue to petitioner (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*). The Administrative Law Judge found that the Division had proven the existence of standard procedures based upon the affidavits of Ms. Nagengast and Mr. Peltier, Division employees who are involved in, and possessing knowledge of, the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). The Administrative Law

Judge then concluded that the notices of deficiency dated October 3, 2012 and February 25, 2008 were properly mailed pursuant to those standard procedures.

Specifically, the Administrative Law Judge addressed the issue of whether both notices of deficiency were mailed to petitioner's last known address. In each case, the Administrative Law Judge found that the notices of deficiency were mailed to the address listed on the last New York State personal income tax return filed by petitioner prior to the issuance of the corresponding notices of deficiency. Furthermore, the Administrative Law Judge found that petitioner presented no evidence that the Division was apprised of any change of address between the time the returns were filed and the corresponding notices of deficiency were issued.

Having found that the Division had shown that it properly mailed the notices of deficiency by certified or registered mail to petitioner's last known address, the Administrative Law Judge explained that petitioner had 90-days from the issuance of the notices of deficiency to file a request for conciliation conference or a petition with the Division of Tax Appeals. The Administrative Law Judge concluded that the filing of a petition with the Division of Tax Appeals on October 5, 2013, was well beyond the 90-day limit for either the notice of deficiency issued on October 3, 2012 or the notice of deficiency issued on February 25, 2008. Thus, the Administrative Law Judge found that the Division had established that the notices of deficiency dated October 3, 2012 and February 25, 2008 were fixed and final tax liabilities (*see* Tax Law § 681 [b]; *Matter of Sak Smoke Shop*).

Notice of Proposed Driver License Suspension Referral

The Administrative Law Judge noted that a review of the amounts due on the consolidated statement of tax liabilities attached to the notice of proposed driver license suspension, not including the notices and demands for which the Division had conceded that petitioner was entitled to a hearing on the merits, left a total of \$16,171.68 of past-due tax

liabilities from five statutory notices (L-038435221, L-029573330, L-039572485, L-034130849, and L-030574366). The Administrative Law Judge explained that as the assessments asserted in these five statutory notices are fixed and final tax liabilities, petitioner's only grounds for challenging the notice of proposed driver license suspension are those provided by Tax Law § 171-v (5). The Administrative Law Judge concluded that petitioner failed to prove that he was entitled to relief under any of those grounds, because petitioner did not submit any evidence indicating that he was not the taxpayer at issue (Tax Law § 171-v [5] [i]); that the past-due tax liabilities were satisfied (Tax Law § 171-v-[5] [ii]); that his wages are being garnished for the payment of past-due child support or combined child and spousal support arrears (Tax Law § 171-v [5] [iii]); that his wages are being garnished by the Division for the payment of the past-due tax liabilities or for past-due child support or combined child and spousal support arrears pursuant to an income execution (Tax Law § 171-v [5] [iv]); that his driver's license is a commercial driver's license (Tax Law § 171-v [5] [v]); or that the Division incorrectly found that he failed to comply with the terms of a payment arrangement more than once in a twelve month period (Tax Law § 171-v [5] [vi]).

Timeliness of Answer

Finally, the Administrative Law Judge concluded that petitioner's argument that the Division's answer was untimely lacked merit. The Administrative Law Judge found that as the petition was initially the subject of a notice of intent to dismiss petition issued by the Supervising Administrative Law Judge, the Division's time to provide its answer was tolled until the issuance of the order addressing the notice of intent to dismiss petition. The Administrative Law Judge noted that such order was issued on July 10, 2014 and specifically gave the Division 75 days to file its answer. Thus, the Administrative Law Judge concluded that the Division timely filed its answer on September 10, 2014.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the Division's answer was untimely and that the notices of deficiency at issue were mailed to the wrong address. Additionally, petitioner argues that all of the Division's evidence submitted in this matter is hearsay and no exception to the hearsay rule has been alleged by the Division. Furthermore, with regard to the October 10, 2014 order of the Administrative Law Judge issued in this matter,⁴ petitioner argues that all of the findings of fact and conclusions of law contained therein should be adopted in this decision as they were not addressed by the Division, and this Tribunal has no authority to review such findings and conclusions. Finally, petitioner argues that there is no constitutional basis for the retroactive application of the law in this case.

The Division argues that the Administrative Law Judge correctly held that it had demonstrated that each of the two notices of deficiency at issue were properly mailed by certified or registered mail to petitioner's last known address. Furthermore, the Division asserts that the Administrative Law Judge correctly concluded that petitioner failed to timely protest such notices and that, therefore, the liabilities set forth therein became fixed and final. Accordingly, the Division argues that the Administrative Law Judge correctly determined that the fixed and final tax liabilities upon which the notice of proposed driver license suspension was issued totaled \$16,171.68, more than meeting the \$10,000.00 threshold requirement for the issuance of the notice. In conclusion, the Division asserts that the threshold requirement having been met, and petitioner having failed to raise or prove any of the specifically enumerated bases for relief set forth in Tax Law § 171-v (5), petitioner's challenge to the notice of proposed driver license suspension must fail.

⁴ Petitioner actually refers to the such order as "Judge Ranalli's" dismissal, but the order was issued by the same Administrative Law Judge who issued the determination in this matter.

With regard to petitioner's argument that the Division failed to submit any admissible evidence in support of its position, the Division argues that such argument should be rejected as affidavits are allowed under the Tribunal's Rules of Practice and Procedure, and hearsay evidence can be the basis of an administrative determination.

With regard to petitioner's assertion that the Division's answer was untimely, the Division argues that the Administrative Law Judge correctly found that its answer was timely because it was filed within the 75 days allowed in the order of the Administrative Law Judge issued on July 10, 2014 (*see* finding of fact 2).

Finally, the Division explains that while petitioner's constitutional argument is unclear, it appears that he is arguing that the retroactive application of Tax Law § 171-v (5) to suspend his driver's license is a violation of his rights under the Federal and State constitutions. In response to this argument, the Division asserts that a new remedy for the collection of delinquent taxes may be validly applied to tax liabilities existing prior to the enactment of the statute.

OPINION

We begin with petitioner's arguments on exception that were either not raised in the proceedings before the Administrative Law Judge or not addressed in the Administrative Law Judge's determination. First, petitioner argues that the Division has failed to introduce any admissible evidence in support of its position. While petitioner's argument is not entirely clear, it appears that petitioner is arguing that the affidavits the Division submitted into evidence were inadmissible. Initially, it must be pointed out that the Division of Tax Appeals is not bound by the formal rules of evidence observed by the courts (SAPA § 306 [1]; 20 NYCRR 3000.15 [d] [1]). Furthermore, the Tribunal's Rules of Practice and Procedure specifically allow for the admission of affidavits into evidence (20 NYCRR 3000.15 [d] [1]). Finally, as noted by the

Division, hearsay evidence can be the basis of an administrative determination (*see Gray v Adduci*, 73 NY2d 741 [1988]). Thus, petitioner's argument must fail.

Petitioner also argues that the findings and conclusions set forth in the Administrative Law Judge's order dated July 10, 2014 should be adopted in this decision and that the Tribunal has no jurisdiction to review such findings and conclusions. Once again, it is difficult to understand petitioner's argument. The Administrative Law Judge dismissed the petition as to the five notices and demands over which the Division of Tax Appeals had no jurisdiction. Petitioner has not protested such dismissal, so the issue is not before the Tribunal. The Administrative Law Judge found that with regard to four other notices and demands, petitioner had a right to a hearing and a separate case before the Division of Tax Appeals was set up. There is nothing for the Tribunal to review or adopt in this regard as presumably the case is still pending before the Division of Tax Appeals. Finally, the Administrative Law Judge determined that with regard to the two notices of deficiency before her, the Division had failed to prove proper mailing by certified or registered mail to petitioner's last known address. That deficiency in proof was overcome by the Division in its presentation of proof in support of its motion for summary determination and was addressed accordingly in the Administrative Law Judge's determination (*see* finding of fact 2). Such determination is properly before this Tribunal for review and petitioner has pointed to no legal support for its assertion that the Tribunal has no authority to review same. Thus, again, petitioner's argument must fail.

With regard to petitioner's assertion that his due process rights under the Federal and State constitutions have been violated by the retroactive application of Tax Law § 171-v to suspend his driver's license, this argument also fails. We recently held that Tax Law § 171-v does not constitute a retroactive application of a statute imposing tax, but rather, the application of a new remedy for the collection of delinquent taxes. In such situations, where a taxpayer has

already been provided with notice and an opportunity to be heard with regard to the imposition of the tax liabilities in the first instance, “the method chosen for the collection of those fixed and final taxes is merely a ministerial administrative act, not requiring its own set of due process protections” (*Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016; *see also Matter of City of New York*, 290 NY 236 [1943]).

After carefully reviewing the analysis given to the remaining issues by the Administrative Law Judge, and the arguments made by the parties regarding such issues on exception, we believe that the Administrative Law Judge completely and correctly addressed such issues and we affirm the determination of the Administrative Law Judge based upon the reasoning contained therein.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John P. DeMaio is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of John P. DeMaio is dismissed with regard to notice of deficiency numbered L-038435221 and dated October 3, 2012 and notice of deficiency numbered L-029573330 and dated February 25, 2008, and denied with regard to the notice of proposed driver license suspension; and

4. The notice of proposed driver license suspension referral is sustained.

DATED: Albany, New York
March 14, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner