STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **DON SISEMORE** for Revision of a Notice of Proposed Driver License Suspension Referral under Article 8, § 171-v of the Tax Law.	DETERMINATION DTA NO. 826854

Petitioner, Don Sisemore, filed a petition for revision of a Notice of Proposed Driver License Suspension Referral under Article 8, § 171-v of the Tax Law.[1]

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), brought a motion filed November 5, 2015, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and sections 3000.5, 3000.9(a)(1)and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Linda A. Jordan, Esq., dated November 5, 2015, and annexed exhibits, and the affidavit of Ronald Catalano, dated November 5, 2015, and an annexed exhibit. Petitioner, appearing by Lee David Auerbach, Esq., had until March 4, 2016 to respond to the Division's motion but did not do so, and thus the 90-day period for issuance of this determination began on March 4, 2016 (20 NYCRR

[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."

3000.5[d]).[2] Based upon the motion papers, the affirmation and affidavit and exhibits submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition in this matter should be dismissed for failure to state a cause for relief or, alternatively, denied on summary determination, thus sustaining the Division of Taxation's Notice of Proposed Driver License Suspension Referral.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Don Sisemore, a Notice of Proposed Driver License Suspension Referral (Form DTF-454), Collection Case ID: E-006703303-CL01-3, (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. This 60-Day Notice is dated October 3, 2014, and is addressed to petitioner at 332 Bleecker St., Apt F45, New York, NY 10014-2980. Included with the 60-Day Notice was a Consolidated Statement of Tax Liabilities (Form DTF 967-E), setting forth a list of eight unpaid assessments, allegedly subject to collection and indicating a (then) current total balance due in the amount of $138,829.39, as follows:[3]

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[2] Petitioner's representative was appointed pursuant to a power of attorney executed by petitioner and dated November 10, 2015, i.e., after the date of the Division's filing of the subject motion. The motion papers, including accompanying documents, were provided to petitioner's representative on or about February 3, 2016. By a letter dated February 4, 2016, the 30-day period within which a response to the motion could be filed (per 20 NYCRR 3000.5[b]), was set at March 4, 2016.

[3] A ninth assessment (Assessment ID L-026636056-6), pertaining to the sales tax period ended August 31, 2005 and assessing tax, penalty and interest in the (then) current amount of $48,792.73, was also listed on the Consolidated Statement of Tax Liabilities. This assessment is listed as issued because petitioner had not filed a tax return or report for the noted period, and indicates that the amount due is an estimate of liability owed. The documents filed with the motion herein reveal that this assessment does not form a part of the liability asserted as support for the 60-Day Notice.

Tax Type	Assessment ID Number	Tax Per. Ended	Tax Amt. Assessed	Interest Amt. Assessed	Penalty Amt. Assessed	Payments/ Credits	Current Balance
Withld	L-026474546-2	6/30/05	$0.00	$604.70	$607.78	$0.00	$1,212.48
Withld	L-025680574-2	6/30/04	0.00	1,611.38	1,498.68	0.00	3,110.06
Withld	L-025680573-3	9/30/04	0.00	2,233.60	2,077.41	0.00	4,311.01
Withld	L-025680572-4	12/31/04	0.00	2,152.16	2.001.66	0.00	4,153.82
Sales	L-025680571-5	2/28/05	4,303.00	12,435.59	1,290.90	0.00	18,029.49
Sales	L-025145090-6	11/30/04	11,156.00	33,781.83	3,346.80	0.00	48,284.60
Sales	L-024959921-7	5/31/04	7,714.00	3,029.59	1,629.80	8,208.89	4,164.50
Sales	L-024959920-8	8/31/04	12,427.00	39,408.30	3,728.10	0.00	55,563.40

2. 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. Among the response options listed for petitioner to undertake within 60 days were the following:

> "-resolve your tax debts or set 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 a Conciliation Conference* (Form CMS-1-MN, available of our Web site) with the Tax Department; or
> >
> > -filing a petition (Form TA-10) with the Division of Tax Appeals, available at *www.nysdta.org*."

3. Petitioner challenged the foregoing 60-Day Notice by filing a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). The record on this motion does not include a copy of either the Request, or the mailing envelope in

which it was enclosed. Hence, the date on which the Request was filed with BCMS cannot be confirmed on this record.

4. By a Conciliation Order Dismissing Request (CMS No. 264290) dated December 19, 2014 (Dismissal Order), BCMS dismissed petitioner's Request as not having been timely filed, stating:

> "The Tax Law requires that a request be filed within 60 days from the date of the statutory notice. Since the notice(s) was issued on October 3, 2014, but the request was not received until December 5, 2014, or in excess of 60 days, the request is late filed."

5. The record on this motion does not include any evidence concerning or establishing the October 3, 2014 claimed date of issuance (mailing) of either the 60-Day Notice or, likewise, the December 19, 2014 claimed date of issuance (mailing) of the Dismissal Order. The cover letter accompanying the Dismissal Order advises that a petition to contest the Order may be filed with the Division of Tax Appeals within 90 days from the date of the Dismissal Order, and lists the address of the Division of Tax Appeals (in bold-faced type) as follows:

NYS Division of Tax Appeals
Agency Building 1
Empire State Plaza
Albany, NY 12223

6. Petitioner challenged the Dismissal Order by filing a petition with the Division of Tax Appeals. The petition was mailed via United State Postal Service (USPS) Priority Mail Express (one day) service. The petition is dated as signed on March 16, 2015. The envelope in which the petition was mailed reveals that it was addressed to BCMS, as opposed to the Division of Tax Appeals, as follows:

NYS Dept of Taxation and Finance
Bureau of Conciliation and Mediation
W.A. Harriman Campus

Albany, NY 12227
ATTN: Daniel Abbott.[4]

7. The envelope in which the petition was mailed bears a machine metered (Pitney Bowes) postage stamp dated March 17, 2015. The envelope further shows that it was accepted into the custody of the USPS for mailing on the same March 17, 2015 date, and was scheduled for delivery on March 18, 2015. The petition, and the envelope in which it was mailed, are each dated stamped as received by BCMS (as addressed) on March 18, 2015, and are further date stamped as received by the Division of Tax Appeals on March 20, 2015 (presumably as the result of having been forwarded by BCMS). The petition, and the attachments thereto, list the same New York, New York, address for petitioner as is set forth above on the 60-Day Notice (***see*** Finding of Fact 1).

8. Petitioner states in his petition, in relevant part, that "I mailed the Request for a Conciliation Conference on the day stated in the Notice. Sales tax payments and returns must be postmarked on the day they are due and I assumed the same rule applied in this case." The petition goes on to state that petitioner has been unable to work for many years due to physical difficulties, but that he is now reentering the workforce and must have a driver's license in order to work and therefore be able to pay his tax debts. The petition makes no mention of the specific assessments listed above (***see*** Finding of Fact 1), and does not raise any challenge to the proper issuance of such

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[4] 20 NYCRR 3000.22(a)(2)(i) specifies the address of the Division of Tax Appeals as: Agency Building 1, Empire State Plaza, Albany, NY 12223. Notice is hereby taken, pursuant to State Administrative Procedure Act § 306(4), of Division of Tax Appeals Form TA-10, Petition, which provides on its final page (page four) as follows:

File the petition and <u>2 identical copies</u> within the time limitations indicated on the notice/assessment with:

Supervising Administrative Law Judge
NYS Division of Tax Appeals
Agency Building 1
Empire State Plaza
Albany, NY 12223.

assessments or to the asserted status thereof as fixed and final liabilities. Likewise, the petition makes no mention of any of the six specifically enumerated grounds set forth at Tax Law § 171-v(5)(i)-(vi) allowing for relief from license suspension.

9. The Division filed its answer to the petition on April 22, 2015, and in turn brought the subject motion on November 5, 2015. The Division submitted with its motion an affidavit, dated November 5, 2015, made by Ronald Catalano, who is employed as a Tax Compliance Manager 2 in the Division's Civil Enforcement Division (CED). Mr. Catalano's affidavit details the steps undertaken by the Division in carrying out the license suspension program, as authorized by Tax Law Article 8, § 171-v.

10. Mr. Catalano's affidavit addresses the foregoing steps as four sequential actions, 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 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 assessment(s) 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 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 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, and (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 8-a. If the taxpayer remains within the criteria for suspension, then a 60-Day Notice will by issued to the taxpayer. In describing the process of 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.[5] 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 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 8-a (e.g., the filing of a protest, a bankruptcy filing, the creation and approval of an installment payment agreement and the like). 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 re-suspension until resolution of the "on-hold" status (the 60-Day Notice would remain in the Division's system). Although not specifically addressed in Mr. Catalano's affidavit, a change to "closed" status would presumably result from events such as payment of the underlying liabilities, establishing that such liabilities were invalid ab initio, or death of the taxpayer. If the subsequent event resulted in "closed" status, the 60-Day Notice would be canceled.

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[5] Prior to license suspension, the Division performs another "criteria for suspension" 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 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.

11. A copy of the 60-Day Notice at issue in this matter, 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 identifies the assessments set forth on the Consolidated Statement of Tax Liabilities, totaling together $138,829.39, as fixed and final tax bills issued to petitioner and subject to collection actions. 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 3, 2014, the Division issued to petitioner a 60-Day Notice. Mr. Catalano states that such 60-Day Notice comports with statutory requirements, that petitioner has not raised any of the specifically listed grounds for challenging such a notice, as set forth at Tax Law § 171-v[5],[i]-[vi]), and that therefore the 60-Day Notice has not been and should not be canceled.

12. In its answer to the petition, and under the motion at issue herein, the Division asserts that petitioner's Request (***see*** Finding of Fact 4) was not timely filed with BCMS, i.e., within 60 days from the alleged October 3, 2014 date of issuance of the 60-Day Notice. Accordingly, the Division maintains that the December 19, 2014 Dismissal Order correctly dismissed petitioner's Request, and asserts that the 60-Day Notice is therefore presumed to be valid and correct. In turn, the Division maintains 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 under 20 NYCRR 3000.9(a)(1)(vi) for failure to state a

cause for relief or, alternatively, seeks summary determination it its favor under 20 NYCRR 3000.9(b) upon the assertion that there are no material issues of fact in dispute.

13. As noted, petitioner did not respond to the Division's motion.

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 the DMV for action (Tax Law § 171-v[3]). At issue in the instant matter is a Notice of Proposed Driver License Suspension Referral, dated October 3, 2014, addressed to and advising petitioner of the possible suspension of his driver's license. This 60-Day Notice is in facial compliance with the terms of Tax Law § 171-v. That is, the Notice is specifically based on the Division's claims that: a) eight tax assessments pertaining to petitioner and reflecting tax, penalty and interest due in the cumulative amount of $138,829.39, remain outstanding and unpaid, and b) petitioner does not meet and in fact has not raised any of the six specifically enumerated grounds set forth at Tax Law § 171-v(5)(i)-(vi) allowing for relief from license suspension.

B. The Division's motion seeks relief upon two alternative bases. That is, either summary determination in its favor, or dismissal of the petition for failure to state a cause for relief. The impact of granting the subject motion, upon either of the bases upon which it is brought, will be to sustain the 60-day Notice and lead to the suspension of petitioner's license.

C. As to the first type of relief sought, 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 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, 382 [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 fact on which he rests his claim'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 449 [1ST Dept 1992] ***citing Zuckerman***). As detailed hereafter, there exist material and triable issues of fact, and the Division is not entitled to summary determination in its favor.

E. Initially implicated in the context of the Division's motion for summary determination are: a) the 60-day time limit within which a taxpayer may protest a 60-Day Notice, and b) the subsequent 90-day time limit within which a taxpayer may protest a Dismissal Order denying a

request for a conciliation conference upon the position that the request was not timely filed. The practical consequence of granting this motion would be dismissal of the case, based upon either a) petitioner's failure to have timely challenged the 60-Day Notice, or b) petitioner's failure to have timely filed a petition challenging the Dismissal Order. These issues are intertwined.

F. As to the first issue, a taxpayer may challenge a notice of proposed license suspension by filing a petition for a hearing with the Division of Tax Appeals within *60* days from the date of mailing of such a notice (Tax Law § 171-v[3], [4]; 2006[4]). Alternatively, a taxpayer may protest such a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170[3-a][a]). In short, a taxpayer initially has *60* days within which to protest a 60-day Notice. In this instance, petitioner initially chose to file a request for a conciliation conference. As to the second issue, a taxpayer may challenge an order dismissing a request for a conciliation conference as untimely by filing a petition with the Division of Tax Appeals within *90* days after the issuance of such an order (Tax Law § 170 [3-a][e]; 20 NYCRR 4000.5[c]).

G. Statutory time limits for filing either a petition or a request for a conciliation conference, in the first instance, or a petition thereafter challenging a Dismissal Order, are strictly enforced and, 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 statutory notice to which protest rights attach (e.g., either a 60-Day Notice in the first instance, or a Dismissal Order in the second) becomes fixed and final leaving the Division of Tax Appeals 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).

H. It is well settled that where the timeliness of a protest (here, first, the timeliness of petitioner's request for a conciliation conference) is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question presented is whether the Division has carried its burden of demonstrating the fact and date of proper mailing of the notice (here, the 60-Day Notice) being protested (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered, properly addressed and with appropriate postage affixed, into the custody of the USPS (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). In the case of a proposed driver's license suspension via a 60-Day Notice, Tax Law § 171-v(3) states that "[n]otice 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 [Division]."

Further, and with respect to the timeliness of a taxpayer's petition following a Dismissal Order, the initial inquiry focuses on whether the Dismissal Order was properly issued (***Matter of Cato***, Tax Appeals Tribunal, October 27, 2005; ***Matter of DeWeese,*** Tax Appeals Tribunal, June 20, 2002). A Dismissal Order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its proper mailing to the taxpayer, and such an order is properly mailed, and thus properly issued, when it is shown to have been mailed to the taxpayer's last known address by certified or registered mail (***Matter of Dean***, Tax Appeals Tribunal, July 24, 2014; ***Matter of Cato***; ***Matter of DeWeese***). In either case, where proper issuance has been established, as required, by the

Division, the petitioner in turn bears the burden of proving that a timely protest was filed (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990).

I. The Division may meet its burden of proving proper mailing by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (***see Matter of Accardo***, Tax Appeals Tribunal, August 12, 1993). The mailing evidence is two-fold, and to prove the fact and date of mailing of the subject notice, 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 notice 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***).

J. First, and as to the 60-Day Notice, petitioner challenged the proposed suspension of his license by filing a Request with BCMS. The Division asserts that the 60-Day Notice was issued on October 3, 2014, but that petitioner's Request (due 60 days thereafter, or on December 2, 2004) was not *received* until December 5, 2014. Hence, the Division posits that the Request was untimely and the Dismissal Order was proper. As noted, the date on which petitioner's Request was filed with BCMS cannot be independently determined with certainty, since neither the Request itself nor the envelope in which it was mailed were included as part of the record on this motion (***see*** Finding of Fact 3). At the same time, petitioner specifically states, in his petition challenging the Dismissal Order, that he "mailed the request for a conciliation conference on the day stated in the notice. Sales tax payments and returns must be postmarked on the day they are due and I assumed the same rule applied in this case" (***see*** Finding of Fact 8).

K. The 60-day Notice in this case is dated October 3, 2014 on its face. The Notice does not, however, specify on its face the particular "due date" by which a protest (either a request for a BCMS conference or a petition for a hearing before the Division of Tax Appeals) had to have been filed in response. Rather, the 60-Day Notice details the consequences of failing to respond within 60 days (referral to DMV and license suspension). In the context of the facts here, it is reasonable to interpret petitioner's statement in his petition to mean that his protest (i.e., the Request) had to be "postmarked" on the date on which it was "due," and that petitioner alleges he filed his Request on the date on which it was due (i.e., on December 2, 2014, or 60 days after the October 3, 2014 date on the face of the 60-Day Notice).[6]

L. Where a period of limitations within which an action must be commenced applies, the end point (latest date) for commencement of that action cannot be discerned unless and until the starting point (date of issuance of the notice) has been established. Thus, resolution of the first issue of timeliness in this case turns upon verifying the date on which the 60-Day Notice was *issued* by the Division, from which point the latest date for the filing of any protest may in turn be established. The Division bears the burden in the first instance of establishing the date of issuance of the 60-Day Notice (***Matter of Katz***).

M. The record on this motion includes no evidence by which mailing of the 60-Day Notice on October 3, 2014, as claimed, can be verified (***see*** Finding of Fact 5). The fact that the claimed date of mailing is set forth on the face of the Notice, coupled with the bare assertion by affidavit

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[6] The specific language found in the 60-Day Notice states "[u]nless you respond within **60 days,**" "**If you do not respond within 60 days,"** and "[u]nless you do one of the following within 60 days." The term "due date" thereby clearly refers to the latest or "outside" date by which a protest in response to a 60-Day Notice must be filed (***see*** Finding of Fact 2).

that the Notice was mailed on such date, is plainly insufficient to establish the fact of proper mailing (i.e., mailing by first class mail on the date claimed per Tax Law § 171-v[3]). In fact, the Catalano affidavit speaks of a "correspondence trigger date," an "additional ten days . . . to allow for processing and mailing," and a 75 day "clock" date. However, these terms are not further explained or tied in any manner to a description of any regular process by which such 60-Day Notices are mailed.[7] Without proof of the date on which the subject Notice was issued to petitioner, the 60-day period within which petitioner was entitled to file a protest was not triggered on October 3, 2014, as alleged by the Division, but rather such period was tolled until such time as petitioner received actual notice of the proposed suspension of his license (***see Matter of Hyatt Equities, LLC.***, Tax Appeals Tribunal, May 22, 2008; ***Matter of Riehm v. Tax Appeals Tribunal***, 179 AD2d 970 [1992], ***lv denied*** 79 NY2d 759 [1992]).

N. In turn, it is clear that petitioner actually received the 60-Day Notice at some point, as evidenced by the statement in the petition admitting to the filing of the Request in response to the Notice (***see*** Finding of Fact 8), and by the fact that BCMS admitted receipt of petitioner's Request on December 5, 2014 (***see*** Finding of Fact 4). However, there is no evidence to establish the date on which the Division issued the 60-Day Notice in the first instance, no evidence of when petitioner actually received the Notice, and no evidence by which the actual date of receipt of the Request by BCMS might be verified (e.g., BCMS in-date stamps establishing the date of receipt of

[7] The giving of notice via mailing by first class mail, per Tax Law § 171-v(3), differs from the more usual statutory requirement imposed upon the Division of giving notice via mailing by certified or registered mail (***see e.g.***, Tax Law §§ 1138[a][1]; 685[a]; 170[3-a][e]). Notwithstanding distinctions between these methods of mailing, including that the latter allows an expedient method to establish both physical delivery of the item allegedly mailed into the custody of the USPS and, via USPS Form 3811-A, subsequent delivery information (or confirmation) with respect to the item, it remains that the record herein provides no basis to support a conclusion that the 60-Day Notice concerning petitioner was in fact mailed to him as claimed on October 3, 2014, or on any other particular date.

the Request). Thus, the only certainty is that the 60-Day Notice was actually received by petitioner at some point prior to December 5, 2014, when his Request was, in turn, received by BCMS. Since the date within which a protest had to have been filed turns upon establishment of the date on which the 60-Day Notice was properly issued, and since neither that date nor the date of petitioner's actual receipt of such notice has been established, it cannot be concluded that the dismissal of the Request as untimely was proper. In sum, the record does not include facts sufficient to establish a starting date, so as to be able to determine, in turn, the latest (or due) date by which a response or protest in opposition had to have been filed. Hence, petitioner's challenge may not be dismissed herein based upon an alleged failure to respond to the 60-day Notice within either: a) 60 days after its claimed issuance date, or b) within 60 days after petitioner's actual receipt of such 60-Day Notice. In fact, without proof of the date on which the 60-Day Notice was issued, it cannot be concluded that the Request did not constitute a timely protest in the first instance (***see Matter of Hyatt Equities, LLC.***,; ***Matter of Riehm v. Tax Appeals Tribunal***), by which petitioner's right to challenge the proposed suspension of his license was preserved. There is thus a material issue of fact outstanding, and the Division's motion for summary determination sustaining the Dismissal Order may not be granted.

O. Addressed next is the timeliness of the petition. In fact, petitioner did challenge the BCMS Dismissal Order by filing a petition with the Division of Tax Appeals. The petition was delivered into the custody of the USPS on March 17, 2014, a date that falls within 90 days after the alleged December 19, 2014 date of issuance of the BCMS Dismissal Order. Where a petition, filed by mail, is delivered into the custody of the USPS in a *properly addressed* envelope within the foregoing 90-day period, the date of mailing will be deemed the date of filing (20 NYCRR 3000.22[a][1],[2][i]). Therefore, a petition delivered into the custody of the USPS within the 90-

day period will be considered timely filed, notwithstanding its delivery to the Division of Tax Appeals on a date falling after the 90th day. Under these circumstances, the petition would appear to have been timely filed (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). At the same time, however, the Rules of the Tax Appeals Tribunal specify that any document required to be filed with the Tribunal or the Division of Tax Appeals within a particular time period will *not* be considered timely *filed*, notwithstanding its delivery into the custody of the USPS within the particular period of time for mailing, unless it is *properly* addressed (20 NYCRR 3000.22[a][2][i]). Here, the envelope in which the petition was mailed was addressed to BCMS (***see*** Finding of Fact 6, n 4), and not to the Division of Tax Appeals, was therefore *improperly* addressed, and was not delivered to the Division of Tax Appeals until March 20, 2015, or some 91 days after the alleged date of issuance of the Dismissal Order. Under such circumstances, the "timely mailing equals timely filing" rule of 20 NYCRR 3000.22(a)(1) is specifically negated by 20 NYCRR 3000.22(a)(2)(i), and the petition would appear to be subject to dismissal as *un*timely.

P. The record on this motion includes no proof establishing the date on which the Dismissal Order, dated December 19, 2014 on its face, was, in fact, issued by BCMS. Without proof of the date of such issuance (or of the date of petitioner's actual receipt of the Dismissal Order), the 90-day period within which a petition had to have been filed was not triggered, and a conclusion may not be reached as to whether the petition was or was not timely filed. There thus exists a material issue of fact concerning the issuance of the Dismissal Order. This is particularly important since an *un*timely petition leaves the Division of Tax Appeals without jurisdiction to address the merits underlying the case, and will result in dismissal of the petition with prejudice. Since the timeliness of the petition may not be determined based on the record as it exists, summary determination will not be granted and the petition may not be dismissed for lack of jurisdiction based on a lack of

timeliness. Accordingly, to the extent the Division's motion seeks summary determination upon that basis, it is properly denied.

Q. Finally, and alternatively, the Division also moves for dismissal of the petition under 20 NYCRR 3000.9(a)(1)(vi), upon the basis that the petition fails to state a cause upon which relief may be granted. In fact, the petition does not raise any challenge that the assessments underlying the proposed suspension of petitioner's license are not fixed and final liabilities with respect to which there are no further hearing rights, nor does it allege the existence of any of the six enumerated bases upon which license suspension may be avoided (***see*** Finding of Fact 8).[8] Petitioner did not respond to the Division's motion, has thus presented no evidence or argument to contest the Division's assertion that the petition does not raise any such challenges, or provided any basis to dispute such assertion. Consequently, petitioner is deemed to have conceded that no questions of fact requiring a hearing exist with respect to this aspect of the motion (***see Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544 [1975]; ***John William Costello Assocs. v. Standard Metals***, 99 AD2d 227 [1ST Dept 1984], ***lv dismissed*** 62 NY2d 942 [1984]; ***Whelan v. GTE Sylvania, Matter of Chin,*** Tax Appeals Tribunal December 3, 2015). Even assuming the Division is unable to provide proof that either the Request, or the petition thereafter, was untimely and subject to dismissal on that basis, as discussed above, such that there is jurisdiction to go forward on the merits, it remains that the petition fails to state any cause upon which relief could be granted. Thus, dismissal of the petition under 20 NYCRR 3000.9(a)(1)(vi) is appropriate and the Division's motion will be granted on this basis.

[8] It is noted that the Request was not included as part of the record on this motion, and thus the record does not disclose whether any of such challenges were raised initially by the petitioner.

R. The Division's motion for summary determination with consequent dismissal of the petition on the basis of timeliness, per Tax Law § 2006(6) and 20 NYCRR 3000.9(a)(1) and (b)(1) is denied; the Division's alternative motion for dismissal based on petitioner's failure to state a cause for relief, per 20 NYCRR 3000.9(a)(1)(vi), is granted; and the petition of Don Sisemore is hereby dismissed.

DATED: Albany, New York
May 19, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE