STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DENNIS SCHWARTZ	:	DETERMINATION DTA NO. 826322
for Review of a Notice of Proposed Driver License Suspension Referral Under Tax Law, Article 8, § 171-v.	:	

Petitioner, Dennis Schwartz, filed a petition for review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.[1]

On December 18, 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) and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, Esq., and annexed exhibits. Petitioner, appearing pro se, filed an affidavit in opposition to the motion on January 14, 2015. After due consideration of the documents submitted, Joseph W. Pinto, 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 Division of Taxation's (Division) motion is the validity of petitioner's protest of a notice of proposed driver license suspension referral dated September 27, 2013, which was 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's license would be suspended. According to the suspension notice, unless the taxpayer did one of the following, his identifying information would be transmitted to the Department of Motor Vehicles (DMV) for the purpose of suspending his license to drive: 1) resolving the outstanding liability, either by payment or establishment of a payment plan; 2) notifying the Division of his eligibility for an exemption; or 3) protesting the suspension notice by filing 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. Petitioner opted to request a BCMS conference, and on April 25, 2014, BCMS issued to petitioner a Conciliation Order, CMS number 259387, denying petitioner's request for reconsideration of the proposed license suspension and sustaining the Notice of Proposed Driver License Suspension Referral.

3. As of September 27, 2013, the date of the issuance of the notice, a Consolidated Statement of Tax Liabilities, setting forth the tax bills issued to petitioner, stated that the total amount of sales tax, penalty and interest due and owing was $3,700,646.71. The following chart shows the bills subject to collection:

Assessment ID	Tax Period Ended	Current Balance Due
L-033438183-6	2/29/08	$353,790.77
L-033329434-3	2/28/07	$119,850.61
L-030711814-7	5/31/08	$40.713.23
L-030408986-5	8/31/07	$666,937.47
L-030408985-6	11/30/07	$203,017.63
L-030408984-7	2/28/05	$1,413,543.17
L-029190287-8	5/31/07	$143,560.65
L-030098229-6	11/30/07	$377,345.31
L-030098228-7	2/29/08	$381,887.87
TOTAL		$3,700,646.71

4. On June 18, 2014, petitioner filed a petition with the Division of Tax Appeals challenging the suspension notice.

5. The Division also submitted the affidavit of Matthew McNamara, an Information Technology Specialist 3 with its Civil Enforcement Division (CED) during the relevant time. His responsibilities included maintenance of the CED internal website, creation of reports and tracking case movements, supervising a reporting team that produces reports, and training staff to support the CED website.

6. In his affidavit, Mr. McNamara described 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 included the following: 1) that the taxpayer have an outstanding balance of tax, penalty, and interest in excess of $10,000.00; 2) that all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) that there be less than 20 years from the issuance of the particular notice and demand; and 4) that the outstanding

assessments not be the subject of an approved payment arrangement. The Division searched its electronic database on a weekly basis for those taxpayers that met the above criteria.

7. Once candidates were identified by the Division, the necessary information was sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer had a qualifying driver's license and was eligible for a notice of proposed driver license suspension.

8. Mr. McNamara stated 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. The Division's motion to dismiss the petition under section 3000.9 of the Rules of Practice and Procedure (Rules) may be granted if the petition does not state a cause for relief (20 NYCRR 3000.9[a][1][vi]). Motions filed pursuant to 20 NYCRR 3000.9, unless otherwise in conflict with the Rules of Practice and Procedure of the Tax Appeals Tribunal, are "subject to the same provisions as motions filed pursuant to section 3211 of the [Civil Practice Law and Rules] CPLR . . . " (20 NYCRR 3000.9 [c]).[2] The regulation at 20 NYCRR 3000.9(a)(1)(vi) is comparable to CPLR 3211(a)(7), which authorizes a party to move to dismiss a cause of action on the ground that "the pleading fails to state a cause of action . . . ."

In ***High Tides, LLC v DeMichele*** (88 AD3d 954 [2011]), the Appellate Division reiterated the standard for granting a motion to dismiss under CPLR 3211(a)(7). In particular, the Court stated that:

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[2]The Division's motion for summary determination is rendered moot since this matter is being determined pursuant to the Division's motion to dismiss.

> "the pleading is to be afforded a liberal construction (***see*** CPLR 3026; ***EBCI, Inc. v. Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]; ***Leon v. Martinez***, 84 NY2d 83, 87-88 [1994]), and the court must accord the plaintiff 'the benefit of every possible favorable inference,' accept the facts alleged in the complaint as true, and 'determine only whether the facts as alleged fit within any cognizable legal theory' (***Leon v. Martinez***, 84 NY2d at 87-88). Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (***see Kuzmin v. Nevsky***, 74 AD3d 896, 898 [2010]; ***Hartman v. Morganstern***, 28 AD3d 423, 424 [2006]" (***High Tides, LLC at 956-957)***.

Here, after according petitioner every possible favorable inference, it is determined that he has not established a cause of action, or cause for relief as dictated by Tax Law § 171-v(5). (***Cf Matter of Medical Capital Corp.***, Tax Appeals Tribunal, July 25, 2013.)

B. Petitioner's response to the Division's motion does not challenge the facts alleged therein. Instead, petitioner argues that a policy set forth in a Technical Services Memorandum (TSB-M-11[17]S) could have reduced his liability for the taxes stated in the Consolidated Statement of Tax Liabilities. The policy set out in the Memorandum, which took effect on March 9, 2011, was an explanation of a new Division policy to provide relief to certain limited partners and members of limited liability companies or partnerships where per se liability had been demonstrated to be too harsh a result. It discussed the eligibility requirements for partners and members who had been identified as persons responsible for the payment of sales tax and the available relief for those who qualified.

Petitioner's argument fails on two grounds. First, the policy change he believes affected the assessments he amassed in 2005, 2007 and 2008 was not effective until March 9, 2011, and therefore is inapplicable to his tax liability. Second, even if the policy were in effect, petitioner has not alleged, let alone proven, any facts to establish that he had even a colorable claim to the relief available. The best petitioner could argue was that, under the new policy, his potential

liability "could" have been reduced.

Other than this unsuccessful argument, based on a policy that was not in effect when petitioner's assessments were issued, and no factual assertions to establish an entitlement to relief thereunder, petitioner did not dispute any of the facts raised by the Division in its 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 Milavec or McNamara affidavits; consequently, those facts may be deemed admitted (***see Kuehne & Nagel v. Baiden***; ***Whelan v. GTE Sylvania***, 182 AD2d 446 [1992]), including the fact that he had outstanding tax liabilities in excess of $10,000.00.

C. Tax Law § 171-v, effective March 28, 2013, provides for the enforcement of past due tax liabilities through the suspension of driver's licenses. The law dictates that the outstanding liability must meet the threshold requirement for suspension of petitioner's driver's license ($10,000.00) and that the Division 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]).

D. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a request for BCMS conference or a petition with the Division of Tax Appeals, and must be based on one of 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;
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> (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;
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> (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
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> (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]).

E. In both his petition and affidavit in opposition to the motion to dismiss, petitioner failed to raise any of the grounds cited in Tax Law 171-v(5) or make an affirmative claim that any of them applied to his circumstances. Instead, petitioner argues only that a suspension of his driver's license under Tax Law 171-v is premature because TSB-M-11(17)S, a policy memorandum that became effective after his assessments accrued, could have had an effect on his ultimate tax liability. Petitioner reasons that it would have been in error for him to enter into a payment agreement if the tax liability had not been liquidated. This argument does not constitute any of the six acceptable grounds for a petition filed in response to a notice of proposed driver license suspension referral specified in Tax Law § 171-v(5).

F. The Division's motion to dismiss for failure to state a cause for relief is hereby granted, rendering its motion for summary determination moot; the petition of Dennis Schwartz is dismissed, and the Division's notice of proposed driver license suspension is sustained.

DATED: Albany, New York
April 2, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE