

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN P. DEMAIO : DETERMINATION
 : 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, Article 8, § 171-v. :
:

Petitioner, John P. DeMaio, filed a petition 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 Article 8, § 171-v.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion dated October 10, 2014 seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and sections 3000.5, 3000.9(a) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, was granted an extension of time to file a response by January 26, 2015. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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

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. This 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 and petitioner's driver's license would be suspended. 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.

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,¹ 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

¹ By Order of the Division of Tax Appeals dated July 10, 2014, the portion of the petition in this matter with regard to notices and demands numbers L-040365544, L-039806861, L-039572485, L-034130849, and L-030574366 was dismissed.

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.”

3. In support of its motion and to prove mailing of the notices of deficiency dated October 3, 2012 and February 25, 2008, the Division of Taxation (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-Day 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) city
- (11) state
- (12) 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

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.

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 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

³ The CMR originally listed 26,824 certified control numbers. As noted in the Findings of Fact below, 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.

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 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 contain 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. This determination addresses notices of deficiency numbers L-038435221 and L-029573330.

CONCLUSIONS OF LAW

A. Tax Law § 171-v provides, in relevant part, as follows:

(1) The commissioner shall enter into a written agreement with the commissioner of motor vehicles, which shall set forth the procedures for the two departments to cooperate in a program to improve tax collection through the suspension of driver's licenses of taxpayers with past due tax liabilities equal to or in excess of ten thousand dollars. For the purposes of this section, the term "tax liabilities" shall mean any tax, surcharge, or fee administered by the commissioner, or any penalty or interest due on these amounts owed by an individual with a New York driver's license, the term "driver's license" means any license issued by the department of motor vehicles, except for a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law, and the term "past due tax liabilities" means any tax liability or liabilities which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review.

* * *

(3) The department shall provide notice to the taxpayer of his or her inclusion in the license suspension program no later than sixty days prior to the date the department intends to inform the commissioner of motor vehicles of the taxpayer's inclusion. . . . Notice shall be provided by first class mail to the taxpayer's last known address as such address appears in the electronic systems or records of the department. . . .

* * *

(5) Notwithstanding any other provision of law, and except as specifically provided herein, the taxpayer shall have no right to commence a court action or proceeding or to any other legal recourse against the department or the department of motor vehicles regarding a notice issued by the department pursuant to this section and the referral by the department of any taxpayer with past-due tax

liabilities to the department of motor vehicles pursuant to this section for the purpose of suspending the taxpayer's driver's license. A taxpayer may only challenge such suspension or referral on the grounds that (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 purposes of subdivision three of this section.

However, nothing in this subdivision is intended to limit a taxpayer from seeking relief from joint and several liability pursuant to section six hundred fifty-four of this chapter, to the extent that he or she is eligible pursuant to that subdivision, or establishing to the department that the enforcement of the underlying tax liabilities has been stayed by the filing of a petition pursuant to the Bankruptcy Code of 1978 (Title Eleven of the United States Code).

B. In the instant matter, petitioner received a Notice of Proposed Driver License Suspension Referral advising of the possible suspension of his driver's license because nine personal income tax assessments issued to him remained unpaid, with a total amount due on same of \$31,756.26. Petitioner filed a petition challenging the underlying notices referenced in the Notice of Proposed Driver License Suspension Referral, along with additional notices (*see* Finding of Fact 2).

C. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law §§ 681[b]; 689[b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services "if the time to petition for such hearing has not elapsed" (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is

strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive 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).

D. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing 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). To prove the fact and date of mailing of the subject notices, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees 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).

F. The October 3, 2012 CMR submitted by the Division provides sufficient documentary proof to establish that a Notice of Deficiency, dated October 3, 2012, was mailed by certified mail to petitioner at his last known address. The 2,439-page document listed 26,822 certified

control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated October 3, 2012. The postal employee wrote and circled “26,822” on the last page of the CMR to indicate the number of pieces of certified mail received at the post office and initialed or signed the last page. The affixation of the USPS postmark dated October 3, 2012 on each page of the CMR, the postal service employee’s initials and the writing and circling of the number 26,822 indicates that each item listed on the CMR, with the exception of the two items that were pulled (*see* Findings of Fact 9 and 10) was delivered to the custody of the USPS on October 3, 2012, the date stamped on the CMR (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). A review of the CMR confirms that the items “pulled” were not related to the notice sent to petitioner. Further, petitioner’s address on the notice, the corresponding mailing cover sheet and the CMR conform with the address reported on the personal income tax return filed by petitioner for 2007, which satisfies the “last known address” requirement in Tax Law § 681. Petitioner has presented no evidence that the Division was apprised of a different address before the issuance of the subject notice of deficiency. It is concluded that the Notice Deficiency, dated October 3, 2012, was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on October 3, 2012.

G. The February 25, 2008 CMR provides sufficient documentary proof to establish that a Notice of Deficiency, dated February 25, 2008, was mailed by certified mail to petitioner at his last known address. The 1,241-page document listed 13,346 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated February 25, 2008. The postal employee initialed or signed the last page and wrote the number “13,346” on the last page of the CMR to indicate the number of pieces of certified mail received

at the post office. The CMR has thus been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*). Further, petitioner's address on the notice, the corresponding mailing cover sheet and the CMR conform with the address reported on the personal income tax return filed by petitioner for 1998, which satisfies the "last known address" requirement in Tax Law § 681. Again, petitioner has presented no evidence that the Division was apprised of a different address before the issuance of the subject Notice of Deficiency. It is concluded that the Notice of Deficiency, dated February 25, 2008, was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on February 25, 2008.

H. In order to timely protest the Notice of Deficiency issued on October 3, 2012, petitioner was required to file a petition or a request for a conciliation conference within 90 days of October 3, 2012. In order to timely protest the Notice of Deficiency issued on February 25, 2008, petitioner was required to file a petition or request for a conciliation conference within 90 days of February 25, 2008. As noted above, petitioner's petition challenging the subject notices of deficiency, which were referenced in the Notice of Proposed Driver License Suspension Referral, was filed on October 5, 2013, well beyond the expiration of the 90-day period of limitations for protesting the statutory notices issued on either October 3, 2012 or February 25, 2008. Petitioner has offered no claim or evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging either of the subject statutory notices expired. As such, the Notice of Deficiency dated October 3, 2012 and the Notice of Deficiency dated February 25, 2008 became fixed and final assessments and petitioner

no longer has the right to petition for review of same (*see* Tax Law § 681[b]; *Matter of Sak Smoke Shop*).

I. The Division has established that the statutory notice (notice number L-038435221) dated October 3, 2012 and the statutory notice (notice number L-029573330) dated February 25, 2008 are fixed and final tax liabilities. These tax liabilities were listed, along with other assessments (including notices and demands numbers L-039572485, L-034130849, and L-030574366, for which the petition herein was previously dismissed), on the Consolidated Statement of Tax Liabilities attached to the Notice of Proposed Driver License Suspension Referral issued by the Division. Review of the Consolidated Statement of Tax Liabilities indicates that the unpaid amounts on these past-due tax liabilities (not including the notices and demands for which the Division concedes petitioner is entitled to a hearing on the merits) totaled \$16,171.68 (*see* Findings of Fact 1 and 23).

In his petition, petitioner challenges the underlying statutory notices referenced in the Notice of Proposed Driver License Suspension Referral. As it has been determined that the assessments asserted in the statutory notices numbers L-038435221, L-029573330, L-039572485, L-034130849, and L-030574366 have become fixed and final tax liabilities, petitioner's only grounds for challenging the Notice of Proposed Driver License Suspension Referral are those provided in Tax Law § 171-v(5). Petitioner did not submit any evidence or arguments to show 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 by the department for the payment of the past-due tax liabilities or for 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 department 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 department 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]). Since petitioner failed to prove any of the bases set forth in Tax Law § 171-v(5), his challenge to the Notice of Proposed Driver License Suspension Referral must fail.

J. Petitioner's argument that the Division's answer is untimely is without merit.⁴ The petition in this matter was initially the subject of a notice of intent to dismiss petition (20 NYCRR 3000.9[a][4]), issued by the Division of Tax Appeals on February 21, 2014. The Division's time to submit an answer was thereby tolled until the issuance of an order addressing the notice of intent to dismiss. The order was issued on July 10, 2014, and the Division was given 75 days from that date to file an answer on the remaining issues. The Division timely filed its answer on September 10, 2014, within the 75 days required by the order.

K. The Division of Taxation's motion is granted, the petition of John P. DeMaio is hereby dismissed and the Notice of Proposed Driver License Suspension Referral is sustained.

DATED: Albany, New York
April 2, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE

⁴ Petitioner argues in his response to the Division's motion that "The Answer of the Division is Ultimately [sic]." Based on the context of petitioner's response, it is assumed that this was a typo and the petitioner intended to say "untimely."