

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>FRANK DEMARTINO</b>	:	DETERMINATION DTA NO. 826652
	:	
for Review of a Notice of Proposed Driver License Suspension Referral under Article 8, § 171-v of the Tax Law.	:	

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Petitioner, Frank DeMartino, filed a petition for review of a Notice of Proposed Driver License Suspension Referral under Article 8, § 171-v of the Tax Law.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda Harmonick, Esq., of counsel), brought a motion filed August 18, 2015, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Linda Harmonick, Esq., dated August 14, 2015 and annexed exhibits, and the affidavit of Ronald Catalano, dated August 18, 2015, and an annexed exhibit. Petitioner, appearing pro se, was granted an extension to October 19, 2015 within which to respond to the motion. Petitioner submitted papers on October 20, 2015, however, these documents were not responsive to the issue herein and, as late filed, have not been considered. Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

**ISSUE**

Whether the Division of Taxation's notice of proposed driver license suspension referral issued to petitioner should be sustained.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued to petitioner, Frank DeMartino, a notice of proposed driver license suspension referral (Form DTF-454), Collection case ID: E-027921596-CL01-2 (60-day notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v.

2. This 60-day notice is dated July 29, 2013 and is addressed to petitioner at his Howard Beach, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated July 29, 2013, setting forth an unpaid assessment. The assessment was for withholding tax, Assessment ID L-027921596-6, for the tax period ended December 31, 2005. The assessment was for interest in the amount of \$10,754.04, plus penalty in the amount of \$20,094.90. Petitioner received a credit for payment in the amount of \$4,000.00, which left a remaining balance due of \$26,848.94.

3. 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 amount due, or set up a payment plan, in order to avoid suspension of his license.

The back page of the 60-day notice is titled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that "[i]f any of

the following apply,” he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim.

The first two headings under the title, “How to respond to this notice,” are “Child support exemption” and “Commercial driver’s license exemption.” The third heading, “Other grounds,” states that the recipient’s driver’s license will not be suspended if any of the following apply: “You are not the taxpayer named in the notice. The tax debts have been paid. The Tax Department [Division] is already garnishing your wages to pay these debts. Your license was previously selected for suspension for unpaid tax debts *and*: you set up a payment plan with the Tax Department [Division], *and* the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period (emphasis added).” 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 Tax Department, or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, “If you do not respond within 60 days,” the recipient is informed the Division will provide DMV with the information necessary to suspend the recipient’s driver’s license, unless the recipient does one of the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or her license by either: filing a request for conciliation conference with the Division, or filing a petition with the Division of Tax Appeals.

4. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the 60-day notice. By conciliation order dated September 5, 2014, the conferee sustained the notice of proposed driver license suspension referral.

5. Thereafter, petitioner filed a petition with the Division of Tax Appeals on December 4, 2014. The petition raises no challenge to the issuance or validity of the tax assessment above as a past-due fixed and final liability giving rise to the proposed suspension of his license.

Likewise, the petition does not challenge the Division's issuance or his receipt of the 60-day notice. Instead, the petition asserts that the underlying assessment failed to offset monies owed to him, and related entities, in a pending federal litigation in United States District Court.

6. The Division filed its answer to the petition on February 11, 2015, and in turn brought the subject motion on August 18, 2015. The Division submitted with its motion an affidavit, dated August 18, 2015, made by Ronald Catalano, who is employed as a Tax Compliance Manager 2 in the Civil Enforcement Division (CED). Mr. Catalano's duties involve overseeing the operations of the Training Unit of the CED's Operations Analysis and Support Bureau. His duties further involve working with the Office of Information Technology Services to ensure that CED's systems support the operational needs of CED.

7. Mr. Catalano's affidavit fully details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process undertaken by the Division in carrying out the license suspension program authorized by Article 8, § 171-v of the Tax Law. 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. First, the Division internally sets the following selection criteria: the taxpayer

has an outstanding cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessment used to determine the cumulative total must be less than 20 years from the notice and demand issue date; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are excluded; and any taxpayer with a “taxpayer deceased” record on his or her collection case is excluded.

Next, the criteria are utilized to search the Division’s databases on a weekly basis, and a file is created of possible taxpayers to whom a 60-day notice of proposed driver license suspension referral could be sent. This process involves first utilizing the criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00 in the relevant time frame, and then for each such identified candidate, determining whether that candidate would be excluded under any of the following criteria:

- a formal or informal protest has been made with respect to any assessment 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 in bankruptcy;
- the taxpayer is deceased; or
- the taxpayer is on an active approved payment plan.

b) The “DMV Data Match” involves the Division providing identifying information to DMV for each 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. DMV then conducts a data match of the information provided by the Division with its information and returns the following information to the Division: (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) street; (10) city; (11) state; (12) zip code; (13) license class; and (14) license expiration date.

Once the Division determines that a taxpayer included in the DMV Data Match 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 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 via regular United States mail.

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.<sup>1</sup> Such case data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends a return data file to the Division each day confirming data records that were processed successfully, and indicating any data records with an issue. The Division investigates those data records with an issue. With regard to the data records that were processed successfully, DMV sends 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.

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<sup>1</sup>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," the 60-day notice will be canceled. If the taxpayer passes this final compliance check, the suspension by DMV will proceed.

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 a) (e.g., the filing of a protest, a bankruptcy filing, the creation and approval of an installment payment agreement). Where a subsequent event causes a case status change to “on-hold,” the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Division for resuspension until resolution of the “on-hold” status; however, 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.

8. Mr. Catalano’s affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice of proposed driver license suspension referral and the consolidated statement of tax liabilities described in findings of fact 1 and 2, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Catalano’s affidavit. Mr. Catalano avers that based upon his review of Division records and his personal knowledge of Departmental policies and procedures regarding driver’s license suspension referrals, that the issuance on July 29, 2013 to petitioner of the 60-day notice 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 has not been and should not be canceled.

9. In its answer to the petition, and under the motion at issue herein, the Division asserts that petitioner has not sought relief from the suspension of his driver’s license under any of the

six specifically enumerated grounds for such relief set forth at Tax Law § 171-v(5)(i)-(vi) and, thus, has raised no basis for administrative or judicial review of the proposed suspension of his license, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition for lack of jurisdiction or summary determination in its favor.

### ***CONCLUSIONS OF LAW***

A. 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]). At issue is a Notice of Proposed Driver License Suspension Referral, dated July 29, 2013, addressed to and advising petitioner of the possible suspension of his driver's license. This notice is in facial compliance with the terms of Tax Law § 171-v, in that it is specifically based on: a) the Division's claim that a withholding tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$26,848.94, remains outstanding and unpaid, and b) petitioner does not meet any of the six specifically enumerated grounds set forth at Tax Law § 171-v(5)(i)-(vi) allowing for relief from license suspension.

B. Petitioner initially challenged the proposed suspension of his license by filing a timely request with BCMS. This request was denied and the notice was sustained. Petitioner, in turn, challenged the BCMS conciliation order by filing a timely petition with the Division of Tax Appeals and, therefore, the Division of Tax Appeals has jurisdiction over the petition.

C. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). A motion for summary



determination “shall 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” (20 NYCRR 3000.9[b][1]).

D. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of act on which he rest his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*). As detailed hereafter, there are no material and triable issues of fact and the Division is entitled to summary determination in its favor.

E. 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]).

F. Petitioner does not dispute the Division’s proper issuance or his subsequent receipt of the notice, nor does he challenge the basis for its issuance, i.e., the existence of a past-due fixed and final tax liability owed by him in an amount equal to or greater than \$10,000.00 pursuant to Tax Law § 171-v(1). The notice thus meets the fundamental requirements necessary to support the validity of its proposed sanction of license suspension. Furthermore, petitioner has not raised any of the foregoing six specifically enumerated substantive bases for relief from an otherwise facially valid notice of proposed license suspension (Tax Law § 171-v[5][i]-[vi]). Instead, petitioner solely argues that there is a pending federal litigation that may result in his being credited for amounts owed to him and related entities. Thus, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination is appropriate (*see Matter of Faupel*, Tax Appeals Tribunal, December 23, 2015).

G. The Division of Taxation's motion for summary determination is hereby granted, the petition of Frank DeMartino is denied, and the Division's notice of proposed driver license suspension, dated July 29, 2013, is sustained.

DATED: Albany, New York  
January 7, 2016

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE