

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER KEEHN	:	ORDER
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law § 171-v.	:	DTA NO. 828667

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

On September 25, 2018, 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., its annexed exhibits, and the affidavits of Todd Lewis, Deena Picard, and Fred Ramundo. Petitioner, appearing pro se, did not respond to the motion. Accordingly, the 90-day period for issuance of this order began on October 25, 2018, the due date for petitioner's response. After due consideration of the documents submitted, 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 by summary determination.

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-034206563-CL01-8, dated January 18, 2018 (60-day notice), and issued to petitioner pursuant to Tax Law § 171-v. The 60-day notice advised petitioner that he 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 January 18, 2018, and is addressed to petitioner at a Sunnyside, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated January 18, 2018, referencing “Bills subject to collection action” and included the following income tax assessments:

Notice Type	Assessment ID	Tax Period Ended	Tax	Current Balance Due ¹
Notice & Demand	L-046998859	12/31/14	\$210.00	\$ 258.21
Notice of Deficiency	L-045924832	12/31/13	\$994.00	\$1,473.26
Notice & Demand	L-045195188	12/31/13	\$203.00	\$191.86
Notice & Demand	L-041754959	12/31/13	\$3,854.00	\$6,318.52
Notice & Demand	L-042973456	12/31/14	\$1,380.00	\$1,957.41
Total				\$10,199.26

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

¹ The current balance due for each assessment includes interest and penalty amounts that have accrued to January 18, 2018. Interest and penalties continue to accrue on unpaid bills.

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 a petition with the Division of Tax Appeals.

7. Petitioner sent an undated letter to the Division of Tax Appeals, date stamped as received on February 26, 2018, responding to the "Notice of Proposed Driver's License Suspension Referral, Collection case ID# E-034206563-CL01-8."² Documentation accompanying the letter did not include a petition. By letter dated March 8, 2018, the Division of Tax Appeals informed petitioner that he must file a petition in order to protest the 60-notice, and provided forms and instructions for doing so. In addition, petitioner's original documents were returned to him.

8. On April 17, 2018, petitioner filed a petition with the Division of Tax Appeals protesting the 60-day notice, and the underlying notices, assessment identification numbers L-046998859-3, L-045924832-3, L-045195188-8, L-041754959-5, L-042973456-2 and E-034206563-1 (*see* finding of fact 2).³ The envelope in which the petition was mailed bears a USPS postmark of April 17, 2018. In his petition, petitioner asserts that he is "[o]n public assistance + food stamps + HEAP;" has "no assets since the start of PA;" and has "been unable to work for 6 years" due to a recurring illness. He further asserts that he would be "happy . . . to continue working and pay anything vetted."

9. The Division filed its answer to the petition on July 3, 2018. The Division, in turn,

² The envelope in which petitioner's letter was sent by first class mail does not have a United States Postal Service (USPS) postmark.

³ The collection case ID number E-034206563-CL01-8 appears on the consolidated statement of tax liabilities, dated January 18, 2018, which was among the documents attached to the petition.

filed a notice of motion and supporting papers on September 25, 2018, 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).

Assessment IDs L-041754959 and L-042973456

10. Attached to the Division's motion as exhibit 2, was a copy of a notice and demand for payment of tax due (notice and demand) bearing assessment identification number L-041754959, and a copy of a notice and demand bearing assessment identification number L-045973456.

11. Notice and demand L-041754959, dated August 1, 2014, was addressed to "Peter I. Keelton" at a Sunnyside, New York, address, and asserted personal income tax, interest and penalty due for the tax period ended December 31, 2013.

12. Notice and demand L-042973456, dated June 1, 2015, was addressed to "Peter I. Keehn II" at a Sunnyside, New York, address, and asserted income tax due for the tax period ended December 31, 2014 in the amount of \$1,380.00, plus interest and penalty, for a current balance due of \$1,407.19. Review of this notice and demand indicates that it was issued because petitioner did not pay the full amount due on the late filed income tax return he filed for the tax period ended December 31, 2014.

13. In its motion, the Division asserts that, pursuant to Tax Law § 173-a, these two notices and demand have no hearing rights and, therefore, petitioner's protest against them should be dismissed.

14. The Division offered no proof of mailing or last known address for either notice.

Assessment IDs L-046998859 and L-045195188

15. Relevant to assessment ID L-046998859, the Division submitted with its motion: (i) a copy of a notice and demand, bearing assessment identification number L-046998859, dated

September 8, 2017; (ii) an affidavit, dated September 20, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "USPS Receipt of Mailing for - DTF-966-E Notice and Demand," postmarked September 8, 2017 (September 8, 2017 mail log); and (iv) an affidavit, dated September 21, 2018, of Fred Ramundo, a Stores and Mail Operations Supervisor in the Division's mail room.

16. Relevant to assessment ID L-045195188, the Division submitted with its motion: (i) a copy of a notice and demand, bearing assessment identification number L-045195188, dated July 6, 2016; (ii) an affidavit, dated September 20, 2018, of Deena Picard; (iii) a "Mailings of Notices of Additional Tax Due, Original Issue Notice and Demands, Responses to Taxpayer Inquiries and Notices of Adjustment," postmarked July 6, 2016 (July 6, 2016 mail log); and (iii) an affidavit, dated September 21, 2018, of Fred Ramundo.

17. The affidavits of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and has been Acting Director of MAPS since May 2017, set forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of records regarding first class mail that was sent with a certificate of mailing, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Notices and demand and other statutory notices are generated from CARTS and are predated with the anticipated date of mailing. The first page of the notice and demand bears the taxpayer's mailing address and a departmental return address on the front, and taxpayer instructions for responding on the back. Each notice and demand, with appropriate enclosures, is a discrete unit within the batch of notices. The first page of the notice and demand

is the first sheet in the unit.

18. Each batch of statutory notices is accompanied by a computer generated mail log. Each page of the mail log lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last pages of both mail logs, in the present case, to the actual mailing dates of "9/8/17" and "7/6/16," respectively. In addition, as described by Ms. Picard, generally all pages of a mail log are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. According to Ms. Picard, the pages of a mail log stay banded together unless otherwise ordered. The page numbers of the mail log run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

19. The mail log lists each notice in the order the notices are generated in the batch. Each notice is assigned a standard mail sequence number. The standard mail sequence numbers are listed under the first heading "Sequence No." The assessment numbers are listed under the second heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Each mail log and associated batches of notices are forwarded to the mail room together.

20. The affidavits of Fred Ramundo describe the Division's mail room's general operations and procedures. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. Notices and demand are mailed by first class mail with a certificate of mailing, and the mail log is the document that records each piece of first class mail with a certificate of mailing. Mr. Ramundo attests that the mail log is signed by Division's CARTS Control staff and mail room staff as confirmation of processing and mailing on the date of mailing. He further attests that the September 8, 2017 and

July 6, 2016 mail logs conform to the USPS form 3665, Certificate of Mailing.

21. Notices and demand that are ready for mailing are received by the Division's Outgoing Mail Processing Center, where they are assigned to a mail room staff member, who operates the mail inserter machine. The assigned staff member places the materials onto a mail inserter machine, which puts each notice and demand and associated documents into a windowed envelope so that the addresses from the notice and demand show through the windows. The inserter machine weighs, seals and affixes postage to each envelope in the order the notices are listed on the mail log. The envelopes are then placed in order into mail trays and delivered to a designated area for outgoing first class mail with a certificate of mailing. A staff member then reviews the mailings, comparing the first and last pieces of mail to the mail log. The total postage fee is computed and a postage meter tape is affixed to the last page of the mail log. A staff member then delivers the envelopes and the mail log to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the mail log, indicating receipt of the mail listed in the mail log and of the mail log itself by the post office.

22. The September 8, 2017 mail log consists of 1,556 pages and lists 21,217 sequence numbers along with corresponding assessment numbers, names and addresses. Each page of the mail log includes 13 such entries, with the exception of page 1,556, which contains 8 entries. Ms. Picard notes that the copy of the September 8, 2017 mail log that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated September 8, 2017 to the first and last page of the mail log, and handwrote the number "21217" below the preprinted "21,217" on page 1,556 next to the heading "Signed for by (Postal Employee)," and also initialed

and hand dated “9-8-17” on the same page. On page 1,556, the last page of the September 8, 2017 mail log, the following preprinted text appears: on the first line, the heading “TOTAL NUMBER OF DOCUMENTS FOR MAILING;” next to which the preprinted number “21,217” appears, followed by the heading “TOTAL POSTAGE:” that contains no entry; next, a two line statement “I AFFIRM THAT THE ABOVE DOCUMENTS HAVE BEEN RECEIVED FROM THE OPERATIONS SECTION AND FORWARDED TO THE MAILROOM: SIGNED FOR BY CARTS CONTROL UNIT EMPLOYEE:” appears, along with the signature of a CARTS Control employee and the handwritten date “9/5/17;” a signature of a mail room employee and the handwritten date “9/6/17” appears beneath the statement “I AFFIRM THAT THE ABOVE LISTED DOCUMENTS HAVE BEEN INSERTED INTO MAILING ENVELOPES AND HAD POSTAGE APPLIED.” The handwritten dollar amount of \$8,274.63 appears in the upper right corner of page 1,556, and several US Postage Pitney Bowes metered tapes dated “SEP 08 2017” are affixed near the bottom of the page.

23. Page 736 of the September 8, 2017 mail log, titled “USPS Receipt of Mailing for - DTF-966-E Notice and Demand,” indicates that a notice and demand with sequence number P0010037000001000002, and reference number L-046998859, was mailed to petitioner at the Sunnyside, New York, address listed on the subject notice and demand.

24. The July 6, 2016 mail log consists of 32 pages and lists 369 standard mail sequence numbers along with corresponding assessment numbers, names and addresses. Each page of the mail log includes 12 such entries, with the exception of page 31, which contains 9 entries, and page 32, which contains zero entries. Ms. Picard notes that the copy of the July 6, 2016 mail log that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a

postmark dated July 6, 2016 to the each page of the mail log, handwrote the number “369” below the preprinted “369” on page 32 next to the heading “Signed for by (Postal Employee),” and initialed page 32. On page 32, the last page of the July 6, 2016 mail log, the following preprinted text appears: on the first line, the heading “TOTAL NUMBER OF DOCUMENTS FOR MAILING;” next to which the preprinted number “369” appears, followed by the heading “TOTAL POSTAGE:” that contains no entry; next, a two line statement “I AFFIRM THAT THE ABOVE DOCUMENTS HAVE BEEN RECEIVED FROM THE OPERATIONS SECTION AND FORWARDED TO THE MAILROOM: SIGNED FOR BY CARTS CONTROL UNIT EMPLOYEE:” appears, along with the signature of a CARTS Control employee and the handwritten date “6/29/16;” no mail room employee signed and dated the line beneath the statement “I AFFIRM THAT THE ABOVE LISTED DOCUMENTS HAVE BEEN INSERTED INTO MAILING ENVELOPES AND HAD POSTAGE APPLIED.” The handwritten dollar amount of \$132.84 appears in the upper right corner of page 32, and two US Postage Pitney Bowes metered tapes dated “JUL 06 2016” are affixed near the bottom of the page.

25. Page 14 of the July 6, 2016 mail log indicates the notice and demand with standard mail sequence number TBP 0000933 1801700, and reference number L-045195188, was mailed to petitioner at the Sunnyside, New York, address listed on the subject notice and demand.

26. As noted, a USPS postmark dated September 8, 2017 appears on pages 1 and 1,556, the first and last pages of the September 8, 2017 mail log attached to the Picard affidavit as exhibit “A.” According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all of the 21,217 articles of mail listed on the mail log, including the article addressed to petitioner, were received by the USPS for mailing on September 8, 2017.

27. As noted, each of the 32 pages of the July 6, 2016 mail log attached to the Picard

affidavit as exhibit “A” contain a USPS postmark dated July 6, 2016. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all of the 369 articles of mail listed on the mail log, including the article addressed to petitioner, were received by the USPS for mailing on July 6, 2016.

Assessment ID L-045924832

28. Relevant to assessment ID L-045924832, the Division submitted with its motion: (i) an affidavit, dated September 19, 2018, of Deena Picard; (ii) a “Certified Record for - DTF-962-F-E - Not of Def Follow Up” (CMR) postmarked February 27, 2017; (iii) an affidavit, dated September 21, 2018, of Fred Ramundo; and (iv) a copy of a notice of deficiency, bearing assessment identification number L-045924832, dated February 27, 2017, with the associated mailing cover sheet.

29. The affidavit of Deena Picard sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with CARTS and the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first and last page of the CMR, in the present case, to the actual mailing date of “2/27/17.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. According to Ms. Picard, the pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are

noted in the upper right corner of each page.

30. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

31. The February 27, 2017 CMR consists of 426 pages and lists 5,855 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes between 11 and 15 such entries, with the exception of page 426, which contains 2 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated February 27, 2017 to each page of the CMR, and handwrote the number "5855" next to and below the preprinted number "5,855" on page 426 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 426.

32. Page 136 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 3395 8263, and reference number L-045924832, was mailed to petitioner at the Sunnyside, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this same certified control number and petitioner's name and address as noted.

33. The affidavit of Fred Ramundo describes the Division's mail room's general

operations and procedures. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each of the 426 pages of the CMR attached to the Picard affidavit as exhibit “A” contain a USPS postmark dated February 27, 2017. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all of the 5,855 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on February 27, 2017.

The 60-Day Notice

34. In support of its motion, the Division submitted, among other documents: (i) the affirmation of Hannelore F. Smith, Esq., an attorney employed in the Office of Counsel of the Division, dated September 21, 2018; (ii) the 60-day notice dated January 18, 2018; (iii) the affidavit, dated September 20, 2018, of Todd Lewis, who is employed as a Tax Compliance

Manager 4 with the Division's Civil Enforcement Division (CED); (iv) an affidavit, dated September 20, 2018, of Deena Picard; (v) a "USPS Receipt of Mailing for - DTF-454-DMV Drivers License Susp'd," postmarked January 18, 2018 (January 18, 2018 mail log); and (vi) an affidavit, dated September 21, 2018, of Fred Ramundo.

35. 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.

36. 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 the 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 pursuant to 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 regular United States mail.

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.⁴ 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 (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

⁴ 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.

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.

37. 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 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 January 18, 2018 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.

38. The affidavit of Deena Picard sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of records regarding first class mail that was sent with a certificate of mailing, and is familiar with CARTS and the Division’s past and present procedures as they relate to statutory notices. The 60-day notices and other statutory notices are generated from CARTS and are predated with the anticipated date of mailing. The first page of the 60-day notice bears the taxpayer’s mailing address and a departmental return address on the front, and taxpayer instructions for responding on the back. CARTS also generates a consolidated statement of tax liabilities and a payment document for each 60-day notice. Each 60-day notice, with appropriate enclosures, is a discrete unit within the batch of notices. The first

page of the 60-day notice is the first sheet in the unit.

39. Each batch of statutory notices is accompanied by a computer generated mail log. Each page of a mail log lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last pages of the mail log, in the present case, to the actual mailing date of "1/18/18." In addition, as described by Ms. Picard, generally all pages of a mail log are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. According to Ms. Picard, the pages of a mail log stay banded together unless otherwise ordered. The page numbers of the mail log run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

40. The mail log lists each notice in the order the notices are generated in the batch. Each notice is assigned a standard mail sequence number. The standard mail sequence numbers are listed under the first heading "Sequence No." The assessment numbers are listed under the second heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

41. The affidavit of Fred Ramundo describes the Division's mail room's general operations and procedures. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The 60-day notices are mailed by first class mail with a certificate of mailing, and the mail log is the document that records each piece of first class mail with a certificate of mailing. Mr. Ramundo attests that the mail log is signed by the Division's CARTS Control staff and mail room staff as confirmation of processing and mailing on the date of mailing. He further attests that the January 18, 2018 mail log conforms to the USPS form 3665, Certificate of Mailing.

42. The 60-day notices that are ready for mailing are received by the Division's Outgoing Mail Processing Center, where they are assigned to a mail room staff member, who operates the mail inserter machine. The assigned staff member places the materials onto a mail inserter machine, which puts each 60-day notice and associated documents into a windowed envelope so that the addresses from the 60-day notice show through the windows. The inserter machine weighs, seals and affixes postage to each envelope in the order the notices are listed on the mail log. The envelopes are then placed in order into mail trays and delivered to a designated area for outgoing first class mail with a certificate of mailing. A staff member then reviews the mailings, comparing the first and last pieces of mail to the mail log. The total postage fee is computed and a postage meter tape is affixed to the last page of the mail log. A staff member then delivers the envelopes and the mail log to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the mail log, indicating receipt by the post office.

43. The January 18, 2018 mail log consists of 134 pages and lists 2,003 sequence numbers along with corresponding assessment numbers, names and addresses. Each page of the mail log includes 15 such entries, with the exception of page 134, which contains 10 entries. Ms. Picard notes that the copy of the mail log that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated January 18, 2018 to the last page of the mail log, and initialed page 134. On page 134, the last page of the January 18, 2018 mail log, the following preprinted text appears: on the first line, the heading "TOTAL NUMBER OF DOCUMENTS FOR MAILING;" next to which the preprinted number "2,003" appears, followed by the heading "TOTAL POSTAGE:" that contains no entry; next, a two line statement

“I AFFIRM THAT THE ABOVE DOCUMENTS HAVE BEEN RECEIVED FROM THE OPERATIONS SECTION AND FORWARDED TO THE MAILROOM: SIGNED FOR BY CARTS CONTROL UNIT EMPLOYEE:” appears, along with signature of a CARTS Control employee and the handwritten date “1/8/18;” a signature of a mail room employee and the handwritten date “1-10-18” appears beneath the statement “I AFFIRM THAT THE ABOVE LISTED DOCUMENTS HAVE BEEN INSERTED INTO MAILING ENVELOPES AND HAD POSTAGE APPLIED.” The handwritten dollar amount of \$781.17 appears in the upper right corner of page 134, and several US Postage Pitney Bowes metered tapes dated “JAN 18 2018” are affixed near the bottom of the page.

44. Page 62 of the January 18, 2018 mail log, indicates that a 60-day notice with sequence number P0000915000001000003, and reference number E-034206563, was mailed to petitioner at the Sunnyside, New York, address listed on the subject notice.

45. As noted, a USPS postmark dated January 18, 2018 appears on page 134, the last page of the January 18, 2018 mail log attached to the Picard affidavit as exhibit “A.” According to Mr. Ramundo, the affixation of the postmark and the USPS employee’s initials indicate that all of the 2,003 articles of mail listed on the mail log, including the article addressed to petitioner, were received by the USPS for mailing on January 18, 2018.

46. Under the motion at issue herein, the Division asserts that petitioner did not timely file his petition in protest of the subject notices, and even if the petition is deemed timely filed, 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.

47. The affirmation of Hannelore F. Smith, also submitted with the motion, asserts in a footnote, that even though petitioner inserts a hyphen in the house number of his address (50-15) on his petition and tax returns, the USPS official website does not. There is no evidence attached from the USPS to verify this assertion, nor are any of petitioner's tax returns attached to verify her claim.

48. The Division did not submit any proof of petitioner's last known address.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition 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 under section 3000.9 (b). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). The standard for review of such a motion to dismiss is the same as that for a motion for summary determination (*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]).

B. 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]).”

C. A taxpayer may protest a notice of proposed driver’s license suspension 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 a 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).

D. It is well settled that where the timeliness of a protest (here the timelessness of the petition) is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question presented is whether the Division has carried its burden of demonstrating the fact and date of proper mailing of the notice being protested (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In the case of a proposed driver's license suspension, Tax Law § 171-v (3) states that “[n]otice shall be provided by first class mail to the taxpayer's last known address as such address appears in the electronic systems or records of the [Division].”

E. The Division may meet its burden of proving proper mailing by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The mailing evidence is two-fold, and to prove the fact and date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

F. The record on this motion does not include any evidence by which the mailing of the 60-day notice to petitioner's last known address on January 18, 2018 can be verified. The Division's proof of mailing of the 60-day notice consisted of the affidavits of Deena Picard and Fred Ramundo, a copy of the 60-day notice, the January 18, 2018 mail log, and a footnote

reference in Ms. Smith's affirmation regarding petitioner's address reflected in such proof of mailing. The Division did not submit any evidence regarding petitioner's last known address as such address appeared in its electronic systems or records at the alleged time the 60-day notice was provided to petitioner. It is well settled that a "bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing" (*Zuckerman* at 563). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value (*see Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 [1st Dept 1981] *aff'd* 54 NY2d 715 [1981]). The proof submitted fails to establish that the 60-day notice was properly mailed on January 18, 2018, and thus the 60-day period within which petitioner was entitled to file a protest was not triggered. Evidence in the record indicates that petitioner had actual notice of the proposed suspension of his license at the latest on February 26, 2018, the date the Division of Tax Appeals received his letter. Petitioner subsequently filed his petition on April 17, 2018, within the 60-day post-notice protest period afforded under Tax Law § 171-v (3), and thus constituted a timely protest (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). As such, the Division's motion to dismiss is denied.

G. While petitioner did not specifically raise any of the six enumerated bases for relief from an apparently otherwise facially valid proposed license suspension (*see* Tax Law § 171-v [5] [i] - [vi]), he did request a vetting (i.e., review) of the five specified assessments underlying the proposed suspension.

H. The remaining issue in this matter is the proper issuance to petitioner of the 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]; emphasis added). 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). In the instant matter, the Division must first establish that the five assessments (L-041754959, L-042973456, L-046998859, L-045195188 and L-045924832) are fixed and final such that petitioner no longer has any right to administrative or judicial review of the same.

I. Turning first to assessments L-041754959 and L-042973456, the Division asserts that these two assessments are notices and demand that have no hearing rights pursuant to Tax Law § 173-a (2). Tax Law § 681 (d) provides that:

“if a mathematical or clerical error appears on a return (including an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax), the commissioner shall notify the taxpayer that an amount of tax in excess of that shown upon the return is due, and that such excess has been assessed. Such notice shall not be considered as a notice of deficiency for purposes of this section, subsection (f) of section six hundred eighty-seven (limiting credits or refunds after petition to the division of tax appeals), subsection (b) of section six hundred eighty-nine (authorizing the filing of a petition with the division of tax appeals based on a notice of deficiency), or article forty of this chapter, nor shall such assessment or collection be prohibited by the provisions of subsection (c). ”

With respect to notice and demand L-041754959, petitioner’s name does not appear on such notice; rather, this notice and demand was issued to Peter I. Keelton (*see* finding of fact 11). The Division has not addressed this discrepancy in the notice and demand. With respect to notice and demand L-042973456, the Division has not provided any evidence that this notice and demand was issued to petitioner at his last known address.

J. As noted, the Division issued three additional assessments to petitioner that it contends

are fixed and final. Specifically, two notices and demand L-046998859 and L-045195188, and a notice of deficiency L-045924832, each of which affords petitioner the right to challenge the same by filing a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of proper issuance of each such notice. The Division contends that petitioner did not challenge these three statutory notices within 90 days of their respective dates of issuance and, therefore, each of those assessments is fixed and final. As noted in conclusion of law D, where the timeliness of a protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. The record on this motion does not include any evidence by which the mailing of notices and demand L-046998859 and L-045195188, and notice of deficiency L-045924832 to petitioner's last known address can be verified. The Division did not submit any of the tax returns filed by petitioner prior to the issuance of these three statutory notices, or any other internal Division record indicating petitioner's last known address prior to the issuance of the same (*see* finding of fact 48; *see also* Tax Law § 681 [a]). As such, it is impossible to determine whether notices and demand L-046998859 and L-045195188, and notice of deficiency L-045924832 are fixed and final assessments.

K. In sum, the Division has not established that the five statutory notices specified in finding of fact 2 are "past-due tax liabilities" as defined by Tax Law § 171-v [1]) (*see* conclusion of law H). Accordingly, and at this stage of the proceedings, the foundational predicate supporting the sanction of license suspension, i.e., the existence of "past-due tax liabilities," pursuant to Tax Law § 171-v [1]), has not been met.

L. The Division's motion to dismiss or, in the alternative, for summary determination is denied and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
January 17, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE