

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HENRY J. MILLER	:	DETERMINATION DTA NO. 828481
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law § 171-v.	:	

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

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), filed a motion on May 3, 2019, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Andreozzi Bluestein, LLP (Michael J. Tedesco, Esq.), responded to the Division of Taxation's motion on May 31, 2019. Pursuant to 20 NYCRR 3000.5 (d), the 90-day period for issuance of this order commenced June 3, 2019. Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's notice of proposed driver license suspension referral pertaining to petitioner should be sustained.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Henry J. Miller, a notice of proposed driver license suspension referral (form DTF-454), Collection case ID: E-028335991-CL01-3 (60-day notice or 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. The 60-day notice is dated December 7, 2016, and is addressed to petitioner at his Rochester, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated December 7, 2016, setting forth eight unpaid assessments subject to collection action. The assessments were for sales tax, as follows:

Assessment ID	Tax Period Ended	Tax	Interest	Penalty	Payments/ Credits	Current Balance
L-032420615	2/29/08	\$8,796.03	\$22,158.02	\$2,638.80	\$0.00	\$33,592.85
L-032420614	5/31/08	9,777.00	23,436.46	2,933.10	0.00	36,146.56
L-032420613	8/31/08	35.62	31.22	0	0.00	66.84
L-030239936	11/30/07	8,022.54	21,200.93	2,406.65	0.00	31,630.12
L-029814156	5/31/07	9,765.88	28,394.16	2,929.58	0.00	41,089.62
L-029814155	8/31/07	11,021.95	30,553.21	3,306.39	0.00	44,881.55
L-028582929	2/28/07	6,319.62	19,274.94	1,995.76	0.00	27,590.32
L-028582928	11/30/06	6,903.63	16,935.23	2,070.96	3,153.52	22,756.30

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, he was required to either pay the amount due, or set up a payment plan, in order to avoid suspension of his license.

4. The back page of the 60-day notice is titled, "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.

5. 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.

6. Under the heading, "Protests and legal actions," it is explained that if the recipient protests with the Division, 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 BCMS, or a petition with the Division of Tax Appeals.

7. On February 1, 2017, petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the 60-day notice. By conciliation order dated August 25, 2017, the conferee sustained the notice of proposed driver license suspension referral.

8. Thereafter, petitioner filed a petition, dated November 21, 2017 and received on November 27, 2018, with the Division of Tax Appeals. The petition states, in part, the following:

- "a) On or around April 11, 2016, and in an effort to address his tax liabilities with the Department, the Petitioner entered into a voluntary wage garnishment.
- b) The Petitioner earns wages on a part-time basis.
- c) Subsequent to the establishment of the aforementioned arrangement, the garnishment defaulted or was otherwise ceased by the Department.
- d) Upon information and belief, the Department ceased such wage garnishment as Petitioner's wages were insufficient to sustain a wage garnishment.
- e) The Petitioner is employed part-time and has limited financial resources to meet his basic necessary living expenses.
- f) The Petitioner received Social Security that is exempt from the repayment of tax debt under the provisions of CPLR §5205(1)(2).
- g) The Petitioner is, therefore, unable to full-pay his NYS tax liabilities.

h) During the Conciliation Conference, the Department suggested that the Petitioner enter into an Offer in Compromise or Installment Payment Agreement to avoid the Driver's License Suspension Referral. However, either an Offer or an Installment Payment Agreement would require a large lump-sum payment which, upon information and belief, the Petitioner cannot afford.

i) It was explained to the Department at the Conference that the Petitioner is prepared to and willing to address his liabilities through a wage garnishment. The Department continued to maintain its position that the Petitioner's wages were insufficient to sustain such an arrangement.

j) Even through the Petitioner has proposed a viable payment arrangement, the Department has rejected such proposal on the grounds that the Petitioner 'doesn't make enough.'

k) Given the nature the Petitioner's income, he is essentially exempt from making any payments to the Department.

l) Under Tax Law §171-v, a taxpayer's driver's license shall not be suspended or revoked if the taxpayer makes payment arrangements satisfactory to the Commissioner. Mr. Miller has attempted and is willing to enter into a wage garnishment, but the Commissioner refuses to accept that payment arrangement. Other standard payment arrangements are also unsustainable as the Department has acknowledged that Mr. Miller 'doesn't make enough.'

m) Mr. Miller has a property interest in his NYS Driver's License. The State proposed to suspend his Driver's License for failure to make payment arrangements for his tax liability. But the State failed to provide Mr. Miller with a meaningful opportunity to enter into a wage garnishment. Consequently, Mr. Miller was denied a meaningful opportunity to be heard before his license was referred for suspension, which may be in violation of the Due Process Clause of the Constitution of the United States.

n) In an effort to maintain his regular driving privileges, which are essential for his basic needs, the Petitioner still endeavors to enter into an affordable payment arrangement with the Department."

9. The Division submitted with its motion an affidavit, dated May 3, 2019, 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.

10. 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 § 171-v of the Tax Law. These steps are summarized as follows:

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 of proposed driver license suspension referral 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:

- the taxpayer is deceased;
- the taxpayer is in bankruptcy:
- 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 on an active approved payment plan; or
- the taxpayer's wages are being garnished for the payment of past-due tax liabilities, past-due child support, or combined child and spousal support arrears.

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 such that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed), the case will be electronically sent by the Division to DMV for license suspension.¹ Such case data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends a 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

¹ Prior 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.

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.

11. 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 of proposed driver license suspension referral 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 of the 60-day notice to petitioner on December 7, 2016 comports with statutory requirements, petitioner has not established 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.

12. The Division asserts that the December 7, 2016 notice complies with Tax Law § 171-v (3), and that petitioner has not established that he is entitled to 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). Specifically, in response to petitioner's argument regarding wage garnishment, the Division argues that it cannot garnish a petitioner's income unless he meets minimal income requirements. Ms. Culihan affirms that the Division cannot garnish petitioner's income because he does not meet the minimum requirements that his disposable weekly earnings exceed the greater of thirty times the federal or state minimum hourly wage (*see* CPLR § 5231 [b]). As such, the Division argues that petitioner 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.

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 December 7, 2016, 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 sales tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$237,754.16, remains outstanding and unpaid; and b) 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 60-day 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 to dismiss the petition under section 3000.9 (a) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (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]).

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 Village 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*).

E. A taxpayer’s right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited, 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. Petitioner argues that material issues of fact exist and therefore summary determination should be denied, contending that he is working to submit an offer in compromise (OIC) to the Division in an effort to obtain a payment arrangement acceptable to the Commissioner, and further that the Division discontinued a voluntary wage garnishment because it determined that petitioner's income was insufficient.

Petitioner's arguments fail to raise a material issue of fact. While petitioner contends that he is working on an OIC, he has offered no proof in admissible form that any payment arrangement has been currently entered into. Indeed, petitioner's statement that he is "working to submit" an OIC shows that there is not a payment arrangement at this time. Similarly, petitioner's statement that the Division discontinued petitioner's voluntary wage garnishment establishes that no grounds exist under § 171-v (5) (iii) to challenge the notice. Therefore, petitioner has not established any of the foregoing six specifically enumerated substantive bases for relief from an otherwise facially valid notice of proposed license suspension (*see* 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 Henry J. Miller is denied, and the Division's notice of proposed driver license suspension, dated December 7, 2016, is sustained.

DATED: Albany, New York
August 29, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE