

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BRIAN RATTNER : DETERMINATION
for Review of a Notice of Proposed Driver License : DTA NO. 826842
Suspension Referral under Tax Law, Article 8, § 171-v. :
:

Petitioner, Brian Rattner, filed a petition 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. (Linda A. Jordan, Esq., of counsel), brought a motion, on October 21, 2015, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Linda A. Jordan, Esq., dated October 21, 2015, and annexed exhibits. Petitioner, appearing pro se, filed a response to the Division of Taxation's motion and a cross-motion by its due date of December 18, 2015. The parties agreed the Division of Taxation would be allowed to respond to the cross-motion, which the Division did by its due date of January 22, 2016, the date from which the 90-day period for the issuance of this order began. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, 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.

FINDINGS OF FACT

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 (the suspension 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 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

Specifically, the suspension 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 suspension notice informed petitioner that unless one of the exemptions on the back page of the suspension 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 suspension 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 [1] 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 taxpayer 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 sets 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

¹ The suspension notice reference to the “Tax Department” is the same body as the Division of Taxation.

- filing a petition (Form TA-10) with the Division of Tax Appeals available at www.nysdta.org.”

2. In protest of the suspension notice, petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). Though initially scheduled, the conciliation conference was adjourned two or three times between April and July, 2014. The Division and petitioner dispute the facts that led up to the conciliation conference being conducted by way of correspondence. However, the conferee sustained the statutory notice, i.e., the suspension notice, by the issuance of a Conciliation Order dated October 24, 2014 (CMS No. 260109).

3. On March 12, 2015, petitioner filed a petition with the Division of Tax Appeals challenging the statement by the conciliation conferee that a conciliation conference had been conducted by way of 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 only addressed the scheduling of the BCMS conference, as well as the conciliation order itself. There was no mention of the merits of the suspension notice.

4. The Division filed its answer to the petition dated May 13, 2015. 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 submitted, with its motion, the sworn affidavit of Ronald Catalano, a Tax Compliance Manager 2 in the Division’s Civil Enforcement Division (CED). Mr. Catalano began his employment with the Division in 1985, and has held various positions within the Division, including Taxpayer Services Specialist 4, held during August 2014, before returning to his current position. Mr. Catalano’s duties include overseeing the operation of the training unit of the CED’s Operations Analysis and Support Bureau. His duties also include working with the Office of Information Technology Services to ensure that the CED’s systems support the operational needs

of the CED. Mr. Catalano's affidavit details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law § 171-v.

5. Mr. Catalano's affidavit sets forth the four sequential steps undertaken by the Division in carrying out the license suspension program. They are 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 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 elimination (or exclusion) criteria:

- the taxpayer is deceased;
- the taxpayer is in bankruptcy;
- the age of any assessments included in determining the cumulative amount of liability is more than 20 years from the Notice and Demand issue date;
- a formal or informal protest has been made with respect to any assessments 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; or
- 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 that taxpayer has a qualifying driver's license potentially subject to suspension per Tax Law § 171-v. This review examines the following 14 data points:

- (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) mailing address: city
- (11) mailing address: state
- (12) mailing address: 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 5 (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice will be issued to the taxpayer. In describing the process for the issuance of the 60-day notice, Mr. Catalano 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 first class U.S. mail with certificate of mailing 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 or otherwise changed), 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 within the Division (DMV-Failed-Suspensions) will investigate and resolve the issue. Upon successful data processing 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

² Prior to license suspension, the Division performs another compliance check of its records to determine if there is a reason for suspension. 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 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 criteria compliance check, the suspension by DMV will proceed.

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 in Finding of Fact 5 (a). Similar to the process described in footnote 2, 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 until resolution of the "on-hold" status and the 60-day notice would remain in the Division's system. If the subsequent event resulted in "closed" status, the 60-day notice would be canceled.

6. A copy of the 60-Day Notice at issue in this matter, i.e., the suspension notice, 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. Catalano's affidavit. Mr. Catalano 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 October 18, 2013, the Division issued to petitioner a suspension notice. Mr. Catalano states that such suspension notice comports with statutory requirements, that as of the date of the affidavit the suspension notice has not been cancelled, that petitioner has failed to allege or establish any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5), and that therefore, the suspension should not be canceled.

SUMMARY OF THE PARTIES' POSITIONS

7. In his response, petitioner sets forth a sequence of events surrounding his request for a conciliation conference and states that he never agreed to waive his right to the conciliation conference or agree to have the conference conducted by correspondence. Petitioner maintains that since the conciliation order contains material misstatements of fact, it must be declared void on its

face, and consequently, he is not required to raise or prove any of the grounds to challenge the proposed driver's license suspension.

8. The Division asserts that petitioner's request to compel the Division to grant him another conciliation conference before BCMS is beyond the power bestowed upon the Division of Tax Appeals, and therefore, cannot be granted. Further, the Division argues that although there may have been a misunderstanding as to how BCMS would proceed with the case, BCMS has already given petitioner an opportunity to submit documentation showing that he meets an enumerated exception to Tax Law § 171-v, and petitioner has failed to do so. The Division thus considers the conciliation order final.

The Division additionally asserts that petitioner has not raised any of the grounds listed in Tax Law § 171-v (5), which are the only grounds for challenging the proposed suspension of petitioner's driver's license, and petitioner has not established that any grounds exist for a challenge to the proposed suspension. The Division lastly argues that there is no material issue of fact and the facts as presented mandate a determination in favor of the Division.

CONCLUSIONS OF LAW

A. First addressing petitioner's asserted entitlement to a conciliation conference, the Rules of Practice and Procedure of the Tax Appeals Tribunal state:

“Where a conciliation conference has not been conducted and it appears that the petitioner intended to file a request for a conciliation conference or that a conciliation conference would serve a useful purpose, the Division of Tax Appeals may, at the request of the petitioner and with the consent of the office of counsel, suspend action on the petition and refer the matter to the Bureau of Conciliation and Mediation Services (see Part 4000 of this Title)” (20 NYCRR 3000.3 [e]).

It is unclear whether there has, in fact, been a misunderstanding between petitioner and BCMS, or whether BCMS held a conference in this case, by correspondence or otherwise. The record does not support the fact that “the requester opted to have the matter decided by correspondence,” which is what BCMS offered as an explanation in lieu of its holding a conference with the parties present. Assuming the worst case scenario, that a conciliation conference has not been conducted as desired by petitioner, the matter may only be referred back to BCMS with the

consent of the Division, and only where it is determined that it would serve a useful purpose to do so. In this case, the Division refuses to consent to the matter being referred back, and further, there is no useful purpose for doing so in this case, even if the Division consented. Petitioner has not lost his right to address the merits of his case since upon issuance of the conciliation order petitioner had the right to bring the matter either before BCMS or the Division of Tax Appeals during the same 90-day period (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c] [4]; Tax Law § 2006 [4]). Since petitioner filed a petition with the Division of Tax Appeals, he is in the same position procedurally as if he had never requested a conciliation conference in the first instance (*Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006). Accordingly, the matter will not be referred back to BCMS, and the merits of petitioner's protest of his license suspension will be addressed herein.

B. The Division has made a motion to dismiss, or alternatively, a motion for summary determination seeking dismissal of the petition or judgment as a matter of law. Since the Division has not contested the timeliness of the petition, the Division of Tax Appeals has jurisdiction over the petition (Tax Law § 171-v [3]). Accordingly, a motion for summary determination under 20 NYCRR 3000.9 (b) is the proper vehicle to consider the merits of petitioner's protest and the Division's arguments in support of the motion.

As the Tax Appeals Tribunal has noted in *Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004):

“Inasmuch 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 v. Tri-Pac Export Corp.*, 22 NY2d 439. . . [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381. . . [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v. Johnson*, 147 AD2d 312. . . [1989]).”

C. Tax Law § 171-v (3) requires the Division to provide a taxpayer with 60 days notice prior to the Division informing DMV of the taxpayer's inclusion in the driver's license suspension program, and such notice must be sent by first class mail to the taxpayer's last known address. The notice must include a clear statement of the taxpayer's past-due liabilities, and a statement of

identifying taxpayer information that the Division will provide to the DMV. This subdivision also provides that a suspension notice will not be issued to a taxpayer whose wages are already being garnished by the Division for past-due tax liabilities, child support, or combined child and spousal support. The process as described herein adequately ensures that notices are issued no later than 60 days prior to a taxpayer being included in the Division's driver's license suspension program (*see also Matter of Muniz*, Tax Appeals Tribunal, February 26, 2016).³

Tax Law § 171-v also requires that the notice include a statement that the taxpayer can avoid license suspension by satisfying the debt or entering into a payment agreement acceptable to the Division and information as to how the taxpayer can accomplish this; a statement that a taxpayer can only protest the 60-day notice based upon the issues set forth in subdivision 5; and a statement that the suspension will remain in effect until the past-due liabilities are paid or a the taxpayer makes payment arrangements satisfactory to the Division.

Subdivision 5 provides that a taxpayer may only challenge a driver's license suspension or referral 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]).

D. The foundational requirements for a valid suspension notice include the requisite 60-day notice to petitioner of the Division's intention to make a referral to DMV for license suspension

³ The Tax Appeals Tribunal identified the following issue with respect to the suspension process in *Muniz*: “There may be a slight inconsistency between the statute and the Division's process in that it appears there is no provision for ensuring that a taxpayer whose wages are already being garnished by the Division for past-due tax liabilities, child support, or combined child and spousal support is not sent a 60-day notice.” However, similar to *Muniz*, as this provision is not relevant to the current matter, and there are provisions in the 60-day notice for such taxpayers to avoid a license suspension referral by notifying the Division of such garnishments, this issue will not be further addressed.

action against petitioner, and the existence of petitioner's past-due tax liabilities that have become fixed and final such that a taxpayer no longer has any right to administrative or judicial review. In this case, the Division has shown that all of the notice requirements of Tax Law § 171-v have been met in the 60-day Notice of Proposed Driver's License Suspension issued in this matter on October 18, 2013, and petitioner does not deny receipt of the notice. Secondly, included with the suspension notice was a consolidated statement of tax liabilities issued to petitioner subject to collection action, i.e., fixed and final liabilities, in excess of \$10,000.00, fulfilling the criteria concerning the existence of requisite tax liabilities. Petitioner does not argue that the underlying notices were not issued to him, received by him, or are invalid for some other reason. Instead, petitioner's only argument is that the fact that the Division did not provide him with a conciliation conference gives him grounds to avoid proving any of the specific defenses set forth in Tax Law § 171-v. This argument is completely without merit. Petitioner's only remedy now is limited to the challenges presented in Tax Law § 171-v (5), and the argument that he has set forth is not within the enumerated challenges available to him. Petitioner has the burden of establishing by clear and convincing evidence that there are grounds to challenge the 60-day notice and actually prove that one or more of the grounds under Tax Law § 171-v (5) exist, and petitioner has failed to carry such burden. Accordingly, his challenge to the Notice of Proposed Driver License Suspension Referral must fail (*see* Tax Law § 171-v [5] [ii]), and the Division's motion for summary determination is granted.

E. The Division of Taxation's motion for summary determination is granted; the petition of Brian Rattner is hereby dismissed; and the Notice of Proposed Driver License Suspension Referral dated October 18, 2013, is sustained.

DATED: Albany, New York
March 31, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE

