

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition :  
of :  
**DANIEL W. LAMARCO** : ORDER  
for Redetermination of Deficiencies or for Refund of : DTA NOS. 828469  
New York State Personal Income Tax under Article 22 : AND 828753  
of the Tax Law for the Years 2013, 2015 and 2016, and :  
for Review of a Notice of Proposed Driver License :  
Suspension Referral under Tax Law § 171-v. :

---

In the Matter of the Petition :  
of :  
**DANIEL W. LAMARCO** :  
for Review of a Notice of Proposed Driver License :  
Suspension Referral under Tax Law § 171-v. :

---

Petitioner, Daniel W. LaMarco, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2013, 2015 and 2016, and the review of a notice of proposed driver license suspension referral under Tax Law § 171-v.<sup>1</sup>

Petitioner filed a petition for review of a notice of proposed driver license suspension referral under Tax Law § 171-v.<sup>2</sup>

---

<sup>1</sup> The Division of Tax Appeals assigned DTA No. 828469 to the first petition received on November 16, 2017.

<sup>2</sup> The Division of Tax Appeals assigned DTA No. 828753 to the second petition received on June 4, 2018.

On May 2, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), filed a motion seeking an order dismissing the petitions or, in the alternative, granting summary determination of the proceedings pursuant to 20 NYCRR 3000.5 and 3000.9 (a). Accompanying the motion was the affirmation of Karry L. Culihan, Esq., its annexed exhibits, and the affidavit of Todd Lewis. Petitioner, appearing pro se, filed a response in opposition to the Division's motion by its due date of June 3, 2019, which date began the 90-day period for issuance of this order. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

### ***ISSUES***

I. Whether the petition in DTA number 828469 was filed prematurely and, therefore, the Division of Tax Appeals lacks jurisdiction over such petition.

II. Whether petitioner timely filed the petition in DTA number 828469 with the Division of Tax Appeals following the issuance of personal income tax deficiencies for the years 2013, 2015 and 2016.

III. 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.

### ***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Daniel W. LaMarco, a notice of proposed driver's license suspension (form DTF-454), collection case ID: E-044867768-CL01-1 (60-day 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 60-day notice is dated October 23, 2017, and addressed to petitioner at a Melville,

New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated October 23, 2017, setting forth the following four unpaid personal income tax assessments subject to collection:

Assessment ID	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/Credits	Current Balance Due
L-046967081	12/31/16	\$13,754.00	\$540.65	\$959.85	\$0.00	\$15,254.50
L-046179129	3/20/17	\$50.00	0.00	0.00	0.00	\$50.00
L-045984405	12/31/13	\$541.00	\$163.29	\$10.80	0.00	\$715.09
L-044867768	12/31/15	\$4,827.00	\$571.70	\$431.67	\$536.40	\$5,293.97
Total						\$21,313.56

3. 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, he was required to either pay the amount due or set up a payment plan in order to avoid suspension of his license.

4. 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.

5. 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 listed 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.

6. Under the heading, “Protests and legal actions,” it is explained that if the recipient protests with the Tax Department, 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’s Bureau of Conciliation and Mediation Services (BCMS), or filing a petition with the Division of Tax Appeals.

**DTA No. 828469**

7. On November 16, 2017, the Division of Tax Appeals received a petition from petitioner. The petition protests the 60-day notice and personal income tax deficiencies for the years 2013, 2015 and 2016, assessment number “E-044867768-CL01-1.” The petition indicates that a conciliation conference was not requested. Attached to the petition is the 60-day notice and the consolidated statement of tax liabilities (*see* findings of fact 1 and 2).<sup>3</sup> In his petition, petitioner

---

<sup>3</sup> The petition does not protest an unpaid personal income tax liability for the period ended March 20, 2017 included in the consolidated statement of tax liabilities.

asserts that the tax deficiencies may be erroneous.

8. The Division filed its answer to DTA number 828469 on January 24, 2018. In its answer, the Division maintains that: a) the 60-day notice included a consolidated statement of tax liabilities that set forth fixed and final tax notices issued to petitioner totaling \$21,313.56 that are subject to collection; b) petitioner has not sought relief from the proposed 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) through (vi); and c) petitioner has requested a conciliation conference before BCMS protesting the 60-day notice, which conciliation conference is pending.

9. Despite his statement to the contrary in his petition, petitioner actually timely requested a conciliation conference before BCMS and opted to have the matter decided by correspondence. Subsequently, BCMS issued a conciliation order, CMS No. 300372, dated March 23, 2018, denying petitioner's request and sustaining the 60-day notice.

**DTA No. 828753**

10. On June 4, 2018, the Division of Tax Appeals received a petition from petitioner, which challenges "CMS No. 000300372." In his petition, petitioner asserts that he does not know how the taxes for the year 2016 were determined, but is willing to pay any tax determined to be due when his circumstances change.

11. The Division filed its answer in DTA number 828753 on October 3, 2018. In its answer, the Division maintains that: a) the 60-day notice included a consolidated statement of tax liabilities that sets forth fixed and final tax notices issued to petitioner totaling \$21,313.56 that are subject to collection; b) petitioner has not sought relief from the proposed 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) through (vi); and c) the BCMS conciliation order, CMS No. 300372,

dated March 23, 2018, sustained the 60-day notice.

12. Subsequently, the Division filed a notice of motion and supporting papers on May 2, 2019 seeking the dismissal of the petitions in DTA numbers 828469 and 828753 or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5 and 3000.9 (a).

13. In support of its motion, the Division submitted: (i) the affirmation of Karry L. Culihan, Esq., an attorney employed in the Office of Counsel of the Division, dated May 2, 2019; (ii) copies of the 60-day notice and the consolidated statement of tax liabilities, each dated October 23, 2017; (iii) a copy of the petition in DTA number 828469; (iv) a copy of the answer to the petition in DTA number 828469; (v) a copy of the conciliation order, CMS no. 300372, dated March 23, 2018; (vi) a copy of the petition in DTA number 828753; (vii) a copy of the answer to the petition in DTA number 828753; and (viii) an affidavit, dated May 1, 2019, of Todd Lewis, a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED).

\_\_\_\_\_ 14. The affidavit of Mr. Lewis describes his responsibilities and duties, which 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.

15. 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 § 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 (a). 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 with certificate of mailing to the taxpayer's mailing address of record.

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.<sup>4</sup> 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

---

<sup>4</sup> 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.



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 (a) (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.

16. Mr. Lewis'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 (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Lewis's affidavit. 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 60-day notice to petitioner on October 23, 2017 comports with statutory requirements, petitioner has not raised any of the specifically listed grounds for

challenging such a notice set forth at Tax Law § 171-v (5) and, therefore, the 60-day notice has not been, and should not be, canceled.

17. In her affirmation in support of the motion, Ms. Culihan maintains that the petition in DTA number 828469 was filed prematurely because a) it was filed concurrently with petitioner's request for a conciliation conference with BCMS, and b) petitioner, in the petitions in DTA numbers 828469 and 828753, has not sought relief from the proposed 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) through (vi). The Division thus argues that the proposed suspension is proper, and that there is no basis for administrative or judicial review of such proposed suspension, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petitions in DTA numbers 828469 and 828753 for lack of jurisdiction or summary determination in its favor.

18. In his response to the Division's motion, petitioner maintains that the Division's motion should be denied. Petitioner asserts that the tax amounts may be erroneous and he does not know how the taxes for the year 2016 were determined.

19. The Division did not submit any proof of mailing or other method of issuance of notices L-045984405, L-044867768 and L-046967081, three of the four underlying assessments referenced in the 60-day notice.

#### ***CONCLUSIONS OF LAW***

A. It is noted that DTA numbers 828469 and 828753 have been consolidated for purposes of judicial economy, because the former challenges the 60-day notice and three of the underlying assessment notices set forth on the consolidated statement of tax liabilities, and the latter challenges the conciliation order sustaining the 60-day notice.

B. The Division brings a motion to dismiss the petitions in DTA numbers 828469 and 828753 under section 3000.9 (a) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination pursuant to 20 NYCRR 3000.9 (b). The standard of review for both such motions is the same (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). A motion for summary determination may 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” (20 NYCRR 3000.9 [b] [1]).

C. Section 3000.9 (c) of the Rules provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004):

“Inasmuch 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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989]).”

D. To prevail against a proponent of a motion to dismiss or 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 rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman*).

E. A taxpayer may protest a notice of proposed driver’s license suspension referral by filing a petition for a hearing with the Division of Tax Appeals within 60 days from the date of mailing of such notice (Tax Law § 171-v [3]). Alternatively, a taxpayer may protest such a notice by filing a request for a conciliation conference with BCMS, “if the time to petition for such hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that statutory time limits for filing either a petition or request for a conciliation conference are strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a statutory notice to which protest rights attach (e.g., a 60-day notice) becomes fixed and final and, consequently, BCMS and the Division of Tax Appeals are without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Tax Law § 170 (3-a) (e) provides that a conciliation order will not be binding on the requester if such person petitions for a hearing concerning the statutory notice within 90 days after the conciliation order is issued, or, for a conciliation order affirming a written notice described in paragraph (h) of this subdivision, within 30 days after the conciliation order is issued, notwithstanding any other provision of law to the contrary. The filing of a request for conciliation conference tolls the statute of limitations for filing a petition (*see* Tax Law § 170 [3-a] [b]).

F. On November 16, 2017, the Division of Tax Appeals received a petition in DTA number 828469 that challenges the 60-day notice, and personal income tax deficiencies for the years 2013, 2015 and 2016, notices L-045984405, L-044867768 and L-046967081, respectively, referenced in the consolidated statement of tax liabilities and underlying the 60-day notice. BCMS issued a conciliation order, dated March 23, 2018, denying petitioner's request and sustaining the 60-day notice. The petition in DTA number 828469's challenge of the 60-day notice is premature and the Division of Tax Appeals is without jurisdiction to consider the petition's substantive merits regarding such 60-day notice (*see* Tax Law § 170 [3-a]). Accordingly, the Division's motion to dismiss the petition in DTA number 828469 is granted with respect to the 60-day notice.

G. The petition in DTA number 828469 also challenges the substantive merits of the assessments set forth on notice numbers L-045984405, L-044867768 and L-046967081. The Division has offered insufficient evidence, and absolutely no mail proof, in the face of petitioner's challenge, to establish the proper issuance and timing of assessment numbers L-045984405, L-044867768 and L-046967081, and the exhaustion or prohibition of petitioner's administrative or judicial review (*see* finding of fact 19). Thus, because a material question of fact remains as to whether the Division properly issued to petitioner notice numbers L-045984405, L-044867768 and L-046967081 for the years 2013, 2015 and 2016, respectively, the Division's motion, with respect to the petition in DTA number 828469's challenge of those three notices, must be denied.

H. The petition in DTA number 828573 challenges the BCMS order sustaining the 60-day notice. At issue in that matter is petitioner's protest concerning the proper issuance to him of the 60-day 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).

I. 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 exists 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 numbers L-045984405, L-044867768, L-046967081 and L-046179129 as comprising the past-due tax liabilities giving rise to the license suspension<sup>5</sup> and petitioner has challenged the facts underlying three of those assessments, L-045984405, L-044867768 and L-046967081, in DTA numbers 828469 and 828753. It was incumbent upon the Division to establish in its motion that petitioner's tax liabilities under those three notices are unequivocally fixed and final. However, the Division has offered insufficient evidence, as determined in conclusion of law G, to establish the proper issuance of assessment numbers L-045984405, L-044867768 and L-046967081, and the exhaustion or prohibition of petitioner's administrative or judicial review. In sum, there remains issues of fact regarding the existence of "past-due tax liabilities," as defined in Tax Law § 171-v (1), and, therefore,

---

<sup>5</sup> The consolidated statement of tax liabilities also includes an unpaid personal income tax assessment number L-046179129 in the amount of \$50.00 for the tax period ended March 20, 2017 (*see* finding of fact 2).

summary determination is inappropriate.

J. The Division of Taxation's motion to dismiss is granted with respect to that portion of the petition in DTA number 828469 challenging the 60-day notice (*see* conclusion of law F).

The Division of Taxation's motion is denied with respect to the petition in DTA number 828469's challenge of notice numbers L-045984405, L-044867768 and L-046967081 (*see* conclusion of law G) and the petition in DTA number 828753, and those petitions of Daniel W. LaMarco, now consolidated, shall proceed in due course.

DATED: Albany, New York  
August 29, 2019

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE