

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NANETTE ESSAY SETEK** : ORDER  
for Review of a Notice of Proposed Driver : DTA NO. 827170  
License Suspension Referral under Article 8, § 171-v :  
of the Tax Law. :

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Petitioner, Nanette Essay Setek, filed a petition for review of a Notice of Proposed Driver License Suspension Referral under Article 8, § 171-v of the Tax Law.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), brought a motion filed June 27, 2016, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Accompanying the motion was the affirmation of Linda A. Jordan, Esq., dated June 27, 2016, and annexed exhibits, and the affidavit of Michael Benson, dated June 27, 2016, and an annexed exhibit. Petitioner, appearing by the Law Offices of Geoffrey J. O'Connor (Geoffrey J. O'Connor, Esq., of counsel), had until July 27, 2016 within which to respond to the motion.

Pursuant to correspondence dated July 26, 2016, the Division of Taxation informed the Division of Tax Appeals that petitioner had filed a Chapter 7 bankruptcy petition in the Eastern District of New York on July 22, 2016 which resulted in a stay of this proceeding so that the bankruptcy matter could proceed. By letter dated December 30, 2016, an Order of Discharge was

received and a request was made by the Division of Taxation to remove the stay on this proceeding. This request was granted and petitioner was given until February 6, 2017 within which to file her response to the motion; however, petitioner failed to respond. Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

***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, Nanette Essay Setek, a notice of proposed driver license suspension referral, dated October 23, 2014, Collection case ID: E-036995719-CL01-4 (60-day notice), which notified petitioner that new legislation allowed New York State to suspend the driver’s licenses of persons who have delinquent unpaid tax debts. Attached to the notice was a consolidated statement of tax liabilities listing petitioner’s withholding and sales tax assessments subject to collections as follows:

Assessment No.	Tax Period Ended	Tax Amount Assessed	Interest Assessed	Penalty Assessed	Payments and Credits	Current Balance Due
L-039715727-2	6/30/10	\$ 0.00	\$ 38.55	\$ 535.96	\$ 0.00	\$ 574.51
L-039715726-3	6/30/10	0.00	293.68	4,083.82	0.00	4,377.50
L-039715725-4	9/30/10	0.00	309.08	4,298.02	0.00	4,607.10
L-039715724-5	6/30/11	0.00	44.40	617.40	0.00	661.80
L-039715723-6	12/31/11	0.00	105.22	1,463.24	0.00	1,568.46
L-039715722-7	3/31/12	0.00	233.31	3,244.40	0.00	3,477.71

L-039715721-8	9/30/12	0.00	168.32	2,340.65	0.00	2,508.97
L-039715720-9	12/31/12	0.00	271.46	3,774.85	0.00	4,046.31
L-039715719-9	3/31/13	0.00	237.62	3,355.73	0.00	3,593.35
L-039715717-2	5/31/12	11,986.02	3,744.67	4,204.30	13,589.01	6,345.98
L-039715716-3	8/31/12	9,594.61	3,499.68	2,979.74	0.00	16,074.03
L-039715715-4	11/30/12	13,076.24	4,035.87	4,004.76	0.00	21,116.87
L-039715714-5	2/28/13	42,164.08	11,158.84	12,120.43	0.00	65,443.35
TOTAL						\$134,395.94

2. 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 to her, she was required to pay the amount due, or set up a payment plan, in order to avoid suspension of her license.

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. 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 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.

Under the heading, “Protests and legal actions,” it is explained that if the recipient protests with the Tax Department [Division], 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 the Division, or filing a petition with the Division of Tax Appeals.

3. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the 60-day notice. By conciliation order dated May 29, 2015, the conferee sustained the notice of proposed driver license suspension referral.

4. On August 26, 2015, petitioner filed a petition with the Division of Tax Appeals. The petition alleges that petitioner is unable to pay the asserted liabilities that she claims emanates from a family business and that the suspension would be a hardship upon her since she is responsible for transporting her minor child to medical, school and other activities. Moreover, petitioner states that the suspension of her driver’s license due to unpaid taxes is an unconstitutional taking of her right to drive, impeding on her ability to earn a living and her freedom of movement.

5. The Division filed its answer to the petition on October 9, 2015 and, in turn, brought the subject motion on June 27, 2016. The Division submitted with its motion an affidavit, dated June 27, 2016, made by Michael Benson, who is employed as a Tax Compliance Manager 2 in the Civil Enforcement Division (CED). Mr. Benson's duties include reviewing and testing CED's collection programs, including the Division's DMV license suspension program. His duties further involve working with the Office of Information Technology Services to ensure that CED's systems support the operational needs of CED.

6. Mr. Benson's affidavit fully 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 Article 8, § 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 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 Finding of Fact 6a. 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 first class United States mail.

Additionally, 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.

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. 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 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 Finding of Fact 6a (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 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.

7. Mr. Benson’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 by which petitioner could remit payment against the liability in question, were included with Mr. Benson’s affidavit.

8. Mr. Benson avers that, based upon his review of Division records and his personal knowledge of its policies and procedures, issuance of the suspension notice to petitioner was proper.

9. Pursuant to correspondence dated July 26, 2016, the Division informed the Division of Tax Appeals that petitioner had filed a Chapter 7 bankruptcy petition in the Eastern District of New York on July 22, 2016, which resulted in a stay of this proceeding pending the resolution of the bankruptcy. By letter dated December 30, 2016, a copy of an Order of Discharge issued to petitioner was received and a request was made by the Division to remove the stay placed on this matter so that its motion for summary determination could proceed.

10. On January 5, 2017, the Division of Tax Appeals acknowledged receiving the Order of Discharge from the Bankruptcy Court and, thus, removed the stay that was placed on this proceeding.



***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 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 October 23, 2014, addressed to and advising petitioner of the possible suspension of her 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 withholding tax and sales tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$134,395.94, remains 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.

B. Petitioner initially challenged the proposed suspension of her 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 and, therefore, the Division of Tax Appeals has jurisdiction over the petition.

C. As noted, the Division brings a motion for summary determination under section 3000.9(b) of the Rules. 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 [1968]; *Museums at Stony Brook v. Village 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 382 [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 fact on which he rest his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*).

E. Here, the Division has not demonstrated entitlement to summary determination. Although the Division has proven that it properly notified petitioner with the 60-day notice, by first class mail to her last known address, that she was going to be included in the driver’s license suspension program, petitioner subsequently filed for bankruptcy which resulted in her becoming ineligible for the license suspension program.

Pursuant to the affidavit of Michael Benson, where a compliance criteria check is performed and the taxpayer no longer meets the collection criteria and is deemed ineligible for collection, the suspension status will be updated to either “on-hold” or “closed” depending on the circumstances and the taxpayer’s information will not be sent to DMV for suspension. As

indicated in Finding of Fact 6a, a taxpayer would be excluded from the license suspension program if she was in bankruptcy.

There is no dispute that petitioner filed for bankruptcy on July 22, 2016. This date falls after the date of Michael Benson's affidavit. Accordingly, there is no evidence in this case that demonstrates what transpired after the Division concluded that petitioner failed the compliance check. The Benson affidavit notes that once a taxpayer fails the compliance check, the notice is either put "on hold" or "canceled." The Division has failed to demonstrate factually whether petitioner's bankruptcy filing resulted in the 60-day notice being placed on hold or if it was canceled. Moreover, it is unknown what each separate procedure involves and whether such protocol was followed in this particular case. Accordingly, given the existence of material issues of fact, a motion for summary determination is not the proper vehicle for a resolution of this matter.

F. The Division of Taxation's motion for summary determination is hereby denied and the matter will be scheduled for hearing in due course.

DATED: Albany, New York  
April 13, 2017

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE