

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition                                                                     | : |                |
| of                                                                                                | : |                |
| <b>ALAN J. BRESLER</b>                                                                            | : | DETERMINATION  |
|                                                                                                   | : | DTA NO. 829527 |
|                                                                                                   | : |                |
| for Review of a Proposed Driver License Suspension<br>Referral Under Tax Law, Article 8, § 171-v. | : |                |

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

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Hannelore F. Smith, Esq., of counsel), brought a motion on February 10, 2020, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9 (a) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Hannelore F. Smith, Esq., dated February 7, 2020, and annexed exhibits. Petitioner, appearing by appeared by Isaac Sternheim & Co. (Isaac C. Sternheim, CPA), did not file a response to the Division of Taxation's motion. The 90-day period for issuance of this determination began on March 11, 2020. Based upon the motion papers, the affidavits and documents submitted therewith, 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 subject of this motion is a notice of proposed driver license suspension referral (form DTF-454), Collection case ID: E-025451679-CL01-6 (60-day notice or notice) issued by the Division of Taxation (Division) to petitioner, Alan J. Bresler. The 60-day notice advised petitioner that he 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 May 1, 2019, 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 May 1, 2019, setting forth 12 unpaid assessments subject to collection action, for a total amount due of \$860,754.84, including penalty and interest. The assessments were for sales and use tax, and included the following four assessments, in the total amount of \$259,116.66:

| Assessment ID | Tax Period Ended | Tax Amount Assessed | Interest Amount Assessed | Penalty Amount Assessed | Current Balance Due |
|---------------|------------------|---------------------|--------------------------|-------------------------|---------------------|
| L-034988860   | 11/30/09         | \$17,896.17         | \$51,578.42              | \$5,368.81              | \$74,843.40         |
| L-034988859   | 5/31/10          | \$15,410.73         | \$40,243.12              | \$4,623.07              | \$60,276.92         |
| L-034288405   | 11/30/08         | \$11,144.98         | \$38,778.89              | \$3,343.29              | \$53,267.16         |
| L-034288404   | 2/28/09          | \$15,273.50         | \$50,873.73              | \$4,581.95              | \$70,729.18         |

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 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 that 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’s Bureau of Conciliation and Mediation Services (BCMS), or filing a petition with the Division of Tax Appeals.

7. The Department of Motor Vehicles suspended petitioner’s driver’s license by order of suspension or revocation dated July 16, 2019.

8. On July 22, 2019, petitioner filed a request for a conciliation conference (request for conciliation) before the Bureau of Conciliation and Mediation Services (BCMS). By conciliation order dated August 16, 2019, BCMS dismissed the request for conciliation on the ground that it was untimely filed.

9. On August 26, 2019, the Division of Tax Appeals received a petition protesting the 60-day notice. The petition was delivered by United States Postal Service (USPS) priority mail, which was postmarked August 20, 2019.

10. In its motion, the Division submitted, as relevant here: (i) an affirmation, dated February 7, 2020, of Hannelore F. Smith, Esq., an attorney employed in the Division’s Office of Counsel; and (ii) an affidavit, of Todd Lewis, dated February 7, 2020.

11. The affirmation of Ms. Smith explains that the Division did not receive any response from petitioner to the 60-day notice, and for that reason the Department of Motor Vehicles issued the order of suspension or revocation dated July 16, 2019. Ms. Smith’s affirmation further asserts that the request for conciliation filed by petitioner protested the order of suspension or

revocation, but BCMS elected to treat the request for conciliation as a protest of the 60-day notice. The Division did not supply a copy of the request for conciliation with its motion papers. The affirmation argues that the petition should be dismissed, or, in the alternative, summary determination granted, because petitioner has not raised any of the five grounds upon which a 60-day notice may be protested, citing Tax Law § 171-v [5]).

12. Mr. Lewis 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.

13. 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 used 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 using 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 Division sends the case electronically to DMV for license suspension. 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 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.

14. 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 the Division's policies and procedures regarding driver's license suspension referrals, the issuance of the 60-day notice to petitioner on May 1, 2019 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.

15. In its answer to the petition, and under the motion at issue herein, the Division asserts that petitioner did not timely protest the 60-day notice because he filed his request for conciliation more than 60 days after the issuance of the 60-day notice, but did not present any proof as to when the 60-day notice was mailed. The Division also claims that the Division has not sought relief from the suspension of his driver's license under any of the 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 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 (*see* Tax Law § 171-v [3]). At issue is a notice of proposed driver license suspension referral, dated May 1, 2019, 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 personal income tax assessments pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$17,481.87, remain outstanding and unpaid, and b) petitioner does not meet any of the specifically enumerated grounds set forth at Tax Law § 171-v (5) (i) - (vi) allowing for relief from license suspension.

B. Petitioner challenged the proposed suspension of his license by filing a request for conciliation conference with BCMS. After BCMS dismissed that request as untimely, petitioner timely filed a petition with the Division of Tax Appeals. Therefore, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference.

C. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the 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. The Division claims that the request for conciliation was not timely filed but has presented no proof of mailing on this motion. Accordingly, this argument for summary determination fails (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

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]).<sup>1</sup>

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

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<sup>1</sup> By part EEE of Chapter 59 of the Laws of 2019, the Legislature amended Tax Law § 171-v to add two new grounds for protesting the issuance of a drivers license suspension notice, namely “(vii) the taxpayer receives public assistance or supplemental security income; or (viii) the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship.” Part EEE made this new legislation effective as of the ninetieth day after the date of chapter 59's enactment, April 12, 2019. In light of the amendment's delayed effective date, it must be given prospective application only and is thus inapplicable to this proceeding, having become effective after the date of the 60-day notice issued to petitioner (*see Davidson v Evans*, 104 AD3d 1046 [3d Dept 2013]).

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 Alan J. Bresler is denied, and the Division's notice of proposed driver license suspension, dated May 1, 2019, is sustained.

DATED: Albany, New York  
June 4, 2020

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE