

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOANNE FELICIANO</b>	:	<b>DETERMINATION</b>
For Review of a Notice of Proposed Driver License	:	<b>DTA NO. 827642</b>
Suspension Referral Under Tax Law, Article 8, § 171-v.	:	

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Petitioner, Joanne Feliciano, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, article 8, § 171-v.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), brought a motion on August 31, 2017, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9 (a) (i) 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 August 30, 2017, and annexed exhibits. Petitioner, appearing pro se, did not respond to the Division's motion. The period within which to respond to the motion closed on October 2, 2017, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affirmation and exhibits included 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 Division of Taxation's notice of proposed driver license suspension referral issued to petitioner should be sustained.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued to petitioner, Joanne Feliciano, a notice of proposed driver license suspension referral (suspension notice), dated May 28, 2015, which notified petitioner that new legislation allows New York State to suspend the driver's licenses of persons who have delinquent unpaid tax debts. The suspension notice informed petitioner of how to avoid such suspension, how to respond to the suspension notice and what would ensue if she failed to take action. Attached to the suspension notice was a consolidated statement of tax liabilities, listing two income tax assessments owed by petitioner and subject to collection in the total amount of \$15,865.25, as follows:

a) Assessment ID L-041789035, pertaining to the period ended December 31, 2009 and assessing a then-current balance due of \$8,761.45, consisting of tax, interest, and penalty in the respective amounts of \$4,393.00, \$2,069.79 and \$2,298.66.

b) Assessment ID L-040652088, pertaining to the period ended December 31, 2008, and assessing a then-current balance due of \$7,103.80, consisting of tax, interest, and penalty in the respective amounts of \$3,939.00, \$2,165.79 and \$2,094.01, less payments and credits in the amount of \$1,095.00.

2. Following the issuance of a conciliation order (CMS No. 266860), dated February 26, 2016, sustaining the suspension notice, petitioner filed a petition with the Division of Tax Appeals. The petition was filed on May 26, 2016, and indicates, at page one, that petitioner seeks "review of revocation or denial of a license, permit or registration," and that the "tax in question" is "personal income tax." The petition alleges, at item six thereof, that it is "related to"

the above-listed two assessments, that petitioner requested a “conciliation hearing” with respect thereto, but instead was granted a conciliation hearing for the suspension of her driver’s license. Item seven of the petition confirms that petitioner requested a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS). The conciliation order, issued by BCMS and attached to the petition, is captioned as pertaining to “Notice of Proposed Driver’s License Suspension Referral Notice dated: May 28, 2015.”

3. The Division filed its answer to the petition on July 18, 2016, and, in turn, brought the subject motion on August 30, 2017. The Division submitted with its motion an affidavit, sworn to August 29, 2017, by Todd Lewis, who is employed as a Tax Compliance Manager 3 with the Division’s Civil Enforcement Division (CED). Mr. Lewis’ responsibilities and duties include overseeing the operations of the CED’s Operations Analysis and Support Bureau and working with the Office of Information Technology Services. 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. Mr. Lewis’ affidavit details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law § 171-v.

4. In his affidavit, Mr. Lewis 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; 4) the outstanding assessments not be the subject of an approved payment arrangement; and 5) deceased taxpayers are excluded. The Division searches its electronic database on a weekly basis for taxpayers that meet the above criteria.

5. 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.

6. After receipt of a match from DMV, but prior to issuance of a proposed suspension notice, an additional compliance check is run by the Division to ensure that the case still meets the aforementioned criteria and is still eligible for suspension. If so, the Division issues the proposed suspension notice to the taxpayer.

7. If the taxpayer does not respond to the Division or there has been no change in his or her status, the case is electronically sent to DMV for the license to be suspended.

8. Mr. Lewis 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.

9. The current action was initiated by the petition filed on May 26, 2016 in response to the BCMS Conciliation Order sustaining the suspension notice (*see* Finding of Fact 2). Petitioner also filed a separate petition, dated May 23, 2016. That earlier petition directly challenged the merits of the two notices of deficiency underlying the assessments identified on the consolidated statement of tax liabilities. It is these assessments that form the basis for the Division's position herein that petitioner has unpaid fixed and final tax liabilities in excess of \$10,000.00, thereby justifying the suspension of her driver's license. As a separate action directly challenging the validity of the underlying notices of deficiency, the May 23, 2016 petition was assigned DTA No. 827649.

10. On June 27, 2016, the Division of Tax Appeals issued a notice of intent to dismiss petition (Notice of Intent), upon the basis that the May 23, 2016 petition (DTA No. 827649) had not been timely filed. The Division of Taxation responded to the Notice of Intent by submitting

its proof of mailing of the two notices of deficiency. By a Determination dated November 17, 2016, an administrative law judge dismissed the May 23, 2016 petition challenging the two notices of deficiency, upon the basis that the petition had not been timely filed, and that the Division of Tax Appeals consequently did not have jurisdiction to address the substantive merits of petitioner's challenge as alleged in the petition (*see Matter of Joanne Feliciano*, DTA No. 827649 [NYS Div. Tax App. Nov. 17, 2016]) .

11. Petitioner filed a timely exception to the administrative law judge's determination. On August 24, 2017, the Tax Appeals Tribunal issued a decision denying petitioner's exception, affirming the determination of the administrative law judge, and dismissing the petition (*see Matter of Joanne Feliciano*, Tax Appeals Tribunal, August 24, 2017).

#### ***CONCLUSIONS OF LAW***

A. The Division alternatively seeks dismissal under 20 NYCRR 3000.9 (a), or summary determination under 20 NYCRR 3000.9 (b). The petition in this matter was filed with the Division of Tax Appeals on May 26, 2016, a date that falls within 90 days after the February 26, 2016 date of the conciliation order (*see* Finding of Fact 2). Consequently, the Division of Tax Appeals has subject matter jurisdiction in the instant matter, and the Division's motion will be treated as one for summary determination (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015), rather than as a motion for dismissal.

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]).

Section 3000.9 of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a

motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. 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]).

C. Tax Law § 171-v (1) authorizes “a program to improve tax collection through the suspension of drivers’ licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars.” Prior to the suspension of a taxpayer’s driver’s license, the Division must meet two obligations:

- 1) provide notice to the 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]), and
- 2) establish that the taxpayer has past due-tax liabilities in excess of \$10,000.00. Tax liabilities are defined as including penalties and interest due on any tax amounts (Tax Law § 171-v [1]).

D. There is no dispute that by its issuance of the suspension notice described in Finding of Fact 1, the Division met the first of the foregoing two obligations. As to the second obligation, the phrase “past-due tax liabilities” is specifically defined 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” (Tax Law § 171-v [1]). The Division alleges that petitioner previously

challenged the two assessments underlying the license suspension notice at issue herein by the petition she filed on May 23, 2016 (*see* Finding of Fact 9), that such challenge was dismissed as untimely, and that the liabilities thereunder are fixed and final (*see* Findings of Fact 10 and 11).

E. Petitioner's opportunity to contest the income tax notices of deficiency, issued by the Division, and serving here as the basis for the asserted past-due liabilities in excess of \$10,000.00, included either filing either a request for a conciliation conference with BCMS, or filing a petition with the Division of Tax Appeals (*see* Tax Law §§ 170 [3-a]; 689; 690; 2000 and 2016; *see also Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016). Any such challenge to the notices had to have been filed within 90 days after the Division's issuance of such notices of deficiency (*id*; *see* Tax Law §§ 681 [b], 689 [b]).

F. As noted, petitioner chose to challenge the substantive bases for the notices of deficiency by filing a petition with the Division of Tax Appeals. That substantive challenge, assigned DTA No. 827649, was dismissed as not having been timely filed, and in turn, that dismissal was upheld on exception by the Tax Appeals Tribunal (*see* Findings of Fact 9 - 11).

G. Tax Law § 2016 provides, in relevant part, that:

“[a] decision of the tribunal which is not subject to any further administrative review shall irrevocably decide all the issues which were raised in the proceeding, unless within four months after the issuance of such decision by the tribunal and the giving of notice of such decision to the parties, the petitioner applies for judicial review in the manner provided by article seventy-eight of the civil practice law and rules” (*see also* 20 NYCRR 3000.20).

Petitioner did not respond to the Division's motion, and there is no claim or evidence that petitioner applied for judicial review within the time limit for doing so, as provided above.

Accordingly, the liabilities represented by the notices of deficiency are fixed and final assessments, and petitioner no longer has any right to any administrative or judicial review

concerning the propriety of, or the amount of the tax assessed by, the assessments listed on the consolidated statement of tax liabilities attached to the suspension notice. Since such liabilities are fixed and final, and are in excess of \$10,000.00, petitioner is properly the subject of the suspension notice challenged herein (*see Matter of Balkin*).

H. Petitioner's right to challenge a suspension notice that is properly issued pursuant to Tax Law § 171-v is specifically limited to 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]).

I. In her petition in this matter, petitioner did not raise a challenge based on any of the above-enumerated grounds. The Division, through the factual assertions set forth in its motion papers, has established a prima facie showing that petitioner met the requirements for license suspension, to wit: the giving of notice of the proposed suspension referral and the existence of fixed and final outstanding tax liabilities in excess of \$10,000.00. To rebut this prima facie showing, it was incumbent upon petitioner to produce evidence in admissible form sufficient to



raise an issue of fact requiring a hearing (*see Zuckerman v City of New York*, 49 NY 2d at 562 [1980]).

J. Petitioner did not respond to the subject motion, did not assert any of the enumerated and exclusive grounds upon which relief from license suspension may be granted (*see* Tax Law § 171-v [5]), and thus has raised no material or triable issue of fact warranting denial of summary determination.

K. The Division's Motion for Summary Determination is granted, the petition of Joanne Feliciano is denied, and the May 28, 2015 Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v is sustained.

DATED: Albany, New York  
December 28, 2017

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE