

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition  
Of  
**LEE FEINSTEIN AND THOMI LIOLIYOU**  
for Redetermination of Deficiencies or for Refund of  
New York State Personal Income Tax under Article 22 of  
the Tax Law for the Years 2015 and 2016 and for Review  
of Notices of Proposed Driver License Suspension Referral  
Under Tax Law, Article 8, § 171-v.

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ORDER  
DTA NO. 829558

Petitioners, Lee Feinstein and Thomi Lioliou, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law and for review of notices of proposed driver license suspension referral under Tax Law § 171-v.<sup>1</sup>

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Hannelore F. Smith, Esq., of counsel), brought a motion on April 20, 2020, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9 (a) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Hannelore F. Smith, Esq., dated April 17, 2020, with annexed exhibits. Petitioners, appearing by Danette Montanaro, E.A., did not file a response to the Division of Taxation’s motion. The 90-day period for issuance of this order began on May 20, 2020. Based upon the motion papers, the affidavits, affirmations, and

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<sup>1</sup> The caption section of the petition in this matter wrongly referenced articles 28 and 29 of the Tax Law, which were not the subject of the statutory notices being protested by the petition. The caption has been revised to reflect the statutory notices being challenged by the petition.

documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following order.

***ISSUES***

I. Whether petitioners filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services after the issuance of two notices of deficiency.

II. Whether the Division of Taxation's notices of proposed driver license suspension referral issued to petitioners should be sustained.

***FINDINGS OF FACT***

1. The petition in this matter protests: (i) two notices of a deficiency, dated January 30, 2019, issued by the Division of Taxation (Division) to petitioners, Lee Feinstein and Thomi Lioliou, asserting personal income tax due; and (ii) the Division's subsequent issuance to petitioners of notices of proposed driver license suspension referral (form DTF-454), collection case ID E-0411184802-CL01-1 and E-141184802-CL01-8, respectively (60-day notices or notices), both dated September 18, 2019, advising that petitioners must pay their New York State tax debts or face the possible suspension of their driver's licenses pursuant to Tax Law § 171-v. The petition lists Ms. Danette Montanaro, with AG Tax Services, as petitioners' representative and lists her address as 1 Croton Pt. Ave., Croton, New York 10620. Attached to the petition is a form POA-1, power of attorney, dated August 22, 2019, in which petitioners designate Michael Grossbach and Ms. Montanaro, both with AG Tax Services, to represent them in this matter. The address used for the two representatives on the power of attorney form is the same Croton, New York, address given for Ms. Montanaro on the petition, except it includes a suite number, suite 11.

2. Included with the 60-day notices was a consolidated statement of tax liabilities (form DTF-967-E), also dated September 18, 2019, setting forth two unpaid assessments subject to collection action, for a total amount due of \$11,837.74, including penalty and interest, as follows:

<u>Assessment ID</u>	<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>Interest Amount Assessed</u>	<u>Penalty Amount Assessed</u>	<u>Current Balance Due (including payments)</u>
L-049278701	12/31/16	\$5,880.42	\$1,233.97	\$1,493.85	\$8,608.24
L-049278700	12/31/15	\$3,466.65	\$982.88	\$994.46	\$3,229.50

3. The 60-day notices 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 petitioners' driver's licenses would be suspended. The front page of the 60-day notices informed petitioners that, to avoid having their licenses suspended, they must either pay the amount due, or prove that they qualified for one of the statutory exemptions.

4. Starting on the bottom of the front page and continuing on to its back is a section entitled "Statutory exemptions from driver's license suspension, which states:

- "Commercial Driver's License (CDL) – You have a commercial driver's license. . . .
- Income Execution – The Tax Department is already garnishing your wages to pay these debts.
- Child Support – Your wages are being garnished, or you have made satisfactory payment arrangements with a child support collection unit for the payment of child support or combined child and spousal support . . . .
- Public assistance – You receive public assistance benefits. . . .
- Supplemental Social Security Income (SSI) – You receive SSI benefits. . . .
- Suspension of your driver's license will cause undue economic hardship . . . ."

5. The next section starts with the heading “How to protest,” and states that “New York State Law limits the grounds for challenging the suspension of your driver’s license to the statutory exemptions listed above.” It explains that the recipient can protest the notice by either filing a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) or by filing a petition with the Division of Tax Appeals.

6. The following section bears the heading “You should also contact the Tax Department if:” and proceeds to list a number of circumstances including that the recipient is not the taxpayer named in the notice, enforcement of the tax debts has been stayed by the filing of a bankruptcy petition, the tax debts have been paid, or the recipient is eligible for innocent spouse relief under Tax Law § 654 for certain income tax debts.

7. No mention is made in the 60-day notices that the recipient would also have the right to protest the notice if the Division has on more than one occasion in the past year wrongly found that the recipient failed to comply with the terms of his or her payment arrangement with the Division.

8. The petition filed by petitioners with the Division of Tax Appeals is dated September 23, 2019, and was received by the Division of Tax Appeals on September 26, 2019. The petition was delivered to the Division of Tax Appeals in an envelope that bears a United States Postal Service (USPS) postage sticker indicating that it was mailed via first-class mail, but which lacks a date. The petition challenges both the notices of deficiency and the 60-day notices issued to petitioners. The petition does not deny receipt of the notices of deficiency. It asserts that the petition was “late” because “when phone calls were made in regards to the audit, we were told there was no auditor we could speak to and that we would have 2 years to protest the findings.”

The Notices of Deficiency

9. In support of its motion, the Division submitted: (i) an affirmation, dated April 17, 2020, of Hannelore F. Smith, Esq., an attorney employed in the Division's Office of Counsel; (ii) an affidavit, dated April 7, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a copy of a 16-page "Certified Record For - DTF-962-F-E - Not of Def Follow Up" (CMR) postmarked January 30, 2019; (iv) an affidavit, dated April 14, 2020, of Susan Saccocio, Senior Administrative Analyst, and manager of the Division's mail room; (v) a copy of each of the two notices of deficiency, both dated January 30, 2019; (vi) a copy of petitioners' electronically filed 2017 New York State resident income tax return (form IT-201), filed on March 22, 2018, which lists the same Elmsford, New York, address for petitioners as used on the notices of deficiency; (vii) a copy of an affidavit, dated March 10, 2020, of Todd Lewis, a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED); and (viii) copies of the 60-day notices.

10. In her affirmation, Ms. Smith asserts that the form IT-201 for 2017 filed by petitioners was the last return filed with the Division prior to January 30, 2019, the claimed issuance date of the notices of deficiency. That return shows petitioners' address as being the same Elmsford, New York, address, as used on the notices of deficiency. The affirmation asserts that the notices of deficiency were also mailed to petitioners' representative, Mr. Grossbach, at 1 Croton Point Ave, Croton, NY 10520. The affirmation does not identify the source of that address for Mr. Grossbach. The signature block section of the return identifies Mr. Grossbach, with AG Tax Services, as the preparer and gives an address for him of 1 Croton Point Ave., Croton On Hudson, New York 10520.

11. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. The CMR is a computer printout. Each page of the CMR lists an initial date ("run date") in the upper left corner 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 CMR in the present case to the actual mailing date of "1/30/19." 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. 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.

12. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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. 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."

13. The CMR in the present matter consists of 16 pages and lists 200 certified control numbers, along with corresponding assessment numbers, names and addresses. According to Ms. Picard, each page of the CMR includes 12 to 13 such entries, with the exception of page 16, which does not include any entries.<sup>2</sup> 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.

14. A USPS representative affixed a postmark dated January 30, 2019 to each page of the CMR, handwrote the number “200” on the blank opposite the heading “Total Pieces Received at Post Office,” and initialed or signed page 16.

15. Page 5 of the January 30, 2019 CMR indicates that statutory notices with certified control numbers 7104 1002 9735 4732 3675 and 7104 1002 9735 4732 3682 and reference number L-049278700 and L-049278701, respectively, were mailed to petitioners at the Elmsford, New York, address listed on the notices of deficiency. The CMR and the corresponding mailing cover sheets attached to the Picard affidavit as exhibit “B” bear these same certified control numbers and petitioners’ names and address as noted.

16. Page 4 of the CMR provides the following information about two items of certified mail that were mailed to Michael Grossbach, with AG Tax Services, at 1 Croton Point Ave., Suite 11, Croton, New York 10520:

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<sup>2</sup> Review of the CMR indicates, to the contrary, that several of the pages have more than 13 entries. This error is without consequence, however, because the total number of entries on the CMR is 200, which matches the number of articles listed as received by the post office on the last page of the CMR.

<u>Certified Number</u>	<u>Reference Number</u>
7104 1002 9735 4732 3637	L-049278700
7104 1002 9735 4732 3651	L-049278701 <sup>3</sup>

Also attached to the Picard affidavit are copies of the above certified articles that were mailed to Mr. Grossbach, i.e., the notices of deficiency, along with the cover pages that accompanied them. The cover pages for the certified letters accompanying them reflect the same information shown in the table above.

17. The affidavit of Susan Saccocio describes the general operations and procedures of the Division's mail room. Ms. Saccocio has been manager of the mail room since 2017 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. A staff member receives 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. A clerk checks the first and last pieces of mail against the information on the CMR. The clerk 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

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<sup>3</sup> The CMR also indicates that the Division sent a duplicate copy of each of the notices of deficiency to Mr. Grossbach, to the 1 Croton Point Ave. address, using "Suite 111," instead of "Suite 11," as above. Ms. Picard's affidavit does not explain why duplicate copies of the notices of deficiency were sent to Mr. Grossbach at a slightly different address, as she wrongly asserts that the CMR shows that all the notices sent to Mr. Grossbach used "Suite 111" in the address box.



received by writing the number on the CMR. According to Ms. Saccocio, the affixation of the USPS postmark on each page of the CMR and the USPS employee's writing "200" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 200 articles of mail listed on the CMR, including the two articles addressed to petitioners, and the articles sent to their representative, Mr. Grossbach, were received by the USPS for mailing on January 30, 2019.

18. According to both the Picard and Saccocio affidavits, a copy of each of the notices of deficiency was mailed to petitioners and their representative, Mr. Grossbach, on January 30, 2019, as claimed.

19. The Smith affirmation asserts that petitioners filed a request for conciliation conference, dated June 12, 2020, with BCMS, protesting the notices of deficiency. The affirmation does not indicate how petitioners filed the request for conciliation (whether by mail, fax, or hand-delivery), and does not include a copy of the request for conciliation, but states that it was filed in "June 2019."

20. On August 2, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation order determined that petitioners' protest of the notices of deficiency were untimely and stated, in part:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on January 30, 2019, but the request was not mailed until June 26, 2019, or in excess of 90 days, the request is late filed."

#### The 60-Day Notices

21. As a Tax Compliance Manager 4 with CED, Mr. Lewis's responsibilities and duties include overseeing the operations of the CED's Operations Analysis and Support Bureau (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. His affidavit describes a four-step process undertaken by the Bureau in carrying out the license suspension program authorized by § 171-v of the Tax Law. In the first phase, "the initial process," the Bureau identifies taxpayers who may be subject to the issuance of the 60-day notice. More specifically, the Division electronically searches its records for taxpayers who may qualify for the program using certain selection criteria, including that the taxpayer has an outstanding assessment with a cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessments used to determine the cumulative total is less than 20 years from the notice and demand issue date; and the assessments are not the subject of a formal or informal protest, or a bankruptcy petition.

In the second, or "DMV data match," phase, the Bureau provides identifying information to DMV for taxpayers found to qualify for license suspension program in the first phase to see if they have a qualifying driver's license potentially subject to suspension per Tax Law § 171-v. In the third or "suspension" phase, the Bureau does another data match review to confirm that the taxpayer continues to meet the criteria for suspension. 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. In the fourth, or "Post-Suspension Process," phase, the Bureau monitors events subsequent to license suspension to update the status of a suspension that has taken place. If events occur that cause a taxpayer whose license has been suspended to no longer be eligible for license suspension, the Division will notify DMV and the license suspension will be revoked.

22. Mr. Lewis's affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notices issued to petitioners. Copies of the 60-day notices 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 petitioners could remit payment against the liability in question, were included with Mr. Lewis's affidavit.

23. Mr. Lewis avers that, based upon his review of Division records and his personal knowledge of the Division's policies and procedures regarding driver's license suspension referrals, the issuance of the 60-day notices to petitioners on September 18, 2019 comports with statutory requirements, petitioners have 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 notices have not been, and should not be, canceled.

24. In its answer to the petition, and in its representative's affirmation submitted in support of the motion, the Division maintains that petitioners: a) have not argued or provided any basis to establish that the liabilities asserted in the notices of deficiency are not fixed, final and outstanding; and b) have not sought relief from the proposed suspension of their driver's licenses under any of the eight specifically enumerated grounds for such relief set forth at Tax Law § 171-v (5). The Division thus argues that the proposed suspensions are proper, and that there is no basis for administrative or judicial review of such proposed suspensions, 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.

25. Petitioners did not respond to the Division's motion.

## **CONCLUSIONS OF LAW**

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss a petition may be granted, as 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*:

“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])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

C. 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*). A party’s failure to contest an allegation in the opposing party’s pleadings or in its motion papers may cause those allegations to be deemed admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Standard Metals*, 99 AD2d 227, 229 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]).

Below petitioners’ protest of the notices of deficiency and the 60-day notices are considered in light of the above standard.

#### The Notices of Deficiency

D. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is 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 notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is 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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the

USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer's last known address (*see* Tax Law § 681[a]), and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured. While the Tax Law does not specifically provide for service of the statutory notice on a taxpayer's representative, the Tax Appeals Tribunal's prior decisions have consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Uddin*, Tax Appeals Tribunal, January 18, 2018, citing *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003).

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 evidence required of the Division in order to establish proper mailing is two-fold:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice 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*, Tax Appeals Tribunal, November 14, 1991).

F. Here, the Division has offered sufficient proof to establish the mailing of the notices of deficiency to petitioners' last known address on January 30, 2019. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing

procedure, as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

Further, the address on the mailing cover sheet and CMR conforms with the address listed on petitioners' 2017 resident income tax return, which satisfies the "last known address" requirement. On January 30, 2019, the Division also mailed a copy of the notices of deficiency to Mr. Grossbach, petitioners' representative at the time, using the address of 1 Croton Pt Ave., Suite 11, Croton, New York 01520. As this is the same address given for Mr. Grossbach in the power of attorney form attached to the petition, it is determined to be a correct address for Mr. Grossbach and that the Division properly mailed the notices of deficiency to him on January 30, 2019.

G. It is therefore concluded that the Division properly mailed the notices of deficiency on January 30, 2019, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 689 [b]). While the Division has not submitted any documentary proof on the issue, Ms. Smith's affirmation asserts that the request for conciliation was dated June 12, 2019, and was filed in "June 2019." Petitioners did not submit a response to the Division's motion and therefore have not challenged those assertions, which are thus deemed admitted (*see Kuehne & Nagel*, 6 NY2d at 544). It is determined therefore that petitioners filed their request for conciliation sometime in June 2019. Even using June 1, 2019, as the filing date of the request for conciliation, the request for conciliation would have been filed more than 90 days after the January 30, 2019, issuance of the notices of deficiency. Accordingly, the request for conciliation was untimely and was properly dismissed by BCMS.

The 60-Day Notices

H. Also at issue is petitioners' protest of the 60-day notices proposing the suspension of their driver's licenses. Petitioners challenged the 60-day notices by timely filing a petition with the Division of Tax Appeals (*see* findings of fact 1 and 8).<sup>4</sup> The 60-day notices were issued pursuant to Tax Law § 171-v, which authorized the Division "to cooperate [with the commissioner of motor vehicles] in a program to improve tax collection through the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of [\$10,000.00]" (*see* Tax Law § 171-v [1]). Under subdivision (3) of section 171-v, the Division is to give 60 days' notice to taxpayers included in the program. The notice is required to have certain information, including:

“(a) a clear statement of the past-due tax liabilities . . . ,

(b) a statement that the taxpayer may avoid suspension of his or her license by fully satisfying the past-due tax liabilities, by making payment arrangements satisfactory to the commissioner, or by demonstrating any of the grounds for challenge set forth in [Tax Law § 171-v (5)];

(c) a statement that the taxpayer's right to protest the notice is limited to raising issues set forth in [Tax Law § 171-v (5)].”

Tax Law § 171-v (5) lists seven grounds that may be raised to protest the issuance of a 60-day notice:

“(i) the individual to whom the notice was provided is not the taxpayer at issue; (ii) the past-due tax liabilities were satisfied; (iii) the taxpayer's wages are being garnished by the department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears; (iv) the taxpayer's wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to [CPLR 5241]; (v) the taxpayer's driver's license is a commercial driver's license as defined in [Vehicle and Traffic Law § 501 (a)]; (vi) the [Division] incorrectly found that the taxpayer has failed to comply with

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<sup>4</sup> Even using September 26, 2019, the date the petition was received by the Division of Tax Appeals, as the filing date, the petition would have been a timely protest of the 60-day notices, which were dated September 18, 2019.



the terms of a payment arrangement made with the commissioner more than once within a twelve month period for the purposes of subdivision three of this section; (vii) the taxpayer receives public assistance or supplemental security income [SSI]; or (viii) the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship.”

I. The 60-day notices issued to petitioners herein do not satisfy § 171-v's requirements.

The notices include a section entitled “Statutory exemptions from driver's license suspension.”

The following exemptions are listed under that heading: (i) the recipient's license is a commercial driver's license, (ii) the Division is already garnishing the recipient's wages to pay the tax debts, (iii) the recipient's wages are being garnished for child support, spousal support or both, (iv) the recipient receives public assistance or SSI, and (v) the suspension of the recipient's driver's license will cause the recipient undue economic hardship. This list of exemptions on the notices here does not include three of the grounds for protesting a 60-day notice under Tax Law § 171-v (5), namely the grounds set forth in clauses (i), (ii), and (vi), quoted above. Thus, when the next section of the form, with the heading “How to protest,” states that “New York State Law limits the grounds for challenging the suspension of your driver's license “to the statutory exemptions listed above,” the form is inaccurate as to the scope of petitioners' protest rights under § 171-v. Nor is the problem remedied by the next section of the form, which advises recipients that they should contact the Division under a number of specified circumstances -- including that the recipient is not the taxpayer named in the notice, enforcement of the tax debts has been stayed by the filing of a bankruptcy petition, or the tax debts have been paid – because that section and the form as a whole do not make clear that the grounds listed in that section can be a basis for filing a protest with BCMS or the Division of Tax Appeals.

J. Not every defect in a statutory notice issued by the Division renders the form a legal nullity (*see, e.g., Matter of Pepsico, Inc. v Bouchard*, 102 AD2d 1000, 1001 [3d Dept 1984]

[notice misstating the period for which tax assessed not invalid since taxpayer not prejudiced]; *Matter of Cheakdkaipejchara*, Tax Appeals Tribunal, April 23, 1992 [failure by the Division to indicate on statutory notice that tax was estimated did not invalidate the assessment since petitioner was not prejudiced]). Here, though, the issue of whether petitioners have been prejudiced by the 60-day notices' failure to properly state the grounds for protesting a 60-day notice is closely tied to the grounds the Division alleges for summary determination herein, namely that petitioners failed to specify any of the permissible grounds under § 171-v (5) for protesting a 60-day notice in their petition. In other words, it could be that petitioners have failed to specify one of the permissible grounds because they have been misled by the Division's defective 60-day notices as to such permissible grounds and might have pled one in the petition, or responded to this motion with proof of such a ground, but for the too narrow description of such grounds in their respective 60-day notices. Under these circumstances, a material question of fact exists as to whether petitioners have been prejudiced by the defect in the 60-day notices issued to them, and the Division's motion for summary determination in regard to the 60-day notices must be denied.

K. The Division's motion to dismiss, or in the alternative, for summary determination is granted in regard to the petition's protest of the notices of deficiency L-049278700 and L-049278701, the petition is denied in regard to those notices, and those notices are sustained; otherwise the Division's motion is denied, and this matter will be set down for a hearing in due course.

DATED: Albany, New York  
August 13, 2020

/s/ James P. Connolly

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ADMINISTRATIVE LAW JUDGE