

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DALE ROBERT JAVINO : DETERMINATION
for Review of a Notice of Proposed Driver’s License : DTA NO. 827762
Suspension Referral under Tax Law, Article 8, § 171-v. :
:

Petitioner, Dale Robert Javino, filed a petition for review of a proposed driver’s license suspension referral under Tax Law, Article 8, § 171-v.

On January 26, 2017, 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, summary determination of the proceeding pursuant to Tax Law § 2006(6), and 20 NYCRR 3000.5 and 3000.9(a) and (b). Accompanying the motion was the affirmation of Linda A. Jordan, Esq., its annexed exhibits, and the affidavits of Ronald Catalano, Mary Ellen Nagengast, Melissa Kate Koslow, and Heidi Corina. Petitioner, appearing pro se, did not respond to the motion. Accordingly, the 90-day period for issuance of this determination began on February 27, 2017, the due date for petitioner’s response.¹ After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

¹ As petitioner’s response was due on Saturday, February 25, 2017, the next business day was Monday, February 27, 2017 (*see* General Construction Law §§ 20; 25-a).

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’s license suspension referral dated March 9, 2016, 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 liabilities 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 9, 2016 (consolidated statement). The consolidated statement referenced “Bills subject to collection action” and included the following:

Tax Type	Assessment ID	Tax Period Ended	Tax	Current Balance Due ²
Income	L-041793490-7	12/31/09	\$618.00	\$ 1,305.60
Income	L-041793489-1	12/31/08	\$3,830.00	\$ 8,786.21
Total				\$10,091.81

² The current balance due for each assessment includes interest and penalty amounts that have accrued to March 9, 2016. Interest and penalties continue to accrue on unpaid bills.

3. On July 13, 2016, petitioner filed a petition with the Division of Tax Appeals protesting the proposed suspension notice, and the underlying notices of deficiency. On the cover of the petition, for the notice/assessment number being challenged, petitioner wrote L-041793490-1, L-041793489-1 and E-006580372-7.³ In his petition, petitioner asserts that the Division is time barred from issuing income tax assessments for tax years 2008 and 2009 because the assessments were not issued within three years of the filing of his New York State resident income tax returns for such years. He further asserted that the underlying assessments for the years 2008 and 2009 should be cancelled and the suspension notice should be withdrawn.

4. Initially, petitioner elected to have the proceedings in this matter conducted in the Small Claims Unit. By letter dated October 18, 2016, petitioner requested that this matter proceed before an administrative law judge.

5. The Division filed its answer to the petition on September 21, 2016. The Division, in turn, filed a notice of motion and supporting papers on January 26, 2017, seeking dismissal of the petition or, in the alternative, granting summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.5 and 3000.9(a) and (b).

In support of its motion, the Division submitted, among other documents: (i) the affirmation of Linda A. Jordan, Esq., an attorney employed in the Office of Counsel of the Division, dated January 26, 2017; (ii) the suspension notice dated March 9, 2016; (iii) the affidavit, dated January 4, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iv) pages "1," "950," and "1,572" of a "Certified Record for Presort Mail - Assessments Receivable"

³ The number E-006580372-7 appears on a letter dated June 3, 2016 from the Division's Civil Enforcement Division, Region 5, and the accompanying consolidated statement of tax liabilities, dated June 3, 2016, that were among the documents attached to the petition.

(CMR); (v) copies of notices of deficiency L-041793489-1 and L-041793490-1, and their associated mailing cover sheets; (vi) an affidavit, dated January 5, 2017, of Melissa Kate Koslow, a head mail and supply clerk and a supervisor in the Division's mail room since April 2010; (vii) an affidavit, dated January 11, 2017, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (viii) two United States Postal Service (USPS) Forms 3811-A (requests for delivery information/return receipts after mailing) and the responses thereto; (ix) an affidavit, dated January 23, 2017, of Ronald Catalano, a Tax Compliance Manager 2 with the Division's Civil Enforcement Division (CED); (x) a certification of non-filing of personal income tax returns for tax years 2008 and 2009 for petitioner; and (xi) petitioner's electronically filed Application for Automatic Six-Month Extension of Time to File For Individuals (Form IT-370) for the tax year 2013 filed on April 6, 2014, and reporting the same address as that listed on notices of deficiency L-041793489-1 and L-041793490-1, dated October 7, 2014. This was the last return filed by petitioner before the issuance of said notices of deficiency.

6. The affidavit of Mr. Catalano 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's 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; 4) the outstanding assessments

not be the subject of an approved payment arrangement; and 5) the taxpayer must be alive. 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's license suspension referral.

9. Mr. Catalano avers that based upon 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 numbers L-041793490 and L-041793489, he states that the cumulative balance of tax, penalty, and interest owed by petitioner on March 9, 2016 was greater than \$10,000.00,⁴ 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, Melissa Kate Koslow, and Heidi Corina; pages "1," "950," and "1,572" of a CMR; copies of notices of deficiency L-041793490 and L-041793489, and their respective associated mailing cover sheets; two USPS Forms 3811-A (requests for delivery information/return receipts after mailing) and the USPS responses thereto; and a copy of petitioner's electronically filed 2013 Application for Automatic Six-Month Extension of Time to File For Individuals, which was the last application filed before the issuance of the notices of deficiency, and which bears the same address as that listed on the notices.

11. The affidavit of Ms. Nagengast, who has been in her current position since October

⁴ As of March 9, 2016, assessment L-041793490 for tax period ended 12/31/2009 had a current balance due of tax, interest and penalty in the amount of \$1,305.60; and assessment L-041793489 for the tax period ended 12/31/2008 had a current balance due of tax, interest and penalty in the amount of \$8,786.21.

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. 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 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. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices, and the mailing cover sheet is the first sheet in the unit.

13. The CARTS-generated CMR for each batch of notices lists each notice in the order the notices are generated in the batch. The certified control numbers are also listed on the CMR under the heading entitled "Certified No." 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." Each CMR and associated batch of statutory notices are

forwarded to the Division's mail room together.

14. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

15. The affidavit of Ms. Koslow describes the mail room's general operations and procedures. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York,

area for mailing. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

16. The CMR for the batch of notices to be issued on October 7, 2014, including the notices addressed to petitioner herein, allegedly consisted of 1,572 cut sheet pages. As noted, the Division included herein only page "1" (the first page), page "950" (the page on which information pertaining to petitioner appears) and page "1,572" (the last page) from the CMR. Each of these three pages includes in its upper left corner the preprinted year/day/time "run" listing of "20142731700." Appearing in the upper right corner of the pages 1 and 1,572 is the handwritten date "10/7/14," reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated October 7, 2014, of the USPS Albany, New York, General Mail Facility. Both pages 1 and 950 include 11 entries, and page 1,572 includes three entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. Page 950 of the CMR indicates that notices of deficiency assigned certified control numbers 7104 1002 9730 0294 8382 and 7104 1002 9730 0294 8399, and reference numbers L-041793489 and L-041793490, respectively, were mailed to

“JAVINO-DALE” at the 64B Senix Ave., Ctr Moriches, NY 11934-2911, address listed thereon. The corresponding mailing cover sheets attached to the Nagengast affidavit as “exhibit B,” bear these certified control numbers and petitioner’s name and address as noted.

17. Appearing below the three entries on page 1,572 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS” and the preprinted number “17,284.” Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” below which the handwritten number “17,284” and the initials of the USPS employee appear. According to Ms. Nagengast, the affixation of postmarks and the Postal Service employee’s initials indicate that all 17,284 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS on October 7, 2014. According to both the Nagengast and Koslow affidavits, copies of the notices of deficiency were mailed to petitioner on October 7, 2014, as claimed.

18. Petitioner’s 2013 Application for Automatic Six-Month Extension of Time to File for Individuals (Form IT-370), electronically filed on April 6, 2014, reported petitioner’s address as 64 B Senix Ave., Center Moriches, NY 11934. This was the last return filed by petitioner prior to the issuance of notices of deficiency L-041793489 and L-041793490.

19. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS Forms 3811-A (requests for delivery information/return receipts after mailing) in this matter.⁵ Filing a USPS Form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured, or express mail. In this instance, Ms. Corina filed

⁵ Although paragraph five of Ms. Corina’s affidavit states that she prepared one Request for Delivery Information/Return Receipt After Mailing (PS Form 3811-A), copies of two requests for delivery information/return receipts after mailing and the USPS responses to the same are attached to her affidavit.

Forms 3811-A seeking information for the items mailed by the Division under certified numbers 7104 1002 9730 0294 8382 and 7104 1002 9730 0294 8399 on October 7, 2014 from the Albany, New York, branch of the USPS. The USPS's responses confirmed delivery of the certified mail items 7104 1002 9730 0294 8382 and 7104 1002 9730 0294 8390 on October 9, 2014 at 4:39 p.m. in Center Moriches, NY 11934. The scanned image of the recipient's signature as shown on each of the USPS responses is "Dale Javino." The scanned address of the recipient on each USPS response is "64 B Senix Ave."

20. In his petition, petitioner asserts that he filed his 2008 New York State Resident Income Tax Return (Form IT-201) on or about June 15, 2009, along with a payment. He also claims that he filed his 2009 New York State Resident Income Tax Return on an unknown date. Petitioner argues that the Division was time barred from issuing notices of deficiency L-041793489 and L-041793490. Copies of petitioner's 2008 and 2009 resident income tax returns were attached to the petition. However, no proof of mailing for either tax return was included with the petition. Petitioner also did not include any proof of payment of tax as reported due on either the 2008 or 2009 tax returns attached to the petition.

21. In her affirmation, Ms. Jordan claims, among other things, that petitioner's statute of limitations argument is without merit. She states that notices of deficiency L-041793489 and L-041793490 are not subject to any statute of limitations, because "[t]hese two assessments were created based on petitioner's failure to file personal income tax returns for tax years 2008 and 2009." Attached to Ms. Jordan's affirmation as "exhibit 6" is a certification of non-filing sealed and signed by Thomas Engel, Deputy Tax Commissioner, Office of Budget and Management Analysis, Disclosure and Government Exchange on January 23, 2017. Review of the certification indicates that on January 23, 2017, the Division searched its personal income tax

files for petitioner's 2008 and 2009 personal income tax returns and did not locate either such returns.

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 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 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 [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 [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* at 562).

C. Petitioner did not respond to the Division’s motion. Accordingly, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in th Division’s affidavits; consequently, these facts may be deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*).

D. 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 instant matter, the Division must first establish that notices of deficiency L-041793489 and L-041793490 are fixed and final such that petitioner no longer has any right to administrative or judicial review of the same.

E. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law §§ 681[b]; 689[b]). Alternatively, a taxpayer may contest a notice by filing a request for a

conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, 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 notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is 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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer’s last known address (Tax Law § 681[a]), and it is the Division’s initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

F. 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 evidence required of the Division in order to establish proper mailing is two-fold:

“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*, Tax Appeals Tribunal,

November 14, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, the proof submitted fails to establish that the notices of deficiency were properly mailed on October 7, 2014, and thus the period within which protests could be filed was not triggered as of such date.

H. An inadequacy in the evidence of mailing, as in Conclusion of Law G, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v. Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the described evidentiary failure with regard to the mailing of notices

of deficiency L-041793489 and L-041793490, the Division has nonetheless established, via the Corina affidavit and the accompanying USPS Forms 3811-A and USPS responses thereto, that the notices were mailed by certified mail and were, in fact, thereafter delivered to and accepted by petitioner on October 9, 2014 (*see* Finding of Fact 19). As a result, the period within which to challenge the notices of deficiency L-041793489 and L-041793490 commenced to run on the date of such actual receipt, i.e., October 9, 2014, and in order to be timely, a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). In turn, 90 days after the date of actual receipt of the notices of deficiency was January 7, 2015. There is no evidence in the record suggesting that petitioner protested the notices of deficiency within 90 days of receipt of the same. The petition in this matter was filed on July 13, 2016, a date that falls well beyond the statutory period within which timely protests had to have been filed. Thus, by operation of law, the assessments became fixed and final liabilities (*see* Tax Law § 681[b]).⁶ As a result, the liabilities represented by the underlying notices meet the threshold requirement for suspension of petitioner's driver's license pursuant to Tax Law § 171-v.

J. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a request for conciliation 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

⁶ As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest of the underlying notices of deficiency.

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]).

K. Petitioner, in his petition, asserted, among other things, that he filed his 2008 income tax return, along with a payment of tax due on the same, on or about June 15, 2009. He also asserted that he filed his 2009 tax return on an unknown date. Attachments to the petition did not include any proof of payment of tax due for either the 2008 or 2009 tax years (*see* Finding of Fact 20). Petitioner did not respond to the Division's motion. As such, there is no evidence that the two past-due tax liabilities, i.e., Assessment ID Nos. L-041793489 and L-041793490, were satisfied. Since petitioner failed to prove that the two fixed and final tax liabilities have been satisfied, his challenge to the suspension notice must fail (*see* Tax Law § 171-v[5]).

L. The Division's motion for summary determination is hereby granted, the petition of Dale Robert Javinio is denied, and the Division's notice of proposed driver's license suspension referral is sustained.

DATED: Albany, New York
May 25, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE