

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LIU BAOTING : DETERMINATION
 : DTA NO. 828533
for Revision of a Determination or for Refund of Cigarette :
Tax under Article 20 of the Tax Law for the Period :
November 12, 2014 and for Review of a Notice of :
Proposed Driver License Suspension Referral under Tax :
Law § 171-v. :

Petitioner, Liu Baoting, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period November 12, 2014 and 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. (Hannelore F. Smith, Esq., of counsel), brought a motion, filed September 4, 2018, 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 pro se, failed to respond to the motion. Petitioner's response was due on October 4, 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, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order denying petitioner's challenge of a notice of determination.

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

FINDINGS OF FACT

1. Petitioner, Liu Baoting (aka Liu-Bao Ting), filed a request for conciliation conference (request) with the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services (BCMS) protesting a notice of determination assessing additional cigarette tax due, dated February 2, 2016, and bearing assessment identification number L-044360067 (notice). The request was dated May 1, 2016, and marked as received by BCMS on May 2, 2016.

2. A conciliation conference was conducted on August 24, 2016. Subsequently, BCMS issued a conciliation order, dated December 16, 2016, denying the request and sustaining the notice.

3. The Division subsequently issued to petitioner a notice of proposed driver license suspension referral (form DTF-454), collection case ID: E-044360067-CL01-6 (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.

4. The 60-day notice is dated November 15, 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 November 15, 2017, setting forth one unpaid assessment subject to collection. The assessment was for cigarette tax, assessment ID L-044360067 for the tax period ended November 12, 2014 (*see* finding of fact 1), and imposed

penalty in the amount of \$423,000.00, while acknowledging a payment/credit of \$37,462.00, thus leaving a total balance due of \$385,538.00.

5. 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.

6. 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.

7. 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.

8. 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 BCMS, or a petition with the Division of Tax Appeals.

9. On December 20, 2017, petitioner filed a petition with the Division of Tax Appeals protesting both the 60-day notice and the notice.

10. The petition does not challenge the Division’s issuance, or petitioner’s receipt of, either the 60-day notice or the notice. Instead, the petition states that petitioner is retired with no income, has health problems that make it difficult to find a job, and that he did not make a profit from his unlicensed sale of cigarettes. Petitioner attached copies of his 2014, 2015 and 2016 federal income tax returns as proof of income.

The Conciliation Order

11. To show proof of proper mailing of the conciliation order, the Division submitted with its motion papers: (i) an affidavit, dated July 30, 2018, of Robert Farrelly, the supervisor of Tax

Conferences of BCMS; (ii) a copy of a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) containing a list of conciliation orders issued by the Division on December 16, 2016; (iii) an affidavit, dated August 1, 2018, of Fred Ramundo, a supervisor in the Division’s mail room; (iv) a copy of the petition, and its attached exhibits, filed with the Division of Tax Appeals on December 20, 2017; (v) a copy of petitioner’s request for conciliation conference, dated May 1, 2016 and marked as received by BCMS on May 2, 2016; (vi) a copy of the conciliation order, dated December 16, 2016, and the associated mailing cover sheets addressed to petitioner and his then-representative.

12. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for BCMS, sets forth the Division’s general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of conciliation orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

13. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

14. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division’s Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, the taxpayer’s name, mailing address, BCMS number, certified control number, and certified control number bar code.

15. The AFP Unit also produces a computer-generated CMR entitled “Certified Record for Presort Mail.” The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “Certified No.” The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

16. The clerk’s regular duties include associating each cover sheet, conciliation order and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

17. It is the general office practice that the BCMS clerk stamps “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the bottom left corner of the last page of the CMR.

18. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “12-16-16” was written in the upper right corner of each page of the CMR.

19. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from BCMS by an employee of the Division’s Mail Processing Center.

20. Mr. Farrelly attests to the truth and accuracy of the copy of the four-page CMR, which contains a list of the conciliation orders issued by BCMS on December 16, 2016. The CMR lists

43 certified control numbers. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number and the name and address of the addressee, and postage and fee amounts.

21. Information regarding the conciliation order issued to petitioner is contained on pages one and three of the CMR. On page one, corresponding to certified control number 7104 1002 9730 0066 9074 is reference number 000270423, along with the name and address of petitioner's then-representative, Sueanne S. Co, at Co & Associates PLLC, in New York, New York. On page three, corresponding to certified control number 7104 1002 9730 0066 9302 is reference number 000270423, along with the name and address of petitioner, Liu Baoting. Specifically, the Brooklyn, New York, address listed on the CMR is the same address as that to which the notice was issued, and as appearing on petitioner's request for a conciliation conference, the conciliation order, the 60-day notice, the petition filed by petitioner, and on the income tax returns for 2014, 2015, and 2016 that petitioner submitted with his petition.

22. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in

Albany, New York. A postal employee affixes a postmark and his or her signature to the CMR indicating receipt by the post office.

23. In this particular instance, the postal employee affixed a postmark dated December 16, 2016, to each page of the four-page CMR. The postal employee also circled the number "43" and initialed page four to indicate the total pieces of mail received at the post office.

24. Mr. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo's staff on the following day after its initial delivery, and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

25. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on December 16, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Liu Baoting, and a piece of certified mail to Sueanne S. Co, to a branch of the USPS in Albany, New York, in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on December 16, 2016, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing these pieces of certified mail to petitioner and his BCMS representative on December 16, 2016.

The 60-Day Notice

26. The Division also submitted with its motion an affidavit, dated September 31, 2018 [sic], of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED).¹ 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.

27. 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

¹ Given that the Division's motion was filed on September 4, 2018, it appears evident that the September 31, 2018 date set forth on the Lewis affidavit represents scrivener's error, and in light of finding of fact 29, is of no consequence.

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:

- 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 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.² 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

² 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.

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.

28. 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 3 and 4, 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 November 15, 2017 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.

29. In its answer to the petition, and in its representative’s affirmation in support of the motion at issue herein based upon her review of the Division’s official records as kept in the ordinary course of business, the Division maintains that petitioner: a) has not argued or provided any basis to establish that the liability assessed under the notice (L-044360067), as sustained by

the December 16, 2016 conciliation order, is not fixed, final and outstanding (*see* finding of fact 2), and b) has not sought relief from the proposed 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). The Division thus argues that the proposed suspension is proper, and that there is no basis for administrative or judicial review of such proposed suspension, 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. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss a petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). 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]).

B. Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211, and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

C. To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman*).

D. Petitioner initially, and only, challenged the substantive merits of the assessment set forth on notice number L-044360067 by filing a request for a BCMS conference. That challenge was denied by a conciliation order dated December 16, 2016. Thereafter, on December 20, 2017, petitioner filed a petition challenging both the foregoing denial of his request, and the Division’s subsequently issued notice of proposed suspension of his driver’s license. Since the petition presents two distinct challenges, and since each distinct challenge is within the ambit of the subject motion, the two challenges will be addressed independently hereafter.

The Conciliation Order

E. Petitioner did not respond to the Division’s motion and has presented no evidence to contest the facts alleged in the Lewis, Farrelly and Ramundo affidavits; consequently, those facts

are deemed admitted (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *Whelan v GTE Sylvania*). Accordingly, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc.; John William Costello Assocs. v Std. Metals*, 99 AD2d 227 [1st Dept 1984] *lv dismissed* 62 NY2d 942 [1984])

F. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

G. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato; Matter of DeWeese; Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, when an order is found to have been properly mailed by the Division to the taxpayer’s last known address by certified or registered mail, the petitioner bears the burden of

proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

H. 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 orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in the particular instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

I. In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address. As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner and his then-representative at their last known addresses by certified mail on December 16, 2016, the date appearing on the CMR.³ The affidavits described the various stages of producing and mailing orders and attested

³ While the Tax Law does not specifically provide for the service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1998). Here, the record establishes that the Division properly served petitioner's representative, Ms. Co, with a copy of the conciliation order.

to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed with respect to the conciliation order issued to petitioner and his then-representative. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of December 16, 2016. There are 43 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "43" on page four of the CMR and initialing that page, that the post office received 43 items for mailing. In short, the Division established that it mailed the order by certified mail on December 16, 2016 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

J. In this case, the order was properly mailed when it was delivered into the custody of the USPS on December 16, 2016, properly addressed to petitioner at his last known address, and with the requisite amount of postage affixed, and it is this date which commenced the 90-day period within which a protest had to have been filed. In fact, the cover letter that accompanied the conciliation order here apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order. Where a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer. Specifically, that section provides that a conciliation order affirming a written notice described in section 170 (3-a) is binding unless a petition is filed "within ninety days after the conciliation order is issued." As noted previously, issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*). Hence, the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, i.e., on December 16, 2016.

K. In sum, the Division has established that the conciliation order was properly mailed as addressed to petitioner at his last known address on December 16, 2016. Since the petition was filed on December 20, 2017, or more than 90 days after the December 16, 2016 date of issuance of the conciliation order, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits vis-a-vis the assessment numbered L-044360067 (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

The 60-Day Notice

L. Also at issue is petitioner's protest of the 60-day notice proposing the suspension of his driver's license. Petitioner challenged this proposed suspension of his driver's license by filing a petition with the Division of Tax Appeals. It is undisputed that the petition was timely filed with respect to the 60-day notice, and therefore, the Division of Tax Appeals has jurisdiction to address this protest.

M. 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 notice of proposed driver license suspension referral, dated November 15, 2017, addressed to and advising petitioner 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 cigarette tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$385,358.00, remain 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.

N. 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]).

O. 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; John William Costello Assocs. v Standard Metals Corp.*). That is, petitioner has not alleged or provided any evidence that the fixed and final liability under assessment identification number L-044360067, listed as collection case ID: E-044360067 on the statement of consolidated liabilities, has been reduced in any manner (by payment or otherwise) to an amount less than the requisite \$10,000.00 threshold for license suspension under Tax Law § 171 - v (1). 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 in the Division's favor will be granted (*see Matter of Faupel*, Tax Appeals Tribunal, December 23, 2015).

P. The Division of Taxation's motion is hereby granted. The petition of Liu Baoting is dismissed with regard to the December 16, 2016 conciliation order, as indicated by conclusion of law K; the petition is denied with regard to 60-day notice, as indicated in conclusion of law O, and the Division's notice of proposed driver license suspension, dated November 15, 2017, is sustained.

DATED: Albany, New York
December 27, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE