STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID FORNESS	:	ORDER DTA NO. 826261
for Review of a Notice of Proposed Driver License Suspension Referral Under Tax Law, Article 8, § 171-v.	:	

Petitioner, David Forness, filed a petition for review of a Notice of Proposed Driver License Suspension Referral Under Tax Law, Article 8, § 171-v.[1]

On December 18, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding, pursuant to 20 NYCRR 3000.5, 3000.9(a) and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, Esq., and annexed exhibits. Petitioner, appearing by Dennis C. Gaughan, Esq., did not respond to the motion. After due consideration of the documents submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion for an accelerated determination should be granted and the notice of proposed driver license suspension referral, issued to petitioner pursuant to Tax Law § 171-v, sustained.

[1] The title of the subject notice uses the phrase "driver license," while the statute at issue, Tax Law § 171-v, uses the phrase "driver's license."

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion to challenge the validity of petitioner's protest of a notice of proposed driver license suspension referral pursuant to Tax Law § 171-v (suspension notice), dated September 16, 2013. The suspension notice informed petitioner that he had outstanding tax liabilities in excess of $10,000.00 owed to the State of New York, and that unless he responded within 60 days of the mailing date of the suspension notice, his driver's license would be suspended. According to the suspension notice, unless the taxpayer did one of the following, his identifying information would be transmitted to the Department of Motor Vehicles (DMV) for the purpose of suspending his license to drive: 1) resolving the outstanding liability, either by payment or establishment of a payment plan; 2) notifying the Division of his eligibility for an exemption; or 3) protesting the suspension notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals.

2. Petitioner opted to request a BCMS conference and, on April 25, 2014, BCMS issued to petitioner a Conciliation Order, CMS number 259481, denying petitioner's request for reconsideration of the proposed license suspension and sustaining the Notice of Proposed Driver License Suspension Referral.

3. As of September 16, 2013, the date of the issuance of the notice, a Consolidated Statement of Tax Liabilities, setting forth the tax bills issued to petitioner, stated that the total amount of sales tax, penalty and interest due and owing was $2,717,342.60, of which petitioner had paid $160,549.89.

4. On May 7, 2014, petitioner filed a petition with the Division of Tax Appeals challenging the suspension notice, indicating in paragraph 6 thereof that "[a]n installment agreement is in place and monthly payments are being made every month." The Division's answer to the petition states in paragraph 1 that the Division denies "all of the allegations, statements and/or positions in section (6) of the petition."

5. The Division also submitted the affidavit of Matthew McNamara, an Information Technology Specialist 3 with its Civil Enforcement Division (CED) during the relevant time period. His responsibilities included maintenance of the CED internal website, creation of reports and tracking case movements, supervising a reporting team that produces reports, and training staff to support the CED website.

6. In his affidavit, Mr. McNamara described the Division's process for selection of candidates who could be sent notices of proposed driver license suspension pursuant to Tax Law § 171-v. The initial search criteria included the following: 1) that the taxpayer have an outstanding balance of tax, penalty, and interest in excess of $10,000.00; 2) that all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) that there be less than 20 years from the issuance of the particular notice and demand; and 4) that the outstanding assessments not be the subject of an approved payment arrangement. The Division searched its electronic database on a weekly basis for those taxpayers that met the above criteria.

7. Once candidates were identified by the Division, the necessary information was sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer had a qualifying driver's license and was eligible for a notice of proposed driver license suspension.

8. Mr. McNamara stated that based on his review of the Division's records and his

knowledge of its policies and procedures, issuance of the suspension notice to petitioner was proper.

CONCLUSIONS OF LAW

A. Tax Law § 171-v, effective March 28, 2013, provides for the enforcement of past-due tax liabilities through the suspension of driver's 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]). Here, the Division determined that the liability represented by the notices referenced in the Consolidated Statement of Tax Liabilities met the threshold requirement for suspension of petitioner's driver's license pursuant to Tax Law § 171-v.

B. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a request for BCMS conference or 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]).

C. The Division's motion to dismiss the petition under section 3000.9 of the Rules of Practice and Procedure (Rules) may be granted if the petition does not state a cause for relief (20 NYCRR 3000.9[a][vi]). Motions filed pursuant to 20 NYCRR 3000.9, unless otherwise in conflict with the Rules of Practice and Procedure of the Tax Appeals Tribunal, are "subject to the same provisions as motions filed pursuant to section 3211 of the [Civil Practice Law and Rules] CPLR . . . " (20 NYCRR 3000.9 [c]). The regulation at 20 NYCRR 3000.9(a)(1)(vi) is comparable to CPLR 3211(a)(7), which authorizes a party to move to dismiss a cause of action on the ground that "the pleading fails to state a cause of action . . . ." (***Medical Capital Corp.***, Tax Appeals Tribunal, July 25, 2013.)

In ***High Tides, LLC v DeMichele*** (88 AD3d 954 [2011]), the Appellate Division reiterated the standard for granting a motion to dismiss under CPLR 3211(a)(7). In particular, the court noted that:

> "the pleading is to be afforded a liberal construction (***see*** CPLR 3026; ***EBCI, Inc. v. Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]; ***Leon v. Martinez***, 84 NY2d 83, 87-88 [1994]), and the court must accord the plaintiff 'the benefit of every possible favorable inference,' accept the facts alleged in the complaint as true, and 'determine only whether the facts as alleged fit within any cognizable legal theory' (***Leon v. Martinez***, 84 NY2d at 87-88). Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (***see Kuzmin v. Nevsky***, 74 AD3d 896, 898 [2010]; ***Hartman v. Morganstern***, 28 AD3d 423, 424 [2006]" (***High Tides, LLC*** at 956-957***)***.

It is determined that petitioner has established a valid challenge to the Division's issuance of the notice as dictated by Tax Law § 171-v(5)(vi).

D. Petitioner's allegation in his petition that he had an installment agreement in place with the Division on which he makes payments every month fits squarely within the statutorily provided ground for relief set out in Tax Law § 171-v(5)(vi), authorizing a cause of action to challenge a notice of proposed driver license suspension referral where "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 . . . ."

In its answer, the Division did not specifically address petitioner's assertion in paragraph 6 of the petition, other than to generally deny it, thereby raising a material issue of fact. Therefore, the motion to dismiss must fail.

With respect to the Division's motion for summary determination, it is well-settled that summary determination is the procedural equivalent of a trial and 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. Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [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 [1960]). Here, petitioner has alleged the existence of a payment agreement that he has adhered to with consistency, making payments each month, and the Division merely denied it in general terms, raising a material issue of fact, which requires a hearing (***see Kuehne & Nagel, Inc., v. Baiden***, 36 NY2d 539 [1975]; ***John William Costello Assocs. v. Standard Metals Corp.***, 99 AD2d 227 [1984], ***lv dismissed*** 62 NY2d 942 [1984]). Petitioner's allegation is bolstered by the Consolidated Statement of Tax Liabilities attached to the Division's motion, which indicates

payments being made on the outstanding assessments, raising serious questions about the Division's basis for issuing the notice.

J. The Division's motions for accelerated determination are denied and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
April 2, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE