STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **JOHN LANZIONE** for Review of a Notice of Proposed Driver License Suspension Referral under Article 8 of the Tax Law.	DETERMINATION DTA NO. 850217

Petitioner, John Lanzione, filed a petition for review of a notice of proposed driver license suspension referral under article 8 of the Tax Law.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Nelson F. Colberg), filed a motion on March 15, 2023, 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. Following an extension of time to file, the Division of Taxation, by its representative, Amanda Hiller, Esq. (David Demeter, Esq., of counsel) filed an affirmation and annexed exhibits in support of the motion. Petitioner, appearing by Barclay Damon LLP (David G. Burch, Esq., of counsel), filed a response to the motion, on August 2, 2023, which date began the 90-day period for issuance of this determination.

Based upon the motion papers, affidavits, pleadings and documents submitted in connection with this matter, Alejandro Taylor, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, John Lanzione, a notice of proposed driver license suspension referral (form DTF-454), collection case ID E-047467189-CL01-2 (60-day notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v.

2. This 60-day notice is dated February 28, 2020, and is addressed to petitioner at his Clayton, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated February 28, 2020, setting forth two unpaid assessments. Assessment ID L-050613554 asserted additional personal income tax due for tax year 2008 and included tax in the amount of $700.00, plus interest of $889.52, plus penalty of $14.00. Assessment ID L-050697931 asserted additional personal income tax due for tax year 2009 and included tax in the amounts of $6,264.49, plus interest of $6,932.47, plus penalty of $93.96. These assessments total $14,894.44.

3. The 60-day notice indicated that a response was required within 60 days from its mailing, and if no response was received, the Division would notify the New York State Department of Motor Vehicles (DMV) to proceed with suspension of petitioner's driver's license. The 60-day notice informed petitioner that New York State law limits the grounds for challenging the proposed suspension of his driver's license to the statutory exemptions listed in the notice. The last page of the 60-day notice contains a section titled, "How to protest" and instructs the recipient on how to protest the notice of the proposed driver's license suspension.

4. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the 60-day notice. By conciliation order dated May 6, 2022, the conferee sustained the notice of proposed driver license suspension referral.

5. Thereafter, petitioner filed a petition with the Division of Tax Appeals on August 3, 2022. Attached to the petition was the May 6, 2022 conciliation order. The petition raises no challenge to the Division's issuance, or petitioner's receipt, of the 60-day notice. Instead, the petition protests the underlying liability, retroactive application of interest to that liability and asserts that suspension of his driver's license would cause him undue economic hardship.

6. The Division filed its answer to the petition on October 5, 2022, amended the same on January 13, 2023, and in turn brought the subject motion on March 15, 2023. The Division submitted with its motion an affidavit, dated March 2, 2023, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis's responsibilities and duties include overseeing the operations of the CED's Operations Analysis and Support Bureau and working with the Office of Information Technology Services. His affidavit is based upon his personal knowledge of the facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

7. Mr. Lewis's affidavit details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process undertaken by the Division in carrying out the license suspension program authorized by section 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; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; 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 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 for any of the following reasons: the taxpayer is deceased or in bankruptcy; an informal protest or protest before BCMS has been added to any assessment which would make the taxpayer's balance of fixed and final tax liabilities fall below $10,000.00; the taxpayer is on an active approved payment plan; the taxpayer's wages are being garnished for the payment of past-due tax liabilities, child support, or combined child and spousal arrears; the taxpayer receives public assistance or supplemental income[1]; or the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship.

Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer's data fails the compliance criteria check, the case

[1] Most likely refers to Supplemental Security Income (SSI) (see Tax Law § 171-v [5] [vii]).

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’s data passes the compliance check, the suspension by the DMV will proceed.

b) Next, the DMV completes a data match process that involves the Division providing identifying information to the 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. The 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 license suspension process.

c) The suspension process commences with the Division sending a collection letter (form DTF-975) to the taxpayer and, after 30 days, performing a post-DMV compliance review to confirm that the taxpayer continues to meet the criteria for suspension detailed above. If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver license suspension referral (form DTF-454) will be issued to the taxpayer via first-class United States mail with certificate of mailing.

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 the DMV for license suspension. Such case data is sent daily, Monday through Friday, by the Division to the DMV. The 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, the 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 the 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, 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 the DMV by the Division for resuspension until resolution of the "on-hold" status; however, the 60-day notice of proposed driver license suspension referral would remain in the Division's system. If the status is changed to "closed," the 60-day notice of proposed driver license suspension referral is canceled.

8. Mr. Lewis's affidavit also 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 February 28, 2020, comports with statutory requirements. Mr. Lewis further asserts that 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.

SUMMARY OF THE PARTIES' POSITIONS

9. In its answer to the petition, and under the motion at issue herein, the Division asserts that petitioner has not sought relief from the suspension of his driver's license under any of the eight specifically enumerated grounds for such relief set forth at Tax Law § 171-v (5) (i) - (viii) 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.

10. Petitioner, in his response to the Division's motion, argues that interest should not have been retroactively applied to tax year 2009 more than 10 years later, noting that the income at issue stemmed from a settlement at the close of a federal tax audit. Petitioner also states in his affidavit included with his response to the Division's motion that suspension of his driver's license would cause him undue economic hardship. According to petitioner, this undue

economic hardship cannot be remedied by obtaining a restricted use driver's license, as he would not be able to travel to different locations for his business. Petitioner avers that a suspension of his driver's license will make it impossible to operate his business.

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 here is a notice of proposed driver license suspension referral, dated February 28, 2020, addressed to and advising petitioner of the possible suspension of his driver's license. This notice is in facial compliance with the provisions 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 $14,894.44 remains outstanding and unpaid; and b) petitioner does not meet any of the eight specifically enumerated grounds set forth at Tax Law § 171-v (5) (i) - (viii) allowing for relief from license suspension.

B. Petitioner initially challenged the proposed suspension of his license by filing a timely request with BCMS. This request was denied and the notice was sustained. Petitioner, in turn, challenged the BCMS conciliation order by filing a timely petition with the Division of Tax Appeals (***see*** Tax Law § 170 [3-a] [a]). Thus, 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 act on which he rest his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992] citing ***Zuckerman***). As detailed hereafter, there are no material and triable issues of fact and the Division is entitled to summary determination in its favor.

E. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v must be based on one or more 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; (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; (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" (Tax Law § 171-v [5]).

Here, petitioner has averred that suspension of his driver's license would cause him undue economic hardship, specifically that he would not be able to operate his business, which requires him to drive several thousand miles per year. In his brief responding to the Division's motion, he argues that a restricted use license would be insufficient, since a restricted use license would not include the ability for petitioner to travel to different locations for his job.

A restricted use license is available to a taxpayer whose driver's license has been suspended for unpaid taxes (***see*** Vehicle & Traffic Law § 510 [4-f] [2]; [5]). Such license is valid:

> "(a) during the time the holder is actually engaged in pursuing or commuting to or from his business, trade, occupation or profession, (b) en route to and from a driver rehabilitation program or related activity specified by the commissioner at which his attendance is required, (c) to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training, (d) enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner, or (e) enroute to and from a place, including a school, at which the child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training and shall contain the terms and conditions under which it is issued and is valid" (Vehicle & Traffic Law § 530 [3]).

Petitioner's argument fails, however, since the statutory language regarding allowable use of a restricted use license is not so restrictive as petitioner claims. A restricted use license is not

limited to merely commuting to and from a business, trade, occupation or profession, but rather can be used in *pursuing or commuting* to or from a business, trade, occupation, or profession (***id.***). Petitioner did not demonstrate how the restricted use driver's license would prevent him from running his business, and thus failed to carry his burden of showing that the proposed driver's license suspension would cause him undue economic hardship.

F. Petitioner also argues that interest should not have accrued on any tax due until such time as he was served with a notice stating the amount of additional tax due (***see Matter of American Pen Corp. v Tax Commn. of the City of New York***, 281 AD2d 249, 250 [1st Dept 2001]). If petitioner is correct, this would cause the total amount of tax, interest and penalties in the instant case to fall below the $10,000.00 threshold required for the issuance of a proposed suspension of driver's license (***see*** Tax Law § 171-v [1]). However, this interpretation is not correct.

Under Tax Law § 659, if the amount of a taxpayer's federal taxable income is changed or corrected by the Internal Revenue Service or other competent authority, the taxpayer must report such change or corrections to the Division within 90 days and concede the accuracy of the change or state that such change or correction is erroneous (***see also Matter of Nevins***, Tax Appeals Tribunal, June 7, 2018). If a taxpayer fails to comply with the reporting requirement of Tax Law § 659, the Division may issue an assessment at any time and is not constrained by the general limitations period on assessments of tax (***see*** Tax Law § 683 [c] [1] [C]). Furthermore, interest on an underpayment of tax may be assessed at any time during the period within which the tax to which such interest relates may be assessed (***see*** Tax Law § 684 [i]). Thus, the Division did not err in assessing interest on the federal changes to income in tax years 2008 and

2009, even 10 years later, where petitioner never reported those changes as required by Tax Law § 659.

G. Petitioner also argues that the amount of tax imposed is incorrect. The Division of Tax Appeals is a forum of limited jurisdiction (***see*** Tax Law § 2008; ***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.***, 151 Misc 2d 326 [1991]). The Division of Tax Appeals' authority to adjudicate disputes is exclusively statutory (***id.***). The Division of Tax Appeals is authorized pursuant to Tax Law § 2000 to "provide hearings as prescribed pursuant to this chapter, or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter."

Under Tax Law § 681 (e) (1), if a taxpayer fails to comply with Tax Law § 659, the Division may assess a deficiency based on such federal change by mailing a notice of additional tax due, which, together with interest and any penalties, shall be deemed to be assessed as of the date of the mailing of the notice. A notice of additional tax due is not considered a notice of deficiency for purposes of Tax Law §§ 681 or 689 (b) and does not give rise to protest rights in the Division of Tax Appeals (***see*** Tax Law §§ 173-a (2), 681 [e] [2]). Because a notice of additional tax due cannot be construed to confer jurisdiction on the Division of Tax Appeals to review such notice (***see Matter of Nevins***, ***see also Matter of Rodriguez***, Tax Appeals Tribunal, March 20, 2017; ***Matter of Kyte***, Tax Appeals Tribunal, June 9, 2011), the substantive merits of petitioner's protest of the underlying amount of tax assessed in the notices of additional tax due cannot be reached.

H. The Division of Taxation's motion for summary determination is hereby granted, the petition of John Lanzione is denied, and the notice of proposed driver license suspension referral, dated February 28, 2020, is sustained.

DATED: Albany, New York
October 5, 2023

/s/ Alejandro Taylor
ADMINISTRATIVE LAW JUDGE