STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BRIAN RATTNER	:	DECISION DTA NO. 826842
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law § 171-v.	:	

Petitioner, Brian Rattner, filed an exception to the determination of the Administrative Law Judge issued on March 31, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. No reply brief was filed. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on September 6, 2016, the date that petitioner's reply brief was due.

ISSUES

I. Whether petitioner is entitled to a conciliation conference in the Bureau of Conciliation and Mediation Services of the Division of Taxation.

II. If petitioner is not so entitled, whether the Division of Taxation's notice of proposed driver license suspension referral issued to petitioner pursuant to Tax Law § 171-v should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that findings of

fact 2, 3 and 4 have been modified to more accurately and fully reflect the record and findings of fact 5 and 6 have not been reiterated herein as such facts are not necessary to reaching the current decision. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.[1]

1. The Division of Taxation (Division) issued to petitioner, Brian Rattner, at his Chappaqua, New York, address, a notice of proposed driver license suspension referral (60-day notice), dated October 18, 2013, which notified petitioner that new legislation allows New York State to suspend the drivers' licenses of persons who have delinquent unpaid tax debts. The notice informed petitioner of how to avoid such suspension, how to respond to the notice and what would ensue if he failed to take action.

Attached to the notice was a consolidated statement of tax liabilities, also dated October 18, 2013, listing petitioner's assessments subject to collection action, as follows:

Assessment No.	Tax Period Ended	Tax Amount Assessed	Interest Assessed	Penalty Assessed	Payments and Credits	Current Balance Due
L-035412023-6	6/30/08	$0.00	$193.88	$1,002.26	$0.00	$1,196.14
L-035412022-7	9/30/08	$0.00	$218.05	$1,127.22	$0.00	$1,345.27
L-035412020-9	3/31/09	$0.00	$191.60	$990.45	$0.00	$1,182.05
L-035412019-9	6/30/09	$0.00	$111.08	$574.21	$0.00	$685.29
L-035412018-1	9/30/09	$0.00	$59.81	$309.19	$0.00	$369.00
L-035412017-2	9/30/09	$0.00	$14.73	$76.19	$0.00	$90.92
L-031712846-3	12/31/07	$3,214.00	$2,075.63	$1,526.65	$0.00	$6,816.28
L-028007275-6	12/31/05	$5,225.00	$4,063.76	$1,381.89	$2,395.16	$8,275.49
Total						$19,960.44

[1] We specifically note that we are making no findings regarding our omissions of parts of the Administrative Law Judge's findings of fact 3 and 4, or the complete omission of findings of fact 5 and 6, other than that such findings are not necessary to this decision.

Specifically, the 60-day notice 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 60-day notice informed petitioner that unless one of the exemptions on the back page of the 60-day 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 60-day notice is entitled, "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 [i.e., the 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, **and**
>
> - the Tax Department 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, and that contacting the Division to ask questions or to resolve any issues does not serve to extend the time to protest.

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:

> "resolve your tax debts or set up a payment plan,
>
> notify the Tax Department of your eligibility for an exemption, or
>
> protest the proposed suspension of your license by:
>
> - filing a *Request for Conciliation Conference* (Form CMS-1-MN, available on our Web site), with the Tax Department; or
>
> - filing a petition (Form TA-10) with the Division of Tax Appeals available at *www.nysdta.org*."

2. In protest of the 60-day notice, petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). By letter dated March 20, 2014, from Daniel Abbott, conciliation conferee, petitioner was informed that a conciliation conference had been scheduled for Thursday, April 24, 2014. By a telephone call with Mr. Abbott on April 14, 2014, petitioner requested an adjournment of that conciliation conference. By letter dated April 15, 2014, Mr. Abbott informed petitioner that his request for an adjournment had been granted and that he would receive ample advance notice of the date, time and place of the rescheduled conciliation conference.

By letter dated June 16, 2014, from Joseph P. DiGaudio, conciliation conferee, petitioner was informed that a conciliation conference had been scheduled for Tuesday, July 22, 2014. Petitioner, having understood that the conciliation conference would be scheduled on a Thursday

because of his work concerns, again contacted BCMS by telephone to request an adjournment, this time speaking with Mr. DiGaudio. Mr. DiGaudio and petitioner agreed upon an adjourned date of Thursday, July 24, 2014, two days after the date scheduled for the conciliation conference by BCMS.

Mr. DiGaudio then contacted petitioner by telephone to inform him that the Division's representative was unable to attend the conciliation conference on July 24, 2014 because of scheduling issues. During this telephone call, Mr. DiGaudio requested that petitioner waive his right to an in-person conciliation conference and agree to have the matter decided based upon correspondence, a procedure to which petitioner objected. It is petitioner's understanding that as a result of that telephone call, the matter would not be decided based upon correspondence, but that he would be receiving another letter setting a date for the adjourned in-person conciliation conference. Accordingly, petitioner did not take any further action regarding his request for a conciliation conference until he received the conciliation order.

By the issuance of a conciliation order dated October 24, 2014 (CMS No. 260109), the conferee sustained the statutory notice, i.e., the 60-day notice. The conciliation order specifically states that "[I]n lieu of appearing at a conciliation conference . . . the requestor opted to have the matter decided by correspondence."

3. On March 12, 2015, petitioner filed a petition with the Division of Tax Appeals challenging the statement by the conciliation conferee that he had opted to have his matter decided based upon correspondence, and setting forth a sequence of events concerning his contact with BCMS leading up to the issuance of the conciliation order. Documents attached to the petition included letters that addressed the scheduling of the BCMS conference, as well as the conciliation order itself. Petitioner requested that the conciliation order be revoked, and

protested the denial of his right to a conciliation conference, as well as the proposed suspension of his driver's license.

4. The Division's answer to the petition was received by the Division of Tax Appeals on May 15, 2015. In its answer, the Division denied all of petitioner's assertions regarding the conciliation conference process, including "allegations, statements and/or positions contained" in its own documents that were attached to the petition, "unless otherwise stated." The Division also affirmatively stated that petitioner had opted to have his conciliation matter decided by correspondence, rather than by an in-person conciliation conference.

The Division then filed a notice of motion and supporting documentation on October 21, 2015, seeking an order dismissing the petition, or, in the alternative, granting summary determination pursuant to Tax Law § 2006 (6), 20 NYCRR 3000.5 and 3000.9 (a) and (b). The Division's notice of motion and supporting documentation pertained exclusively to the issue of whether the 60-day notice should be upheld and did not address petitioner's assertions regarding his right to a conciliation conference. Petitioner filed an affidavit in answer to the Division's motion pertaining solely to the issue of his right to a conciliation conference. The Division filed an affidavit and a letter brief in reply, addressing petitioner's assertions regarding his right to a conciliation conference. The affidavit was executed by Robert Farrelly, Assistant Supervisor of Tax Conferences, who, because of his duties in that position, is "fully familiar with the operations and procedures of BCMS."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge initially addressed petitioner's asserted right to a conciliation conference. The Administrative Law Judge explained that pursuant to 20 NYCRR 3000.3 (e), even assuming that a conciliation conference was not provided to

petitioner by BCMS, the matter could only be referred back to BCMS with the consent of the Division and if it were found that a useful purpose would be served in doing so. The Administrative Law Judge then found that the Division did not agree that the matter should be referred back to BCMS and that no useful purpose would be served in holding a conciliation conference. The Administrative Law Judge went on to explain that petitioner did not lose his right to address the merits of his case as he had 90 days from the issuance of the conciliation order to bring the matter either before BCMS or the Division of Tax Appeals. As petitioner chose to file a petition with the Division of Tax Appeals, he was in the same position procedurally as if he had never filed a request for a conciliation conference to begin with (***citing Matter of Poindexter***, Tax Appeals Tribunal, September 7, 2006; Tax Law §§ 170 [3-a] [e] and 2006 [4]; 20 NYCRR 4000.5 [c] [4]). Accordingly, the Administrative Law Judge determined that the matter would not be referred back to BCMS.

The Administrative Law Judge then addressed the question of whether the 60-day notice should be sustained. The Administrative Law Judge concluded that the Division had proven that the 60-day notice met all of the requirements to issue a valid notice of proposed driver license suspension referral under the statute and that petitioner had not even asserted any of the challenges allowed under the statute to a validly issued notice. The Administrative Law Judge noted that petitioner's only argument is that he is entitled to a conciliation conference and such argument is not one of the challenges to the 60-day notice available to him. Accordingly, the Administrative Law Judge held that the Division's motion for summary determination should be granted and the 60-day notice upheld.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner continues to argue that he is entitled to a conciliation conference, particularly as

the Administrative Law Judge found a lack of evidentiary support for the Division's assertion that petitioner opted to have his case before BCMS decided upon correspondence rather than by an in-person conciliation conference. Petitioner notes that, in any event, there is no evidence in the record supporting the Division's assertion that a conciliation conference via correspondence actually took place. Petitioner also asserts that the Administrative Law Judge's conclusion that the Division must consent for this matter to be sent back to BCMS is simply incorrect. Additionally, petitioner argues that the facts of this case are distinguishable from ***Matter of Poindexter***, relied upon by the Administrative Law Judge, in that petitioner properly requested a conciliation conference and BCMS simply failed to hold such conciliation conference. Finally, citing ***Matter of Muniz*** (Tax Appeals Tribunal, February 26, 2016), petitioner argues that it appears that the Division has a pattern of proceeding to the Division of Tax Appeals rather than holding conciliation conferences and that practice is unfair to taxpayers as they are denied their rights to a conciliation conference.

The Division argues that the Division of Tax Appeals may only refer a matter back to BCMS to conduct a conciliation conference pursuant to 20 NYCRR 3000.3 (e) and that the Administrative Law Judge correctly found that this case did not meet those requirements. Furthermore, the Division asserts that the Administrative Law Judge correctly pointed to ***Matter of Poindexter*** in finding that petitioner was in the same position as he would have been had he chosen to file a petition with the Division of Tax Appeals in the first instance. Thus, petitioner has lost no rights as a result of the procedure followed in this matter and a referral back to BCMS would therefore be inappropriate. With regard to the 60-day notice, the Division argues that the Administrative Law Judge was correct in finding both that it properly issued the 60-day notice and that petitioner failed to assert any of the defenses to such a notice allowed by the statute.

Accordingly, the Division asserts that its motion for summary determination should be granted and the 60-day notice should be sustained.

OPINION

The primary issue raised by petitioner is whether he is entitled to a conciliation conference. The Administrative Law Judge found that he was not. We reverse the determination of the Administrative Law Judge and conclude that, under the circumstances presented herein, petitioner is entitled to a conciliation conference.

The Administrative Law Judge found as a fact that petitioner and the Division disputed what occurred between petitioner's filing of his request for a conciliation conference and the issuance of the conciliation order. The Administrative Law Judge concluded that the record did not support the fact that petitioner had opted to have the matter decided by correspondence, which was the Division's explanation for why an in-person conciliation conference was not held. We specifically find, however, that not only did petitioner not opt to have the matter be decided by correspondence, but that contrary to the Division's assertions, the last contact petitioner had with BCMS prior to the issuance of the conciliation order was a telephone call wherein he was informed that the Division's representative could not make an agreed upon date for a conciliation conference of Thursday, July 24, 2014. Additionally, during that same call, petitioner informed the conciliation conferee that he did not, and would not, consent to have the matter determined by correspondence. We conclude that, based upon this telephone call and based upon petitioner's previous experience in requesting an adjournment, it was reasonable for petitioner to expect that the next step in the process was for BCMS to send him a letter with a new conciliation conference date.

These additional and more specific facts do not contradict the findings of the

Administrative Law Judge, but merely expand upon them. Such facts are based primarily upon the affidavit of petitioner, as he was the person involved in the events at issue and thus present a first-hand account of those events. In response, the Division provided the affidavit of the Supervisor of Tax Conferences, who, while he had knowledge of the operations and procedures of BCMS, did not have personal knowledge of the events at issue. Furthermore, the supervisor's affidavit does not provide the basis of his second-hand knowledge of the specific events, such as if it was based upon a review of the BCMS file. Nor does the Division assert any reason why there was no affidavit or affidavits from the actual conciliation conferees who would have had personal knowledge of the specific events. Finally, there is no documentary evidence in the record, such as additional letters or contemporaneous notes of telephone conversations, indicating that petitioner had opted to have the matter decided based upon correspondence. Having found that a conciliation conference was not held in this matter through no fault of petitioner, we now turn to whether those circumstances require that BCMS provide that a conciliation conference be held.

The Administrative Law Judge concluded, and the Division asserts on exception, that 20 NYCRR 3000.3 (e) governs this situation and that this Tribunal can remand this matter to BCMS to hold a conciliation conference only if the Division agrees and a useful purpose would be served by doing so. 20 NYCRR 3000.3 (e) provides that the Division of Tax Appeals may refer a matter back to BCMS at petitioner's request and with the consent of the Division, when "it appears that the petitioner intended to file a request for conciliation conference or that a conciliation conference would serve a useful purpose." It is intended to allow for a suspension of the Division of Tax Appeals' process where a petition was mistakenly filed instead of a request for conciliation conference, or where both parties and the Division of Tax Appeals agree that it

would be useful for a conciliation conference to be held prior to proceeding in the Division of Tax Appeals. This provision is inapplicable to the current situation where petitioner is seeking a remand back to BCMS to conduct a conciliation conference that he maintains was requested but never held. Furthermore, this Tribunal's decision in ***Matter of Poindexter***, cited by the Administrative Law Judge and the Division for the proposition that somehow petitioner's rights have not been abrogated as he is in the same position as he would have been had he chosen to file a petition with the Division of Tax Appeals rather than a request for conciliation conference, is also inapplicable to the circumstances herein. The facts in ***Matter of Poindexter*** were that the petitioner had defaulted at BCMS. There is a specific regulatory provision, 20 NYCRR 4000.5 (b) (3) dealing with that circumstance that allows a petitioner to either request that BCMS vacate the default order, or file a petition with the Division of Tax Appeals. Such provision is intended to allow a petitioner the choice between contesting the default order and thereby hopefully obtaining a conciliation conference, or proceeding to the Division of Tax Appeals on his substantive case. In contrast to ***Matter of Poindexter***, petitioner did not default at BCMS and, accordingly, the facts here are not governed by 20 NYCRR 4000.5 (b) (3) or any cases applicable to that regulatory provision.

It appears to us that this case is properly guided by the decisions of this Tribunal dealing with the untimely filing of a request for a conciliation conference (***see e.g.***, ***Matter of Yoell-Mirel***, Tax Appeals Tribunal, September 21, 2015 ["proper remedy is to remand this matter to the Division for a conciliation conference in BCMS."]; ***see also Matter of Huang***, Tax Appeals Tribunal, April 27, 1995 [also remanded to the Division "for conduct of a conciliation conference."]. Particularly germane to the circumstances herein is that the decision in ***Matter of Yoell-Mirel*** was based upon a taxpayer's specific right to a conciliation conference as provided

for in Tax Law § 170 (3-a) (a) and this Tribunal found that regardless of the hurdles and issues a taxpayer must address in a case, "the process as established in the Tax Law entitles [her] to have those issues first addressed during a conciliation conference."

As such, the proper remedy is to remand this matter to the Division for a conciliation conference in BCMS. Having so determined, we deem it inappropriate to address the remainder of the issues presented herein and, therefore, decline to do so at this time.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the determination of the Administrative Law Judge is reversed, and the exception and petition of Brian Rattner are granted, to the extent that this matter is remanded to the Division of Taxation for a conciliation conference in the Bureau of Conciliation and Mediation Services.

DATED: Albany, New York
March 06, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner