

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VIKAS MUNJAL : DETERMINATION
for Review of a Notice of Proposed Driver License : DTA NO. 827123
Suspension Referral under Tax Law, Article 8,
§ 171-v. _____ :

Petitioner, Vikas Munjal, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, Article 8, § 171-v.

On May 5 and 9, 2016, respectively, petitioner, appearing by the LoBiondo Law Offices (Anthony R. LoBiondo, Esq.), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Hannelore Smith, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by October 27, 2016, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Herbert M. Friedman, Jr., Supervising 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. On August 20, 2014, the Division of Taxation (Division) issued a notice of proposed driver license suspension referral to petitioner, Vikas Munjal, 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 license would be suspended. According to the suspension notice, an adequate response within that time period would consist of 1) resolution of the outstanding liability either by payment or establishment of a payment plan; 2) notification to the Division of petitioner's eligibility for an exemption; or 3) a protest of the suspension notice by the filing of 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. Attached to the suspension notice was a consolidated statement of tax liabilities for petitioner, also dated August 20, 2014 (consolidated statement). The consolidated statement referenced "Bills subject to collection action" and included the following:

Tax Type	Assessment ID	Tax Period Ended	Balance Due
Sales	L-040222144-9	11/30/11	\$148,245.79

As of August 20, 2014, the date of the issuance of the suspension notice, the unpaid amount on the above assessment, including penalty and interest, was \$148,245.79.¹

3. Notice of Determination number L-040222144-9, dated October 15, 2013, was the statutory notice giving rise to the liability referenced in Finding of Fact 2. It was issued to petitioner as a responsible person, pursuant to Tax Law § 1131 and §1133, for Green Olive Bar

¹ The consolidated statement also separately listed a notice with assessment number L-041370633-8, for the period ending February 29, 2012. This notice was identified as "Estimated amounts due because of returns not yet filed," and totaled \$16,207.45 as of August 20, 2014. This notice was not included by the Division for purposes of calculating the \$10,000.00 liability threshold for the driver's license suspension.

& Grill, Inc., and was broken down as follows:

Tax Assessed	Interest Assessed	Penalty Assessed	Total
0	\$29,655.59	\$114,864.00	\$144,519.59

4. On August 7, 2015, petitioner filed a petition with the Division of Tax Appeals challenging the suspension notice. Attached to the petition was the suspension notice, including the consolidated statement of tax liabilities. The petition also stated that the amount of tax contested is “\$148,245.79.” Included as grounds for the challenge, petitioner wrote:

“Taxpayer is not responsible for a tax liability as the amount alleged owed is due to a business entity, the Green Olive Bar and Grill, Inc. . . . Taxpayer was not an officer of the corporation. In addition, taxpayer made an agreement with NYS Tax Department, wherein the Tax Department forfeited \$57,432.00 in U.S. currency.”

5. Beginning in 2011, petitioner was the subject of a criminal tax investigation by the Division and the Town of Newburgh police department with regard to unpaid sales taxes by Green Olive Bar & Grill, Inc. In July 2013, petitioner pled guilty to one count of petit larceny in the Town of Newburgh Justice Court and executed a consent order consenting to the forfeiture of \$57,432.00, which had been seized as part of the criminal tax matter. These funds were paid to the New York State Department of Taxation and Finance as restitution for liabilities of Green Olive Bar & Grill, Inc. The consent order does not make reference to any satisfaction of petitioner’s potential ensuing civil tax liability.

6. At all relevant times, petitioner’s address was 158 Rock Cut Road, Newburgh, New York.

7. The Division submitted the affidavit of Ronald Catalano, a Tax Compliance Manager 2 with its Civil Enforcement Division (CED). His responsibilities include overseeing the

operations of the Training Unit of the CED's Operations Analysis and Support Bureau.

8. In his affidavit, Mr. Catalano describes 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 includes that 1) the taxpayer have an outstanding balance of tax, penalty, and interest in excess of \$10,000.00; 2) all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) there must be less than 20 years from the issuance of the particular notice and demand; and 4) the outstanding assessments not be the subject of an approved payment arrangement. The Division searches its electronic database on a weekly basis for those taxpayers that meet the above criteria.

9. Once candidates have been identified by the Division, the necessary information is sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer has a qualifying driver's license and is eligible for a notice of proposed driver license suspension.

10. Mr. Catalano avers that based on his review of the Division's records, his knowledge of its policies and procedures, and personal knowledge of the facts in this matter, issuance of the suspension notice to petitioner was proper.

11. The Division also submitted the following to prove mailing of Notice of Determination number L-040222144-9: (i) an affidavit, dated June 24, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a 38-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked October 15, 2013; (iii) an affidavit, dated June 27, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; and (iv) a copy of the October 15, 2013 Notice of

Determination with the associated mailing cover sheet.

12. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR.

Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "10/15/13." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Ms. Nagengast. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

13. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

14. The CMR relevant to Notice of Determination L-040222144-9 consists of 38 pages and lists 410 certified control numbers along with corresponding assessment numbers, names and

addresses. Ms. Nagengast notes that portions of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated October 15, 2013 to each page of the CMR and also wrote his or her initials on each page thereof.

15. Page 32 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0090 8937 and assessment number L-040222144-9, was mailed to petitioner at the 158 Rock Cut Road, Newburgh, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

16. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her signature or initials on the CMR, indicating receipt by the post office. Here, each page of the CMR contains such postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS employee complied with this request by handwriting and circling the

number “410” on the last page next to his or her initials.

17. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of Notice of Determination number L-040222144-9 was mailed to petitioner on October 15, 2013, as claimed.

18. There is no evidence in the record that petitioner filed a request for conciliation conference or petition challenging Notice of Determination number L-040222144-9 within 90 days of October 15, 2013.

19. Petitioner maintains that the petition must be granted and the notice canceled for several reasons. Petitioner asserts, through his affidavit and the affirmation of his representative, Anthony R. LoBiondo, Esq., that the Division’s referral to DMV is improper as he is not the taxpayer at issue and that the past due liabilities were satisfied (citing Tax Law § 171-v[i] and [ii]). Petitioner emphasizes that he was not an officer or director of the Green Olive Bar and Grill, Inc., and that his plea agreement in the criminal matter was not a concession of civil tax liability. Moreover, he asserts that as part of the plea agreement in the criminal matter referenced in Finding of Fact 5, petitioner forfeited \$57,432.00 that was previously seized and subsequently provided to the Division. Petitioner argues that he understood the matter was concluded by that payment.

CONCLUSIONS OF LAW

A. Tax Law § 171-v is titled “Enforcement of delinquent tax liabilities through the suspension of driver’s licenses.” A specific statutory predicate underlying this sanction is the establishment of the existence of “delinquent tax liabilities,” specifically the existence of “past-due tax liabilities,” owed by the taxpayer in an aggregate amount equal to or greater than \$10,000.00. Tax Law § 171-v(1) defines the term “past-due tax liabilities” as “any tax liability or

liabilities which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review.”

B. The evidence in this case demonstrates that there exist fixed and final tax liabilities owed by petitioner with respect to which he no longer has any right to administrative or judicial review. The Division specifies notice number L-040222144-9 as comprising the past-due tax liabilities giving rise to the license suspension. Through the affidavits of Ms. Nagengast and Mr. Peltier, as well as the remaining exhibits in the record, the Division has established the proper issuance of assessment number L-040222144-9 to petitioner on October 15, 2013 (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Furthermore, there is no proof that petitioner filed a request for conciliation conference or a petition challenging Notice of Determination number L-040222144-9 within the required subsequent 90 day period (*see* Tax Law § 1138; *see also Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Thus, the Division meets the threshold requirement of Tax Law § 171-v by establishing petitioner’s past-due liability.

C. Tax Law § 171-v(5) limits the grounds upon which a taxpayer may protest a notice of suspension as follows:

“Notwithstanding any other provision of law, and except as specifically provided herein, the taxpayer shall have no right to commence a court action or proceeding or to any other legal recourse against the department or the department of motor vehicles regarding a notice issued by the department pursuant to this section and the referral by the department of any taxpayer with past-due tax liabilities to the department of motor vehicles pursuant to this section for the purpose of suspending the taxpayer’s driver’s license. A taxpayer may only challenge such suspension or referral on the grounds that (i) the individual to whom the notice was provided is not the taxpayer at issue; (ii) the past-due tax liabilities were satisfied; (iii) the taxpayer’s wages are being garnished by the department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears; (iv) the taxpayer’s wages are being garnished for the payment of past-due child support or combined child and

spousal support arrears pursuant to an income execution issued pursuant to section five thousand two hundred forty-one of the civil practice law and rules; (v) the taxpayer's driver's license is a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law; or (vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for purposes of subdivision three of this section.”

D. Petitioner raises two grounds for cancellation of the notice under the statute. First, he asserts that, pursuant to section 171-v(5)(i), he is not the taxpayer that owes the underlying tax liability. On the contrary, however, Notice of Determination number L-040222144-9 was issued to petitioner, and has become a fixed and final liability. His opportunity to dispute the underlying merits of the Notice of Determination expired when he failed to file a challenge within 90 days of its issuance. As a result, his argument on this point fails.

E. Additionally, petitioner maintains that the past-due liabilities were satisfied by the forfeiture agreement, thereby requiring cancellation of the suspension notice under section 171-v(5)(ii). Again, the evidence speaks to the contrary. Notice of Determination number L-040222144-9, issued after the forfeiture, asserted penalties and interest against petitioner in the amount of \$144,519.59. This amount was neither timely challenged nor paid. Meanwhile, the forfeiture was a criminal sanction without any encumbrance upon ensuing civil liability, including penalties and interest (*see e.g. Matter of Hirschfeld*, Tax Appeals Tribunal, April 5, 2007). Petitioner has not clearly and convincingly demonstrated an accord and satisfaction of civil liability with the Division arising from the forfeiture. Hence, petitioner's argument on this issue is rejected.

F. Finally, the remaining arguments made by petitioner in opposition to the suspension notice (i.e., whether petitioner was a responsible person of the Green Olive Bar and Grill, Inc.) are

insufficient as Notice of Determination number L-040222144-9 has become fixed and final and they do not meet any of the enumerated statutory grounds.

G. The petition of Vikas Munjal is denied and the notice of proposed license suspension referral, dated August 20, 2014, is sustained.

DATED: Albany, New York
April 6, 2017

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE