STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LINDA M. JARVIS	:	ORDER DTA NO. 827955
for Review of a Notice of Proposed Driver's License Suspension Referral under Tax Law, Article 8, § 171-v.	:	

Petitioner, Linda M. Jarvis, filed a petition for review of a notice of proposed driver's license suspension referral under Tax Law, article 8, § 171-v.

On March 17, 2017, 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, summary determination of the proceeding pursuant to Tax Law § 2006 (6), and 20 NYCRR 3000.5 and 3000.9 (a) and (b). Accompanying the motion was the affirmation of Hannelore F. Smith, Esq., with annexed exhibits, and the affidavit of Ronald Catalano with attached exhibits. On September 15, 2017, upon extensions, petitioner, appearing by Robert J. Jarvis, filed a letter in opposition to the Division of Taxation's motion for summary determination. Accordingly, the 90-day period for issuance of this order began on September 15, 2017. After due consideration of the documents submitted, and upon all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's notice of proposed driver's license suspension referral

issued to petitioner pursuant to Tax Law § 171-v should be sustained.

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's license suspension referral (Collection case ID: E-122104678-CL01-5), dated July 8, 2015, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). The suspension notice informed petitioner that she had outstanding tax liabilities in excess of $10,000.00 owed to the State of New York, and that unless she responded within 60 days of the mailing date of the suspension notice, her driver's license would be suspended. According to the suspension notice, an adequate response within that time period would consist of 1) resolution of the outstanding liabilities 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 July 8, 2015 (consolidated statement). The consolidated statement referenced "Bills subject to collection action" and included the following:

Tax Type	Assessment ID Number	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
Income	L-022104678-2	12/31/98	$2,261.00	$5,071.53	$3,259.81	$0.00	$10,592.34
Total							$10,592.34

3. Petitioner requested a conciliation conference before BCMS protesting the 60-day notice. By conciliation order dated August 26, 2016, the conferee sustained the suspension notice.

4. On November 23, 2016, petitioner filed a petition challenging the suspension notice. In her petition, petitioner asserts, among other things, that:

a) the proposed driver's license suspension referral is not valid because the liability upon which it is based is not a fixed and final assessment; and

b) the subject assessment is in pending litigation at the Appellate Division after having been "properly protested through the administrative appeals process," and therefore the assessment is not fixed and final.

5. The Division filed its answer to the petition on January 11, 2017.[1] The Division, in turn, filed a notice of motion and supporting papers on March 17, 2017, seeking dismissal of the petition or, in the alternative, granting summary determination pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.5 and 3000.9 (a) and (b).

In support of its motion, the Division submitted the affirmation of Hannelore F. Smith, Esq., the Division's representative, with attached exhibits, and the affidavit, dated March 16, 2017, of Ronald Catalano, a Tax Compliance Manager 2 in the Division's Civil Enforcement Division (CED) during the relevant time. His responsibilities include overseeing the operations of the Training Unit of the CED's Operations Analysis and Support Bureau.

6. Mr. Catalano's affidavit fully details the sequential actions, i.e., the "Initial Process," the "DMV Data Match," the "Suspension Process" and the "Post-Suspension Process"

[1] The Division mailed the answer to petitioner by certified mail on January 11, 2017. However, it was returned to the Division as undeliverable. On February 7, 2017, the answer was remailed to petitioner by first class mail.

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 the Department of Motor Vehicles (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, 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.

7. Mr. Catalano'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 suspension notice 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. Catalano's affidavit.

8. Mr. Catalano asserts 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. Previously, petitioner and her spouse, Robert J. Jarvis, timely challenged the notice of deficiency, Notice No. L-022104678, issued for the year 1998, at the Division of Tax Appeals.[2] On June 5, 2008, the undersigned administrative law judge issued a determination in the ***Matter of Robert J. and Linda M. Jarvis***.[3] The determination held that, for the year 1998, no adjustment to the Division's calculation of Mr. and Mrs. Jarvis's federal or New York adjusted gross income was warranted; however, it was found that Mr. and Mrs. Jarvis were entitled to two dependent exemptions and credit for taxes withheld, and the Division was directed to recompute the deficiency for the year 1998 accordingly. The determination also held that the failure to file return penalty was automatic since Mr. and Mrs. Jarvis did not file a tax return for the year 1998; a negligence penalty was properly imposed for the year 1998 because Mr. Jarvis failed to maintain adequate records of his business income and expenses for such year; and a penalty for failure to pay estimated income tax was properly imposed for the year 1998 because the only taxes paid by Mr. and Mrs. Jarvis in 1998 were taxes withheld from Mrs. Jarvis's wage income received from the South Colonie Central Schools for that year.

10. Petitioner and her spouse filed an exception to the June 5, 2008 determination with the Tax Appeals Tribunal (Tribunal) and the Tribunal issued its decision on July 22, 2010,

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[2] Petitioner and Mr. Jarvis filed a petition challenging notices of deficiency asserting additional New York State personal income tax due for the years 1998 (Notice No. L-022104678) and 1999 (Notice No. L-022104665). The Division of Tax Appeals assigned DTA No. 820588 to that petition.

[3] Official notice is taken of the determination issued in the ***Matter of Robert J. and Linda M. Jarvis***, DTA No. 820588.

denying the exception and sustaining the undersigned administrative law judge's determination regarding the notice of deficiency, Notice No. L-022104678, issued for the year 1998.[4]

11. Subsequently, on November 22, 2010, petitioner and Mr. Jarvis filed a petition with the Appellate Division, Third Department, for Article 78 review of the Tribunal's July 22, 2010 decision.

12. In her affirmation, Ms. Smith contends that petitioner's consolidated statement of tax liabilities includes outstanding fixed and final tax liabilities attributable to a notice of deficiency (Notice No. L-022104678) for the tax period ended December 31, 1998. With respect to petitioner's allegation in her petition that the underlying assessment is not fixed and final, Ms. Smith asserts the following:

a) Petitioner's previous challenge of the notice of deficiency (Notice No. L-022104678), at the Division of Tax Appeals, resulted in the June 5, 2008 administrative law judge determination that denied the petition and sustained the notice of deficiency after reducing the assessment by $139.00.

b) Petitioner then filed an exception to the June 5, 2008 determination with the Tribunal and the Tribunal's July 22, 2010 decision denied the exception and sustained the administrative law judge's determination as regards the notice of deficiency (Notice No. L-022104678).

c) Subsequently, on November 22, 2010, petitioner and Mr. Jarvis filed an Article 78 petition challenging the Tribunal's decision.

d) The verified answer to the petition was filed on behalf of the Division on January 21, 2011; however, petitioner and Mr. Jarvis did not file either a record on review or a brief.

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[4] Official notice is taken of ***Matter of Jarvis***, Tax Appeals Tribunal, July 22, 2010.

13. Attached as "exhibit 3" to Ms. Smith's affirmation is a copy of follow-up correspondence dated July 14, 2016, from Erica Putnam Little, the managing attorney of the Clerk of the Court of the State of New York, Supreme Court, Appellate Division, Third Judicial Department to Mr. Jarvis.[5] Ms. Little wrote, in part as follows:

> "As I explained in my prior correspondence, Section 800.12 of the Court's rules directs that a civil proceeding instituted in this Court shall be deemed to have been abandoned where the petitioner fails to serve and file a record and brief within nine months after the date of the Notice of Petition. Because your Notice of Petition is dated November 22, 2010, this Office is prohibited from accepting for filing your record on review or brief absent an order of the Court as you are well-beyond the applicable nine-month period. Specifically, your proceeding was deemed abandoned as of August 22, 2011. Thus, should you like to continue your efforts to perfect this proceeding, it is necessary for you to make a motion seeking permission of the Court to do so."

14. In her affirmation, Ms. Smith also argues that since there is no indication that petitioner and Mr. Jarvis made a motion seeking to revive their Article 78 petition, as of August 22, 2011, "Assessment ID # L-022104678-2, for the tax period ended 12/31/98 with a balance due of tax, interest and penalty as of 7/8/15 in the amount of $10,592.34 became fixed and final and subject to collection." She further argues that because the time period for challenging the Tribunal decision regarding the underlying assessment has long passed and the assessment has been fully litigated, petitioner has "no legal right or basis to again bring a challenge to the underlying assessment." In her affirmation, Ms. Smith states that petitioner failed to raise any of the enumerated grounds for cancellation of his suspension notice found in Tax Law § 171-v. Since petitioner has raised no permissible defenses set forth in Tax Law § 171-v (5) (i) - (vi), Ms. Smith argues that petitioner has no right to administrative or judicial review of the proposed

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[5] The enclosures referenced in this letter are not part of this exhibit.

suspension of her license, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition or summary determination in its favor.

15. The record does not include any documentation showing the manner in which the Division recomputed the tax as directed in the June 5, 2008 determination ***(see*** Finding of Fact 9) that was sustained by the Tribunal in its July 22, 2010 decision (***see*** Finding of Fact 10).

16. Petitioner's spouse submitted a letter in opposition to the Division's motion for summary determination. In his letter, Mr. Jarvis asserts that the Division's moving papers "do not include any showing of how the amounts allegedly owed have been calculated." He further asserts that "without a computation and accompanying explanation of how the particular amounts involved were calculated," it is not possible for the Division to establish that it made the ordered adjustments and that they were done accurately. Mr. Jarvis argues that without this showing, the Division "has not established that the amount actually owed" by petitioner "exceeds the required $10,000 threshold." In his letter, Mr. Jarvis also maintains that the assessment being relied upon by the Division is not fixed and final. He argues that the answer to the Article 78 petition was not received by Mr. and Mrs. Jarvis until a copy was provided with the July 14, 2016 letter. Mr. Jarvis contends that "there is a significant question of fact as to whether, at the time the proposed driver's license suspension" referral was issued in July 2015, "the time period for [Mr. and Mrs. Jarvis] to file the case record had yet begun to run, and, concomitantly, whether the appellate review proceeding was in default."

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 is a notice of proposed driver license suspension referral, dated July 8, 2015, 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 an income tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of $10,592.34 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 (***see Matter of Frank DeMartino***, Tax Appeals Tribunal, December 16, 2016).

C. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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 and that the administrative law judge can therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9 [b] [1]; ***see also*** Tax Law § 2006 [6]).

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]).

E. At issue in this matter is the proper issuance to petitioner of the July 8, 2015 suspension notice. 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 (Tax Law § 171-v [1]). 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." Although the Division claims that, as of July 8, 2015, petitioner's outstanding tax liability attributable to notice of deficiency (Notice No. L-022104678) exceeded $10,000.00, it failed to submit any documentation showing that the assessment accurately reflected the recomputation of tax directed by the June 5, 2008 administrative law judge's determination and affirmed by the July 22, 2010 Tribunal decision (***see*** Finding of Fact 15). As such, it is impossible to determine whether the outstanding personal income tax liability for the tax period ended December 31, 1998 exceeded $10,000.00 in July 2015. Additionally, there is the issue of whether petitioner still had the right to judicial review of

the subject notice of deficiency in July 2015. 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
December 7, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE