

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ALBERT NIGRI : ORDER
for Review of a Notice of Proposed Driver License : DTA NO. 828377
Suspension Referral under Tax Law § 171-v. :
:

Petitioner, Albert Nigri, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law § 171-v of the Tax Law.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Kileen C. Davies, Esq., of counsel), brought a motion, filed February 16, 2018, 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. Accompanying the motion was the affirmation of Kileen C. Davies, Esq., dated February 16, 2018, and annexed exhibits, and the affidavit of Todd Lewis, dated February 15, 2018, and an annexed exhibit. Petitioner, appearing by Isaac Sternheim, CPA, failed to respond to the motion. Petitioner's response was due on March 19, 2018, which date began the 90-day period for issuance of this order. Based upon the motion papers, the affirmations, affidavits, and other documents submitted, and all pleadings and documents submitted in connection with this matter, James P. Connolly, 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, Albert Nigri, a notice of proposed driver license suspension referral, Collection case ID number E-027667624-CL01-8, dated February 23, 2017 (proposed suspension 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. The proposed suspension notice was addressed to petitioner at his Brooklyn, New York, address. Included with the proposed suspension notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated February 23, 2017, setting forth an unpaid liability, assessment number L-045454102. The assessment was for personal income tax in the amount of \$311,298.00 for the year 2013, plus interest and penalty, with a total balance due of \$447,441.65.

3. The proposed suspension 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 proposed suspension notice informed petitioner of two exemptions from the drivers' license suspension process, the exemption for drivers holding a commercial driver's license and the exemption for persons making certain child or combined child and spousal support payments. It further provided that petitioner should see the back of the page "for more information about these exemptions and for instructions on contacting the Tax Department if any of the exemptions apply to you." The proposed suspension notice stated that, unless one of the exemptions on the back of

the notice applied to petitioner, he was required to pay the amount due, or set up a payment plan, in order to avoid suspension of his license. The proposed suspension notice further instructed petitioner that, if he disagreed with the notice, to “[s]ee the back for instructions on how to respond.”

4. The back side of the proposed suspension notice is not included in the copy of the proposed suspension notice attached to Ms. Davies’s affirmation; nor does that copy include a payment document referred to on the form’s front, which petitioner was required to use to remit payment of the liability in question by mail. The front side does not include any statement that the taxpayer’s right to protest the notice is limited to raising the issues set forth in Tax Law § 171-v (5).

5. Petitioner protested the proposed suspension notice by timely requesting a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). By conciliation order dated September 8, 2017, the conferee sustained the proposed suspension notice.

6. Thereafter, petitioner filed a petition with the Division of Tax Appeals on September 12, 2017. The petition does not challenge the Division’s issuance or petitioner’s receipt of the proposed suspension notice. Instead, the petition asserts that petitioner’s protest of the underlying assessment to the license suspension, assessment number L-045454102, was pending, so his license should not have been suspended.

7. Separately, petitioner protested assessment number L-045454102 by filing a request for conciliation conference with BCMS, which issued a conciliation order dismissing the request as untimely. Petitioner protested that conciliation order to the Division of Tax Appeals. On October 19, 2017, the Division of Tax Appeals issued a determination denying the petition and

sustaining assessment number L-045454102 (*see Matter of Albert and Lina Nigri*, October 19, 2017 [DTA No. 828148]). Petitioner did not file an exception to that determination, and the time to do so was not extended.¹ Review of that determination reveals that petitioner's request for conciliation conference was filed on March 2, 2017, i.e., after the issuance date of the proposed suspension notice.

8. The affidavit of Todd Lewis notes that he 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.

9. 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 article 8, § 171-v, of the Tax Law.

10. Mr. Lewis's affidavit also fully details how that process was followed by the Division with regard to the proposed suspension notice issued to petitioner. 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 proposed suspension notice on February 23, 2017 comports with statutory requirements. In light of that

¹ Pursuant to State Administrative Procedure Act § 306 (4), "official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." A court may take judicial notice of its own prior proceedings (*see Matter of Kolovinas*, Tax Appeals Tribunal, December 28, 1990; CPLR 4511).

fact, and because petitioner has also not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5), he concludes that the proposed suspension notice has not been and should not be canceled.

11. The copy of the proposed suspension notice attached to Mr. Lewis's affidavit lacks the reverse side of the page, and also does not include the payment document referred to on the form's front side, which petitioner was required to use to remit payment of the liability in question by mail. The front side does not include any statement that the taxpayer's right to protest the notice is limited to raising the issues set forth in Tax Law § 171-v (5).

12. In its answer to the petition, and on 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 six specifically enumerated grounds for such relief set forth at Tax Law § 171-v (5) (i) - (vi) 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.

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 September 8, 2017 BCMS order and, therefore, this motion is properly treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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 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 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 whether there are any material factual issues concerning the proper issuance to petitioner of the proposed suspension notice. Tax Law § 171-v provides for the enforcement of past-due tax liabilities through the suspension of drivers’ licenses. Under subdivision (3) of that section, the Division must provide notice to a taxpayer of his or his 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 (*see* Tax Law § 171-v [3]). Under that subdivision, the notice must include the following information:

- “(a) a clear statement of the past-due tax liabilities along with a statement that the department shall provide to the department of motor vehicles the taxpayer's name, social security number and any other identifying information necessary for the purpose of suspending his or her driver's license . . . sixty days after the mailing or sending of such notice to the taxpayer;
- (b) a statement that the taxpayer may avoid suspension of his or her license by fully satisfying the past-due tax liabilities or by making payment arrangements satisfactory to the commissioner, and information as to how the taxpayer can pay the past-due tax liabilities to the department, enter into a payment arrangement or request additional information;
- (c) statement that the taxpayer's right to protest the notice is limited to raising issues set forth in subdivision five of this section;
- (d) a statement that the suspension of the taxpayer's driver's license shall continue until the past-due tax liabilities are fully paid or the taxpayer makes payment arrangements satisfactory to the commissioner; and
- (e) any other information that the commissioner deems necessary.”

D. The copies of the proposed suspension notice in the record refer to the reverse side of the notice, but do not include that side. Thus, it remains at issue whether the statements required to be on that notice were actually on the notice issued to petitioner. For example, Tax Law § 171-v (3) (c) requires that the proposed suspension notice include a statement that the taxpayer’s right to protest the notice is limited to raising the issues set forth in Tax Law § 171-v (5), and this statement is not included in the parties’ partial copies of the proposed suspension notice in the record. More significantly, the proposed suspension notice must also include “any other information that the commissioner deems necessary” (Tax Law § 171-v [3] [e]). The partial copies of the proposed suspension notice in the record make clear that the Division has determined that a proposed suspension notice, on its reverse side, should provide a description of

all the exemptions that apply to the notice (*see* Findings of Fact 3 and 11). This is important from a due process point of view, as it alerts the taxpayer subject to the notice of possible defenses he or she may have to the notice. Because the copies of the proposed suspension notice in the record lack the reverse side of the notice, the record in this matter, as developed at this time, does not allow for an inarguable conclusion that the proposed suspension notice issued to petitioner included that listing of the exemptions applicable to the proposed suspension notice that the Division has deemed necessary. Thus, it is not possible, on this record, to determine whether the proposed suspension notice issued to petitioner satisfied the requirements of Tax Law § 171-v (3). Accordingly, based on the record, summary determination in favor of the Division is not appropriate.

E. The Division of Taxation's motion is denied, without prejudice, and the petition of Albert Nigri shall proceed in due course.

DATED: Albany, New York
June 14, 2018

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE