

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
IVAN RIVAS : DETERMINATION
 : DTA NO. 825897
for Revision of a Notice of Proposed Driver License :
Suspension Referral issued on August 16, 2013 :
pursuant to Article 8, § 171-v of the Tax Law. :

Petitioner, Ivan Rivas, filed a petition for review of a notice of proposed driver license suspension referral under Article 8 of the Tax Law.¹

On August 4, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, and annexed exhibits. Petitioner, appearing pro se, did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

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.

¹ The title of the subject notice uses the phrase "driver license," while the statute at issue, Tax Law § 171-v, uses the phrase "driver's license."

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the validity of petitioner's protest of a notice of proposed driver license suspension referral dated August 16, 2013, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). The suspension notice informed petitioner that he had outstanding tax liabilities in excess of \$10,000.00 owed to the State of New York, and that unless he responded within 60 days of the mailing date of the suspension notice, his driver license would be suspended. According to the suspension notice, an adequate response within that time period would consist of 1) resolution of the outstanding liability either by payment or establishment of a payment plan; 2) notification to the Division of petitioner's eligibility for an exemption; or 3) a protest of the suspension notice by the filing of a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals.

2. On May 15, 2009, BCMS issued to petitioner a Conciliation Order, CMS number 224021, sustaining notices of deficiency numbers L-029525593, L-029525594, and L-029525595 for tax years 2001, 2002, and 2003 (notices of deficiency). Petitioner did not file a petition with the Division of Tax Appeals challenging the Conciliation Order or notices of deficiency within 90 days of the Conciliation Order.

3. As of August 16, 2013, the date of the issuance of the suspension notice, the unpaid amount on the notices of deficiency, including penalty and interest, was \$19,878.51.

4. On October 3, 2013, petitioner filed a petition with the Division of Tax Appeals challenging both the suspension notice and the underlying notices of deficiency. Petitioner did not file a petition challenging the notices of deficiency prior to that date.

5. In support of its motion and to show proof of proper mailing of the May 15, 2009 Conciliation Order, the Division submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

6. To commence this procedure, the BCMS Data Management Services Unit prepares and provides the conciliation order and the accompanying cover letter, predated with the intended date of mailing, to the conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation order.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The CMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets and delivers these documents to the BCMS clerk assigned to process conciliation orders.

9. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

10. On each page of the CMR, the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

11. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "5/15/09" is written in the upper right corner of each page of the CMR.

12. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center (Center).

13. Mr. Farrelly attests to the truth and accuracy of the copy of the three-page CMR relevant to this matter, which contains a list of the conciliation orders issued on May 15, 2009. This CMR lists 31 computer-printed certified control numbers. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a CMS number, the name and address of the addressee, and postage and fee amounts.

14. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1338 3301 is CMS number 224021, along with petitioner's name and a Hurleyville, New York,

address.

15. The Division also submitted the affidavit of Bruce Peltier, a supervisor in the Registry Unit since 1999 and currently a mail and supply supervisor in the Center. Mr. Peltier's affidavit describes the Center's general practices and procedures. After a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A USPS employee affixes a postmark and his or her initials or signature to the CMR, indicating receipt by the post office. The Center further requested that the USPS either circle the number of pieces received or indicate the number of pieces received by writing the number on the last page of the CMR.

16. In this particular instance, according to Mr. Peltier, the postal employee affixed a postmark dated May 15, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the three-page CMR. On page three, the postal employee also circled and wrote the number "31" and wrote his or her initials near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

17. According to both Messrs. Farrelly and Peltier, a copy of the subject conciliation order was mailed to petitioner on May 15, 2009, as claimed.

18. The Hurleyville, New York, address for petitioner as listed on the CMR is identical to the address reported on petitioner's May 8, 2008 letter requesting the conciliation conference that resulted in the subject conciliation order. It is also the same address petitioner himself listed

on his petition.

19. Petitioner does not dispute receipt of the subject conciliation order.

20. The Division also submitted the affidavit of Ronald Catalano, a Tax Compliance Manager 2 with its Civil Enforcement Division (CED) during the relevant time. His responsibilities include overseeing the operations of the Decision Support and Testing Unit of the CED's Operations Analysis and Support Bureau.

21. In his affidavit, Mr. Catalano describes the Division's process for selection of candidates who could be sent notices of proposed driver license suspension pursuant to Tax Law § 171-v. The initial search criteria includes that 1) the taxpayer have an outstanding balance of tax, penalty, and interest in excess of \$10,000.00; 2) all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) there must be less than 20 years from the issuance of the particular notice and demand; and 4) the outstanding assessments not be the subject of an approved payment arrangement. The Division searches its electronic database on a weekly basis for those taxpayers that meet the above criteria.

22. Once candidates have been identified by the Division, the necessary information is sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer has a qualifying drivers' license and is eligible for a notice of proposed driver license suspension.

23. Mr. Catalano avers that based on his review of the Division's records and his knowledge of its policies and procedures, issuance of the suspension notice to petitioner was proper.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Farrelly, Peltier and Catalano affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e), the conciliation order in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals, which lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Thus, it first must be determined whether petitioner has filed a timely challenge to the conciliation order or the underlying notices of deficiency.

D. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing

procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. In this case, the affidavits of Messrs. Farrelly and Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, along with the CMR, establish the Division's standard mailing procedure. Additionally, the CMR has been properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Therefore, the Division has established that the Conciliation Order at issue was mailed as addressed to petitioner on May 15, 2009.

F. Petitioner did not file a petition with the Division of Tax Appeals challenging the conciliation order or notices of deficiency within the 90-day period required by law. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest of the notices of deficiency (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007), and they have become fixed and final (*see Tax Law §§ 170[3-a][e]; 681; 2006[4]*).

G. Meanwhile, petitioner has timely protested the suspension notice. Tax Law § 171-v, effective March 28, 2013, provides for the enforcement of past-due tax liabilities through the suspension of drivers' licenses. The Division must provide notice to a taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to the date the Division

intends to refer the taxpayer to DMV for action (Tax Law § 171-v[3]). The liability represented by the notices of deficiency meets the threshold requirement for suspension of petitioner's drivers license pursuant to Tax Law § 171-v.

H. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a petition with the Division of Tax Appeals, and must be based on the following grounds:

- (i) the individual to whom the notice was provided is not the taxpayer at issue;
- (ii) the past-due tax liabilities were satisfied;
- (iii) the taxpayer's wages are being garnished by the department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears;
- (iv) the taxpayer's wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to section five thousand two hundred forty-one of the civil practice law and rules;
- (v) the taxpayer's driver's license is a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law; or
- (vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for the purposes of subdivision three of this section (Tax Law § 171-v[5]).

I. In the instant case, petitioner has failed to respond to the Division's motion, thereby failing to raise any of the grounds cited in Tax Law 171-v(5). Moreover, in his petition, petitioner similarly does not raise any of the grounds enumerated in the statute. Instead, petitioner solely argues that a suspension of his driver's license under Tax Law 171-v would be "an unconstitutional deprivation pursuant to a coercive state procedure disguised as a method of tax collection." Such a facial constitutional challenge to the statute is not within the

jurisdiction of the Division of Tax Appeals (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003). Accordingly, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination is appropriate.

J. The Division's motion for summary determination is hereby granted, the petition of Ivan Rivas is denied, and the Division's notice of proposed driver license suspension is sustained.

DATED: Albany, New York
November 13, 2014

/s/Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE