

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROGER DELONEY : DETERMINATION
for Review of a Notice of Proposed Driver License : DTA NO. 827188
Suspension Referral under Tax Law, Article 8, :
§ 171-v. :

Petitioner, Roger DeLoney, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, Article 8, § 171-v.¹

On July 29, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Kileen C. Davies, Esq., of counsel), filed a motion seeking an order dismissing the petition, or in the alternative, summary determination of the proceeding pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.5, 3000.9(a), and 3000.9(b). Accompanying the motion was the affirmation of Kileen C. Davies, its annexed exhibits, and the affidavits of Ronald Catalano, Mary Ellen Nagengast, and Bruce Peltier. Petitioner, appearing pro se, did not respond to the motion. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation’s notice of proposed driver license suspension referral issued to petitioner pursuant to Tax Law § 171-v should be sustained.

¹ The title of the subject notice uses the phrase “driver license,” while the statute at issue, Tax Law § 171-v, uses the phrase “driver’s license.”

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the validity of petitioner's protest of a Notice of Proposed Driver License Suspension Referral dated March 31, 2015, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). The suspension notice informed petitioner that he had outstanding tax liabilities owed to the State of New York, and that unless he responded within 60 days of the mailing date of the suspension notice, his driver's license would be suspended. According to the suspension notice, 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 March 31, 2015 (consolidated statement). The consolidated statement referenced "Bills subject to collection action" and included the following:

Tax Type	Assessment ID	Tax Period Ended	Balance Due
Income	L-040618144-7	12/31/09	\$49,889.57

3. Petitioner requested a conciliation conference before BCMS to address the suspension notice and the matter was assigned CMS number 267135. By order dated July 17, 2015, BCMS issued a Conciliation Order Dismissing Request, which stated that:

"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 March 31, 2015, but the request was not mailed until June 27, 2015, or in excess of 60 days, the request is

late filed.”

4. On August 31, 2015, petitioner filed a petition with the Division of Tax Appeals and attached the Conciliation Order Dismissing Request, CMS number 267135. On the cover of the petition, for the notice/assessment number being challenged, petitioner wrote L-040618144-7.

5. On July 29, 2016, the Division filed a motion seeking dismissal of the petition or summary determination. In support of its motion, the Division submitted, among other documents, (i) the affirmation of Kileen C. Davies, Esq., an attorney employed in the Office of Counsel of the Division, dated July 29, 2016; (ii) a Notice of Proposed Driver License Suspension Referral dated March 31, 2015; (iii) the affidavit of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS), dated January 5, 2016; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked February 24, 2014; (v) a copy of a Notice of Deficiency, notice number L-040618144, dated February 24, 2014, and its associated mailing cover sheet, (vi) an affidavit, dated January 6, 2016, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division’s mail room; (vii) an affidavit, dated July 26, 2016, of Ronald Catalano, a Tax Compliance Manager 2 with the Division’s Civil Enforcement Division (CED); (viii) the Conciliation Order Dismissing Request, CMS Number 267135, dated July 17, 2015; and (ix) a transcript of petitioner’s New York State income tax return for tax year 2003, filed on July 20, 2004, reporting the same address as that listed on the Notice of Deficiency, notice number L-040618144, dated February 24, 2014. This was the last return filed by petitioner before the issuance of said Notice of Deficiency.

6. The affidavit of Ronald Catalano, a Tax Compliance Manager 2 with the CED,

describes his responsibilities, which include overseeing the operations of the Training Unit of the CED's Operations Analysis and Support Bureau. His affidavit is based upon his personal knowledge of the facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

7. In his affidavit, Mr. Catalano describes the Division's process for selection of candidates who could be sent notices of proposed driver license suspension referral 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.

8. 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 referral.

9. Mr. Catalano avers that based on his review of the Division's records and his knowledge of its policies and procedures, issuance of the suspension notice to petitioner was proper. Regarding assessment number L-040618144-7, he states that the cumulative balance of tax, penalty, and interest owed by petitioner on March 31, 2015 was greater than \$10,000.00, and that petitioner met all other compliance checks referenced in Finding of Fact 7 for proper issuance of the suspension notice.

10. In order to establish petitioner's past-due liabilities, the Division provided the

affidavits of Mary Ellen Nagengast and Bruce Peltier, a CMR postmarked February 24, 2014, a copy of the Notice of Deficiency, notice number L-040618144, dated February 24, 2014, with the associated mailing cover sheet, and a copy of petitioner's 2003 New York State income tax return transcript, which was the last return filed before the issuance of the Notice of Deficiency, and which bears the same address as that listed on the notice.

11. The affidavit of Ms. Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "2/24/14." In addition, as described by Ms. Nagengast, generally 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 the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

12. 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 taxpayer mailing address and the Departmental return address on the front, and taxpayer

assistance information on the back. The certified control numbers are 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."

13. The CMR in the present matter consists of 1,741 pages and lists 19,141 certified control numbers, along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 1,741 which contains 1 entry. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated February 24, 2014 to each page of the CMR, handwrote "19,141 pieces" on page 1,741 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 1,741. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 19,141.

14. Page 681 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0167 0468 and reference number L-040618144 was mailed to petitioner at the Brooklyn, New York, address listed on that Notice of Deficiency. The corresponding mailing cover sheet, attached to Ms. Nagengast's affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

15. The affidavit of Mr. Peltier, a supervisor in the mail room since 1999 and currently a principal mail and supply clerk, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr.

Peltier confirms that a 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 first and last pieces of mail listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 1,741 and affixed a postmark dated February 24, 2014 to each page of the CMR. The mail room 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 CMR. Here, the USPS employee complied with this request by handwriting the number "19,141" and initialing the last page next to the heading "Total Pieces Received at Post Office."

16. According to Mr. Peltier, the subject notice was mailed to petitioner on February 24, 2014, as claimed.

17. There is no evidence of petitioner filing a request for a conciliation conference or a petition with the Division of Tax Appeals within 90 days of issuance of Notice of Deficiency number L-040618144 .

CONCLUSIONS OF LAW

A. The Division has filed a motion seeking summary determination of the proceeding pursuant to Tax Law § 2006(6); 20 NYCRR 3000.5, and 3000.9(a) and (b). As grounds, the

Division states that (1) the pleadings fail to state a cause for relief, (2) considerations petitioner may have addressed exceed the jurisdiction of the Division of Tax Appeals under Tax Law § 171-v, and (3) there are no material issues of fact, and the Division is entitled to summary determination as a matter of law.

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]). 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. Vil. 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]).

C. At issue in the instant matter is the proper issuance to petitioner of the suspension notice. 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]; emphasis added). 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*” (emphasis added). In the present motion, the Division has established that the requisite past-due liabilities exist to issue the suspension notice. Specifically, through the affidavits of Ms. Nagengast and Mr. Peltier, the Division has demonstrated its general procedure for issuing notices and that Notice of Deficiency number L-040618144 was issued to petitioner on February 24, 2014 consistent with that procedure (*see Matter of Clayton*, Tax Appeals Tribunal, January 28, 2016). Meanwhile, there is no evidence in the record suggesting that petitioner protested the Notice of Deficiency within 90 days of its issuance. Additionally, petitioner has presented no evidence to support the allegation, raised in his petition, that the Notice of Deficiency was sent to an incorrect address. The Division presented evidence that the address listed on the notice was the same as the address reported on petitioner’s 2003 New York income tax return, which was petitioner’s last return filed before the issuance of the Notice of Deficiency. Petitioner presented no evidence to indicate that he informed the Division of a change of address before the issuance of the Notice of Deficiency. Thus, by operation of law, the assessment became a fixed and final liability (*see* Tax Law § 681[b]). As a result, the liability represented by the underlying notice meets the threshold requirement for suspension of petitioner’s drivers license pursuant to Tax Law § 171-v.

D. A taxpayer’s right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a request for conference with BCMS or 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]).

In the instant case, petitioner has failed to respond to the Division’s motion, thereby failing to raise any of the grounds cited in Tax Law 171-v(5) or dispute the facts as asserted. Moreover, in his petition, petitioner similarly does not raise any of the grounds enumerated in the statute. Accordingly, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination in the Division’s favor is appropriate.

E. The Division’s motion for summary determination is hereby granted, the petition of Roger DeLoney is denied, and the Division’s Notice of Proposed Driver License Suspension Referral is sustained.

DATED: Albany, New York
November 17, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE