

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALBERT NIGRI	:	DETERMINATION
for Review of a Notice of Proposed Driver License	:	DTA NO. 828377
Suspension Referral under Tax Law § 171-v.	:	

Petitioner, Albert Nigri, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law § 171-v of the Tax Law.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Kileen C. Davies, Esq., of counsel), brought a motion, filed July 5, 2018, for an order granting summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Kileen C. Davies, Esq., dated July 5, 2018, and annexed exhibits, and the affidavit of Todd Lewis, dated July 5, 2018, and an annexed exhibit. Petitioner, appearing by Isaac Sternheim, CPA, failed to respond to the motion. Petitioner's response was due on August 6, 2018, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, James P. Connolly, 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, Albert Nigri, a notice of proposed driver license suspension referral (form DTF-454), Collection case ID: E-027667624-CL01-8 (60-day notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v.

2. This 60-day notice is dated February 23, 2017, and is addressed to petitioner at his Brooklyn, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated February 23, 2017, setting forth an unpaid assessment. The assessment was for personal income tax, assessment number L-045454102, for the tax period ended December 31, 2013. The assessment was for tax in the amount of \$311,298.00, interest in the amount of \$78,175.56 and penalty in the amount of \$57,968.09, for a total balance due of \$447,441.65.

3. The 60-day notice indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles (DMV) and petitioner's driver's license would be suspended. The front page of the 60-day notice informed petitioner that, unless one of the exemptions on the back page of the 60-day notice applied to him, he was required to pay the amount due, or set up a payment plan, in order to avoid suspension of his license.

The back page of the 60-day notice is entitled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that

“[i]f any of the following apply,” he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim.

The first two headings under the title, “How to respond to this notice,” are “child support exemption” and “commercial driver’s license exemption.” The third heading, “Other grounds,” states that the recipient’s driver’s license will not be suspended if any of the following apply:

“You are not the taxpayer named in the notice. The tax debts have been paid. The Tax Department [Division] is already garnishing your wages to pay these debts. Your license was previously selected for suspension for unpaid tax debts **and**: you set up a payment plan with the Tax Department [Division], **and** the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period.”

Also listed under “Other grounds” is the statement that the recipient may contact the Division to establish that he or she is eligible for innocent spouse relief under Tax Law § 654, or that enforcement of the underlying tax debts has been stayed by the filing of a bankruptcy petition.

Under the heading, “Protests and legal actions,” it is explained that if the recipient protests with the Tax Department, or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, “If you do not respond within 60 days,” the recipient is informed the Division will provide DMV with the information necessary to suspend the recipient’s driver’s license, unless the recipient does one of the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or her license by either filing a request for conciliation conference with the Division or a petition with the Division of Tax Appeals.

4. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the 60-day notice. By conciliation order dated September 8, 2017, the conferee sustained the 60-day notice.

5. Thereafter, petitioner filed a petition with the Division of Tax Appeals on September 12, 2017. The petition does not challenge the Division's issuance or petitioner's receipt of the 60-day notice. Instead, the petition asserts that a protest of the assessment underlying the 60-day notice, notice number L-045454102, was ongoing so his license should not have been suspended.¹

6. The Division submitted with its motion an affidavit, dated July 5, 2018, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis's 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.

7. Mr. Lewis's affidavit details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process undertaken by the Division in carrying out the license suspension program authorized by article 8, § 171-v of the Tax Law. These steps are summarized as follows:

¹The notice forming the basis for the 60-day notice, notice number L-045454102, was the subject of a determination wherein the petition challenging that notice was denied. That notice was issued on September 15, 2016 and, by operation of law, became fixed and final 91 days thereafter (Tax Law § 1138 [a] [1]). The protest for that notice did not commence until March 2, 2017, after the issuance of the 60-day notice.

a) The “Initial process” involves the Division’s identification of taxpayers who may be subject to the issuance of a 60-day notice of proposed driver license suspension referral under Tax Law § 171-v. First, the Division internally sets the following selection criteria: the taxpayer has an outstanding cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessment used to determine the cumulative total must be less than 20 years from the notice and demand issue date; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are excluded; and any taxpayer with a “taxpayer deceased” record on his or her collection case is excluded.

Next, the criteria are utilized to search the Division’s databases on a weekly basis, and a file is created of possible taxpayers to whom a 60-day notice could be sent. This process involves first utilizing the criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00 in the relevant time frame, and then for each such identified candidate, determining whether that candidate would be excluded under any of the following criteria:

- a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment(s) would leave the balance of such liability below the \$10,000.00 threshold for license suspension;
- the taxpayer is in bankruptcy;
- the taxpayer is deceased; or
- the taxpayer is on an active approved payment plan.

b) The “DMV data match” involves the Division providing identifying information to DMV for each taxpayer not already excluded under the foregoing criteria to determine whether the taxpayer has a qualifying driver’s license potentially subject to suspension per Tax Law § 171-v. DMV then conducts a data match of the information provided by the Division with its information and returns the following information to the Division: (1) social security number; (2) last name; (3) first name; (4) middle initial; (5) name suffix; (6) DMV client ID; (7) gender; (8) date of birth; (9) street; (10) city; (11) state; (12) zip code; (13) license class; and (14) license expiration date.

Once the Division determines that a taxpayer included in the DMV Data Match has a qualifying driver’s license, that taxpayer is put into the suspension process.

c) The “Suspension process” commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension detailed above in (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver license suspension referral will be issued to the taxpayer via regular United States mail.

After 75 days with no response from the taxpayer, and no update to the case indicating that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed), the case is electronically sent by the Division to DMV for license suspension.² Such case data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends a

²Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer “fails” the compliance criteria check, the case status will be updated to “on-hold” or “closed” (depending on the circumstances) and the suspension will be stayed. If the status is “on-hold,” the 60-Day notice of proposed driver license suspension referral remains on the Division’s system but the suspension will not proceed until the “on-hold” status is resolved. If the suspension is “closed,” the 60-day notice will be canceled. If the taxpayer “passes” this final compliance check, the suspension by DMV will proceed.

return data file to the Division each day confirming data records that were processed successfully, and indicating any data records with an issue. The Division investigates those data records with an issue. With regard to the data records that were processed successfully, DMV sends a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the taxpayer, and DMV does not receive a cancellation record from the Division, the taxpayer's license will be marked as suspended on the DMV database.

d) The "Post-Suspension process" involves monitoring events subsequent to license suspension so as to update the status of a suspension that has taken place. Depending upon the event, the status of a suspension may be changed to "on-hold" or "closed." A change to "on-hold" status can result from events such as those set forth above in (a) (e.g., the filing of a protest, a bankruptcy filing, or the creation and approval of an installment payment agreement). Where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Division for resuspension until resolution of the "on-hold" status; however, the 60-day notice of proposed driver license suspension referral would remain in the Division's system. If the status is changed to "closed," the 60-day notice of proposed driver license suspension referral is canceled.

8. Mr. Lewis's affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice and the consolidated statement of tax liabilities described in Findings of Fact 1 and 2, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Lewis's affidavit. Mr. Lewis avers that, based upon his review of Division records and his personal knowledge of Departmental policies and

procedures regarding driver's license suspension referrals, the issuance on February 23, 2017 to petitioner of the 60-day notice comports with statutory requirements, petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5) and, therefore, the 60-day notice has not been and should not be canceled.

9. In its answer to the petition, and under the motion at issue herein, 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 summary determination in its favor.

CONCLUSIONS OF LAW

A. Tax Law § 171-v provides for the enforcement of past-due tax liabilities through the suspension of drivers' licenses. 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]). At issue is a 60-day notice, dated February 23, 2017, addressed to petitioner, advising him of the possible suspension of his driver's license. This notice is in facial compliance with the terms of Tax Law § 171-v, in that it is specifically based on: a) the Division's claim that a personal income tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$447,441.65, remains outstanding and unpaid; and b) the fact that petitioner does not meet any of the six specifically enumerated grounds set forth at Tax Law § 171-v (5) (i) - (vi) allowing for relief from license suspension.

B. Petitioner initially challenged the proposed suspension of his license by filing a timely request for conciliation conference with BCMS, which issued a conciliation order denying the request and sustaining the notice. Petitioner, in turn, challenged the BCMS conciliation order by filing a timely petition with the Division of Tax Appeals. Therefore, the Division of Tax Appeals has jurisdiction over the petition.

C. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules). 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]).

D. 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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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*). As detailed hereafter, there are no material and triable issues of fact and the Division is entitled to summary determination in its favor.

E. A taxpayer’s right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a petition with the Division of Tax Appeals and must be based on one of 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]).

F. As set forth above, petitioner did not respond to the Division’s motion for summary determination. Therefore, it is deemed that petitioner has 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], *appeal dismissed* 62 NY2d 942 [1984]). Furthermore, petitioner has not raised any of the foregoing six specifically enumerated substantive bases for relief from an otherwise facially valid notice of proposed

license suspension (Tax Law § 171-v [5] [i] - [vi]). Thus, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination is appropriate (*see Matter of Faupel*, Tax Appeals Tribunal, December 23, 2015).

G. The Division of Taxation's motion for summary determination is hereby granted, the petition of Albert Nigri is denied, and the Division's notice of proposed driver license suspension, dated February 23, 2017, is sustained.

DATED: Albany, New York
November 01, 2018

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE