STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ARIEL JIMENEZ** for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law § 171-v.	:	DETERMINATION DTA NO. 828477

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

On June 8, 2019 and June 18, 2019, respectively, petitioner, appearing by Hodgson Russ LLC (William J. Comiskey, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by December 23, 2019, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the notice of proposed driver license suspension referral should be sustained.

FINDINGS OF FACT[1]

1. Petitioner, Ariel Jimenez, was a tax return preparer who was audited by the Division of Taxation (Division) with respect to returns that he prepared for tax years 2009 through 2011.

2. As a result of the audit, the Division issued three notices of deficiency (Assessment Nos. L-038866440, L-038866437 and L-038866435) to petitioner which asserted preparer penalties under Tax Law § 685 (aa) (the Preparer Assessments), as follows:

Assessment No.	Penalty Amount Assessed
L-038866440	$243,000.00
L-038866437	$ 13,000.00
L-038866435	$464,000.00
Total	$720,000.00

3. Petitioner filed a petition with the Division of Tax Appeals protesting the Preparer Assessments.

4. On April 25, 2016, petitioner entered a stipulation for discontinuance with the Division, settling his protest of the Preparer Assessments, as follows:

“Deficiency: $0.00

Interest: $0.00

Penalty: $162,000.00”

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[1] The parties executed and submitted a Stipulation of Facts setting forth seven numbered stipulated facts. The stipulated facts are renumbered and generally incorporated herein. Additionally, pursuant to State Administrative Procedure Act (SAPA) § 307 (1), both parties submitted proposed findings of fact. Petitioner submitted 13 proposed findings of fact and the Division submitted multiple unnumbered paragraphs of proposed findings of fact. Petitioner’s proposed findings of fact 1, 2, 4, and 6 through 13 are supported by the record and have been renumbered and generally incorporated herein. Petitioner’s proposed finding of fact 3 is a legal conclusion and not a proper finding of fact. Petitioner’s proposed finding of fact 5 has been modified to more accurately reflect the record. As the Division’s proposed findings of fact are unnumbered, they will not be ruled on individually. To the extent the Division’s proposed findings of fact are supported by the record and are consistent with the stipulation of facts, they are generally incorporated herein; however, a portion of the first sentence in the last paragraph of the Division’s proposed findings of fact is rejected as legal argument and legal conclusion.

The stipulation for discontinuance further provided, in part, that "This stipulation is subject to the condition that petitioner remit $40,500.00 to the Division by June 20, 2016; otherwise the penalty will [sic] recomputed to be $180,000.00."

5. Petitioner failed to remit payment in the amount of $40,500.00 by the date established in the stipulation for discontinuance, and the Preparer Assessments were recomputed to total $180,000.00. Although the stipulation for discontinuance does not provide a breakdown of the reduced amount per assessment number, the parties agreed in the stipulation of facts that the Preparer Assessments were reduced as follows:

Assessment No.	Penalty Amount Assessed
L-038866440	$ 70,000.00
L-038866437	$ 10,000.00
L-038866435	$100,000.00
Total	$180,000.00

6. On May 13, 2016, the Division of Tax Appeals issued an order of discontinuance for the petition protesting the Preparer Assessments, pursuant to the stipulation for discontinuance.

7. On December 14, 2016, the Division issued a notice of proposed driver's license suspension referral to petitioner (60-day notice).

8. The 60-day notice stated, in part, that "[n]ew legislation allows New York State to suspend the driver's licenses of persons who have delinquent unpaid tax debts. Our records indicate you owe the amounts listed on the enclosed Consolidated Statement of Tax Liabilities."

9. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), dated December 14, 2016, setting forth the Preparer Assessments listed above (***see*** finding of fact 2), as well as an assessment for tax year 2014, as follows:

Assessment ID	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Current Balance Due
L-043943109	12/31/14	$3,291.00	$518.04	$1,069.50	$4,878.54
L-038866440	12/31/10	0.00	$2,761.53	$243,000.00	$245,761.53
L-038866437	12/31/11	0.00	$147.73	$13,000.00	$13,147.73
L-038866435	12/31/09	0.00	$5,273.04	$464,000.00	$469,273.04
Total					$733,060.84

The consolidated statement of tax liabilities did not accurately set forth the correct amount of the Preparer Assessments as reflected in the stipulation for discontinuance (***see*** findings of fact 4 and 5).

10. Petitioner timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). On August 28, 2017, petitioner's written request to discontinue the matter before BCMS was accepted as filed. On November 20, 2017, petitioner filed the petition in this matter with the Division of Tax Appeals.

11. In the petition challenging the 60-day notice, petitioner has not raised any of the grounds set forth in Tax Law § 171-v (5). Instead, petitioner asserts that the preparer penalties imposed under Tax Law § 685 (aa) do not constitute "tax liabilities" within the meaning of Tax Law § 171-v (1) and that the statutory limitations of permissible grounds for challenging a notice of proposed driver's license suspension referral set forth in Tax Law § 171-v (5) do not apply to him because he is not a "taxpayer with past-due tax liabilities" as required by that section.

CONCLUSIONS OF LAW

A. Tax Law § 171-v provides, in relevant part, as follows:

> "(1) The commissioner shall enter into a written agreement with the commissioner of motor vehicles, which shall set forth the procedures for the two departments to cooperate in a program to improve tax collection through the suspension of driver's licenses of taxpayers with past due tax liabilities equal to or in excess of ten thousand dollars. *For the purposes of this section, the term "tax liabilities" shall mean any tax, surcharge, or fee administered by the commissioner, or any penalty or interest*

> *due on these amounts owed by an individual with a New York driver's license*, the term "driver's license" means any license issued by the department of motor vehicles, except for a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law, *and the term "past due tax liabilities" means 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).

Petitioner contends that preparer penalties under Tax Law § 685 (aa) do not constitute "tax liabilities" as defined in Tax Law § 171-v, arguing that "penalties are included in the definition of 'tax liabilities' if, and only if, the penalties are due on 'any tax, surcharge, or fee administered by the commissioner." According to petitioner, the definition of tax liabilities under Tax Law § 171-v (1) requires that taxes are (or were) actually owed and that penalties have been imposed in connection with those taxes, and stand-alone penalties, such as the preparer penalty, are not due on a tax, surcharge or fee administered by the commissioner.

Petitioner's strained reading of Tax Law § 171-v (1) is inconsistent with the plain language of the statute. As noted above, "tax liabilities" means any tax, surcharge, or fee administered by the commissioner, or any penalty *or* interest due on these amounts. Petitioner's argument that the penalty must be imposed in connection to an underlying tax liability ignores the rules of statutory construction that each word in the statute must be given effect (***Matter of Friss v City of Hudson Police Dept***, 187 AD2d 94, 96 [3d Dept 1993] ["It is a well-settled principle of statutory construction that every word in a statute is to be given effect and to be presumed to have some meaning"]). Specifically, petitioner's construction of the statutory language ignores the word "or" in the phrase "any penalty *or* interest due on these amounts."

When "or" is used in a statute, it is a "disjunctive particle . . . indicating an alternative and it often connects a series of words or propositions presenting a choice of either" (***Matter of Gerald R.M.***, 12 AD3d 1192, 1194 [4th Dept 2004]). The use of the disjunctive "or" indicates that the definition of tax liabilities includes penalties of all types, not merely limited to penalties

that are due on a tax, surcharge or fee, and the phrase "due on these amounts" applies to the word which immediately precedes it, specifically, interest.

B. The Tax Appeals Tribunal has upheld the suspension of driver's licenses in various cases where the past due liability at issue was for penalty only, without tax assessed against the taxpayer, and has held that "[t]ax liabilities include penalties and interest," without limiting such amount to only penalties that are due on an underlying tax (***Matter of Salaria***, Tax Appeals Tribunal, September 28, 2018). In ***Matter of Salaria***, the Tribunal sustained a notice of proposed driver's license suspension referral where the past due tax liability was for a withholding penalty and interest assessed against the taxpayer as a responsible person under Tax Law § 685 (g) (***Matter of Salaria***; ***see also Matter of DeMartino*** Tax Appeals Tribunal, December 16, 2016). Similarly, in ***Matter of Nastasi*** (Tax Appeals Tribunal, July 16, 2018), the Tribunal sustained a notice of proposed driver's license suspension referral where the past due liability was for penalty and interest assessments only. In each of these cases, in determining that the taxpayers had past due tax liabilities, the Tribunal did not distinguish between the treatment of tax assessments and penalty assessments for purposes of Tax Law § 171-v, and held that tax liabilities include penalties and interest (***see Matter of Salaria***; ***Matter of DeMartino***; ***Matter of Nastasi***).

As such, petitioner's argument that the preparer penalties imposed under Tax Law § 685 (aa) do not constitute "tax liabilities" within the meaning of Tax Law § 171-v (1) is rejected.

C. The petition of Ariel Jimenez is denied and the notice of proposed driver license suspension referral dated December 14, 2016, as modified by findings of fact 4, 5, and 9, is sustained.

DATED: Albany, New York
June 18, 2020

/s/ Barbara J. Russo______________
ADMINISTRATIVE LAW JUDGE