

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH J. JACOBI : DETERMINATION
for Review of a Notice of Proposed Driver License : DTA NO. 827401
Suspension Referral under Tax Law, Article 8, :
§ 171-v. :

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

On October 25, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Linda A Jordan, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Linda A. Jordan, and annexed exhibits. Pursuant to 20 NYCRR 300.5(b), petitioner's response to the motion was due on or before November 25, 2016. On November 23, 2016, petitioner, appearing by Andreozzi, Bluestein, Weber and Brown, LLP (Randall P. Andreozzi, Esq., of counsel), submitted an affirmation and a memorandum in opposition to the Division of Taxation's motion. After due consideration of the documents submitted, and upon all pleadings and proceedings had herein, Dennis M. Galliher, 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 subject of the motion of the Division of Taxation (Division) is the validity of petitioner, Joseph J. Jacobi's, protest of a notice of proposed driver license suspension referral (Collection case ID: E-007101739-CL001-5), dated April 1, 2015, and issued to petitioner 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's license would be suspended. Specifically, petitioner was advised through a Consolidated Statement of Tax Liabilities dated April 1, 2015, that two income tax assessments with a combined balance, including penalty and interest (less payment credits), in the amount of \$270,825.00 (as of April 1, 2015), were due and subject to collection action.¹ According to the suspension notice, an adequate response within the specified 60-day 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. Petitioner requested a conference before BCMS, and a conciliation conference was

¹ The subject assessments were identified as the following:

Tax Type	Assessment ID Number	Tax Period Ended	Tax Amount	Interest Amount	Penalty Amount	Payment Credit	Current Balance
Income	L-039575472-5	12/31/04	\$92,818.00	\$103,999.14	\$23,204.00	\$11,742.00	\$208,279.14
Income	L-039564194-4	12/31/01	\$23,230.00	\$40,259.86	\$5,806.00	\$6,750.00	\$62,545.86

held on August 12, 2015. On October 2, 2015, BCMS issued to petitioner a Conciliation Order, CMS number 266746, that sustained the Notice of Proposed Driver License Suspension Referral dated April 1, 2015.

3. On December 29, 2015, the Division of Tax Appeals received a petition challenging the suspension notice. According to the petition, petitioner and his spouse are currently unemployed and do not receive any unemployment benefits. Petitioner stated that he does not have any current income, that his spouse receives only periodic installment disbursements resulting from her sale of certain business interests in 2013, and that they are insolvent and do not have any excess monthly income to pay their unpaid taxes from prior years. According to petitioner, he has no current federal or New York State tax obligations. He also maintains that his existing tax debt is currently uncollectible.

4. In support of its motion, the Division submitted the affidavit of Ronald Catalano, a Tax Compliance Manager 2 in its Civil Enforcement Division (CED) during the relevant time. His responsibilities include overseeing the operations of the Training Unit of the CED's Operations Analysis and Support Bureau. Mr. Catalano's affidavit details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law, Article 8, § 171-v.

5. 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.

6. 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.

7. 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.

8. In its answer to the petition, the Division asserts that petitioner has not sought relief from the suspension of his driver's license under any of the six specifically enumerated grounds for such relief set forth at Tax Law § 171-v(5)(i)-(vi), and thus has raised no basis for administrative or judicial review of the proposed suspension of his license, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition for lack of jurisdiction or summary determination in its favor.

9. In response to the Division's motion, petitioner points out that the Notice of Proposed Driver License Suspension Referral under the heading "How to avoid suspension of your license" instructs taxpayers to "pay the amount due or set up a payment plan to avoid suspension of your license." The notice also advises taxpayers that a driver's license suspension referral will be provided to the DMV unless the taxpayer, among other things, sets up a payment plan, or protests the proposed suspension of the license by filing a Request for Conciliation Conference or a petition with the Division of Tax Appeals.

10. On June 3, 2014, petitioner (together with his spouse) filed an Offer in Compromise (OIC) with New York State (Form DTF-4.1), accompanied by a payment of \$750.00 and the proposal that they will make continuing payments in such amount for a period of 48 months in satisfaction of their outstanding liabilities. A Statement of Financial Condition and Other Information (Form DTF-5) was filed with the OIC. Petitioner and his spouse continued making voluntary payments of \$750.00 per month toward their outstanding tax liabilities while their OIC was pending before the Division.

11. By a letter dated January 26, 2015, the Division rejected the OIC, citing Tax Law § 171(15) in support thereof. Specifically, the letter advises that the “offer does not reflect what [the Division] could reasonably collect with a combination of collection techniques.” The letter further states that “[a]cceptance of [the] offer would not be in the best interest of New York State. Public knowledge of such an offer would be seriously detrimental to voluntary compliance.”²

12. In support of his position, petitioner’s representative, Randall P. Andreozzi, Esq., filed an affirmation in opposition to the motion for summary determination, together with an accompanying memorandum of law. Petitioner’s memorandum contends that there are material issues of fact that preclude the granting of summary determination. Petitioner states specifically that he relied upon the Division’s advice and followed the instructions on how to avoid a suspension of his license, as set forth in the suspension notice, by requesting a conciliation conference, submitting an OIC and, thereafter, by filing a petition.

² The OIC proposed to settle the outstanding liabilities of petitioner and his spouse, listed as \$856,719.00, upon payment of \$36,000.00, via monthly payments of \$750.00 over a period of four years.

13. Petitioner correctly notes that an accepted Offer in Compromise would serve to prevent his driver's license from being suspended. At the same time, petitioner admits that his OIC has been rejected by the Division. However, petitioner claims that the rejection of his OIC was summarily made without specific or meaningful explanation for such rejection, and without affording petitioner an opportunity to be heard with respect to the Division's failure to accept the OIC. According to the petition, the loss of his driving privileges will dramatically impact petitioner's ability to care for himself and his family, including specifically his ability to transport his spouse to her necessary ongoing medical treatments.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). The Division of Tax Appeals has jurisdiction over the petition by virtue of the fact that it was timely filed, i.e., within 90 days after issuance of the BCMS Conciliation Order (*see* Findings of Fact 2 and 3). accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the propriety of the Division's notice of proposed driver license suspension. This determination shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought (***Matter of Frank DeMartino***, Tax Appeals Tribunal, December 16, 2016).

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. Tax Law § 171-v, effective March 28, 2013, provides for the enforcement of past-due tax liabilities equal to or in excess of ten thousand dollars through the suspension of drivers' licenses. Tax liabilities are defined as including penalties and interest due on any tax amounts, and "past-due tax liabilities" are defined as those which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review thereof (Tax Law § 171-v[1]). The Division must provide notice to a taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to the date the Division intends to refer the taxpayer to DMV for action (Tax Law § 171-v[3]). Petitioner has raised no issues herein regarding the propriety of, or the amount of the tax assessed by, the assessments listed on the April 1, 2015 consolidated statement of tax liabilities attached to the 60-day notice. Accordingly, by operation of the definition in the statute, such liabilities are fixed and final and meet the threshold requirement for issuance of a 60-day notice proposing the suspension of petitioner's driver's 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, 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]).

E. Tax Law § 171-v(3)(d) states that the notice to a taxpayer shall include:

“a statement that the suspension of the taxpayer’s driver’s license shall continue until the past-due tax liabilities are fully paid or the taxpayer makes payment arrangements satisfactory to the commissioner. . . .”

F. Here, there is no dispute that the Commissioner rejected petitioner’s proposed OIC.

An application for an OIC, without acceptance thereof by the Commissioner, does not satisfy the criterion of making “payment arrangements satisfactory to the commissioner” so as to avoid a driver’s license suspension. Moreover, this conclusion is not altered by a suggestion in a notice from the Division that the taxpayer make an OIC. In short, simply making an OIC application, without acceptance thereof, provides no relief from license suspension.

G. Petitioner contends that the Division unreasonably failed to accept his proposed OIC, and that he must be given a meaningful opportunity to be heard with respect to such action. This argument essentially mirrors that made and addressed by the Tribunal in a related earlier matter involving petitioner’s spouse (*Matter of Mary E. Jacobi*, Tax Appeals Tribunal, May 12, 2016).³ In that matter, the Tribunal concluded that Tax Law § 171-v does not provide a process by which a taxpayer may challenge a decision by the Commissioner to reject an offer in compromise or a proposed payment arrangement, stating as follows:

“Tax Law § 171-v (5), quoted above, emphatically provides that a suspension notice may be challenged only upon the specific grounds listed in that subdivision.

³ In fact, the OIC discussed herein was filed jointly by petitioner and his spouse, Mary E. Jacobi (*see* Finding of Fact 10).

Plainly, none of the grounds so listed deal with the reasonableness of the Commissioner's decision to reject an offer in compromise. Furthermore, an offer in compromise of a fixed and final liability, such as petitioner's offer, is a collection activity of the Division of Taxation (*see* Tax Law § 171 [Fifteenth]; 20 NYCRR 5005.1). The Division of Tax Appeals generally lacks authority to review such an activity (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *see also Matter of Williams*, Tax Appeals Tribunal, September 1, 1994 [Tax Appeals Tribunal 'lacks statutory authority to accept or even consider' an offer in compromise]).

As we recently commented, Tax Law § 171-v is a unique tax collection statute because it involves the suspension of a taxpayer's driver's license (*see Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016). As we noted in *Balkin*, a taxpayer has a property right in his or her license that would normally give rise to the due process protections of notice and a right to be heard if the State attempts to suspend that license (*see Bell v Burson*, 402 US 535, 539 [1971] [driver's licenses are important interests to the licensees because once issued, they may become essential to the 'pursuit of a livelihood']). As we also noted in *Balkin*, however, a taxpayer whose license has been suspended pursuant to Tax Law § 171-v is eligible for a restricted use driver's license (*see* Vehicle and Traffic Law § 510 [4-f] [5] [a person whose license has been suspended for failure to pay past-due tax liabilities may apply for the issuance of a restricted use licence] and Vehicle and Traffic Law § 530 [5-b] [implying that a restricted use license cannot be denied to a person whose license has been suspended for failure to pay past-due tax liabilities]). Pursuant to Vehicle and Traffic Law § 530 (1), a restricted use license may be issued if such a license is necessary for certain employment or education reasons for the person whose driver's license has been suspended, or as required for medical treatment for that person or member of his or her household. As we found in *Balkin*, these Vehicle and Traffic Law provisions preserve petitioner's right to drive for reasons of employment, education or medical treatment, and thereby ameliorate the necessity for petitioner to be provided with notice and an opportunity to be heard with respect to a denial of an offer in compromise in the context of a license suspension pursuant to Tax Law § 171-v.

Accordingly, we reject petitioner's argument that Tax Law § 171-v as applied to her in the present matter violates her right to due process. To the extent that petitioner argues that Tax Law § 171-v is unconstitutional on its face, we decline to address this issue as it is not within our jurisdiction (*Matter of Balkin*)." (*Matter of Mary E. Jacobi*).

H. Petitioner also argues that he has no assets which can be levied upon and that suspension of his license would greatly hinder his ability to care for himself and his family.

None of these assertions raise any of the grounds set forth in Tax Law § 171-v(5). Accordingly,

there is no dispute as to the facts and no basis in law to grant the petition. As a result, the granting of summary determination is appropriate.

I. The Division's motion for summary determination is hereby granted, the petition of Joseph J. Jacobi is denied, and the Division's notice of proposed driver license suspension is sustained.

DATED: Albany, New York
February 16, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE