STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VIKAS MUNJAL	:	ORDER DTA NO. 827123
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.	:	

Petitioner, Vikas Munjal, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, Article 8, § 171-v.[1]

On October 8, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Hannelore F. Smith, 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 Hannelore F. Smith, and annexed exhibits, and the affidavit of Ronald Catalano. Petitioner, appearing by the LoBiondo Law Offices (Anthony R. LoBiondo, Esq., of counsel), filed an opposition to the motion on December 8, 2015. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's notice of proposed driver license suspension referral issued to petitioner pursuant to Tax Law § 171-v should be sustained by summary determination.

[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 subject of the motion of the Division of Taxation (Division) is the validity of petitioner's protest of a notice of proposed driver license suspension referral dated August 20, 2014, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). 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 license would be suspended. According to the suspension notice, an adequate response within that time period would consist of 1) resolution of the outstanding liability either by payment or establishment of a payment plan; 2) notification to the Division of petitioner's eligibility for an exemption; or 3) a protest of the suspension notice by the filing of 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. Attached to the suspension notice was a consolidated statement of tax liabilities for petitioner, also dated August 20, 2014 (consolidated statement). The consolidated statement referenced two categories of liabilities. The first category was labeled "Bills subject to collection action" and included the following:

Tax Type	Assessment ID	Tax Period Ended	Balance Due
Sales	L-040222144-9	11/30/11	$148,245.79

As of August 20, 2014, the date of the issuance of the suspension notice, the unpaid amount on the above assessments, including penalty and interest, was $148,245.79.

3. The consolidated statement also separately listed a notice with assessment number L-041370633-8, for the period ending February 29, 2012. This notice was identified as "Estimated

amounts due because of returns not yet filed," and totaled $16,207.45 as of August 20, 2014. This notice was not included by the Division for purposes of calculating the $10,000.00 liability threshold for the driver's license suspension.

4. Petitioner timely requested a conciliation conference before BCMS and the matter was assigned CMS number 263762. By order of May 8, 2015, BCMS issued its order in matter number 263762 sustaining the suspension notice.

5. On August 7, 2015, petitioner filed a petition with the Division of Tax Appeals. On the cover of the petition, petitioner stated that he was challenging "CMS No. 263762." Attached to the petition was the suspension notice, including the consolidated statement of tax liabilities. The petition also stated that the amount of tax contested is "$148,245.79." Included as grounds for the challenge, petitioner wrote:

> "Taxpayer is not responsible for a tax liability as the amount alleged owed is due to a business entity, the Green Olive Bar and Grill, Inc. . . . Taxpayer was not an officer of the corporation. In addition, taxpayer made an agreement with NYS Tax Department, wherein the Tax Department forfeited $57,432.00 in U.S. currency."

6. There has not been a prior proceeding before the Division of Tax Appeals involving Notice of Determination number L-040222144-9.

7. In support of the instant motion, the Division submitted the affidavit of Ronald Catalano, a Tax Compliance Manager 2 with its Civil Enforcement Division (CED). His responsibilities include overseeing the operations of the Training Unit of the CED's Operations Analysis and Support Bureau. 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.

8. In his affidavit, Mr. Catalano describes 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 includes that 1) the taxpayer have an outstanding balance of tax, penalty, and interest in excess of $10,000.00; 2) all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) there must be less than 20 years from the issuance of the particular notice and demand; and 4) the outstanding assessments not be the subject of an approved payment arrangement. The Division searches its electronic database on a weekly basis for those taxpayers that meet the above criteria.

9. Once candidates have been identified by the Division, the necessary information is sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer has a qualifying driver's license and is eligible for a notice of proposed driver license suspension.

10. Mr. Catalano avers 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. Applying the liability from assessment number L-040222144-9, he states that the cumulative balance of tax, penalty, and interest owed by petitioner on August 20, 2014 was greater than $10,000.00, and that petitioner met all other compliance checks referenced in Finding of Fact 8 for proper issuance of the suspension notice.

11. The Division also attached to its motion the affirmation of its attorney, Hannalore F. Smith. In her affirmation, Ms. Smith states that petitioner's status as a responsible person for the Green Olive Bar and Grill, Inc., is not a fact in dispute based on the results of ***The People of the State of New York v. Vikas Munjal*** (Docket # 13070520, Town of Newburgh Justice Court), in which petitioner conceded such status as part of a plea agreement. According to Ms. Smith,

petitioner "is collaterally estopped from asserting differently here."

12. Petitioner maintains that the Division's motion must be denied for several reasons. He asserts, through the affirmation of his representative, Anthony R. LoBiondo, Esq., that the Division's referral to DMV is improper as he is not the taxpayer at issue and that the past due liabilities were satisfied (citing Tax Law §§ 171-v[i] and [ii]). Petitioner emphasizes that he was not an officer of the Green Olive Bar and Grill, Inc., and that his plea agreement in the criminal matter was not a concession of civil tax liability. Moreover, he asserts that as part of the plea agreement in the criminal matter referenced in Finding of Fact 10, petitioner forfeited $57,432.00 that was previously seized and subsequently provided to the Division.

13. The Division did not submit any proof of mailing or other method of issuance of assessment number L-040222144-9 referenced in the underlying the suspension notice.

CONCLUSIONS OF LAW

A. The Division has 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). There is no dispute with regard to the timeliness of the petition with regard to its challenge of the May 8, 2015 BCMS order and, therefore, this motion is properly treated as one for summary determination (***see Matter of Ryan***, September 12, 2013).[2]

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]). Section 3000.9(c)

[2] The Division did not attach to its motion any proof to establish mailing of the BCMS order dated May 8, 2015. Additionally, it did not raise the issue of timeliness of the petition in either its answer or the instant motion.

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 v. Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v. Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [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]). A review of the pleadings and the record as a whole demonstrates that there exist material and triable issues of fact, and the Division is not entitled to summary determination in its favor.

C. At issue in the instant matter is the absence of a materially factual dispute concerning the proper issuance to petitioner of the suspension notice. Tax Law § 171-v is titled "Enforcement of *delinquent tax liabilities* through the suspension of drivers' licenses" (emphasis added). The stated aim of section 171-v is "to improve tax collection through the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars" (Tax Law § 171-v[1]). A specific statutory predicate underlying this sanction is the establishment of the existence of "delinquent tax liabilities," specifically the existence of "*past-due tax liabilities*," owed by the taxpayer in an aggregate amount equal to or greater than

$10,000.00 (emphasis added).

D. Tax Law § 171-v(1) defines the term "past-due tax liabilities" as "any tax liability or liabilities which have become fixed and final *such that the taxpayer no longer has any right to administrative or judicial review*" (emphasis added). The record in this matter, as developed at this point in time, does not allow for an inarguable conclusion that there exist fixed and final tax liabilities owed by petitioner with respect to which he no longer has any right to administrative or judicial review. The Division specifies notice number L-040222144-9 as comprising the past-due tax liabilities giving rise to the license suspension and petitioner has challenged the facts underlying that assessment in his petition and opposition to the instant motion. It was incumbent upon the Division to establish in its motion that petitioner's tax liabilities under the cited notice are unequivocally fixed and final. However, the Division has offered insufficient evidence, and absolutely no mail proof, in the face of petitioner's challenge, to establish the proper issuance of assessment number L-040222144-9 and the exhaustion or prohibition of petitioner's administrative or judicial review. In sum, there remains an issue of fact regarding the existence of "past-due tax liabilities," as defined in Tax Law § 171-v(1), and, therefore, summary determination is inappropriate.

E. The remaining arguments made by petitioner in opposition to the motion (i.e., the satisfaction of petitioner's existing liabilities and whether petitioner was an officer of the Green Olive Bar and Grill, Inc.) are arguments that raise factual disputes based on the documents in the record and, thus, must, likewise, be developed at hearing.

F. The Division of Taxation's motion is denied, and the petition of Vikas Munjal shall proceed in due course.

DATED: Albany, New York
January 14, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE