

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH J. JACOBI	:	DECISION
	:	DTA NO. 827401
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.	:	

Petitioner, Joseph J. Jacobi, filed an exception to the determination of the Administrative Law Judge issued on February 16, 2017. Petitioner appeared by Andreozzi, Bluestein, Weber and Brown, LLP (Randall P. Andreozzi, Esq., and Tiffany Bell, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard in Albany, New York on September 14, 2017, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those findings of fact

are set forth below.

1. The subject of the motion of the Division of Taxation (Division) is the validity of petitioner, Joseph J. Jacobi's, protest of a notice of proposed driver license suspension referral (Collection case ID: E-007101739-CL001-5), dated April 1, 2015, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). The suspension notice informed petitioner that he had outstanding tax liabilities in excess of \$10,000.00 owed to the State of New York, and that unless he responded within 60 days of the mailing date of the suspension notice, his driver's license would be suspended. Specifically, petitioner was advised through a consolidated statement of tax liabilities dated April 1, 2015, that two income tax assessments with a combined balance, including penalty and interest (less payment credits), in the amount of \$270,825.00 (as of April 1, 2015), were due and subject to collection action.¹ According to the suspension notice, an adequate response within the specified 60-day time period would consist of 1) resolution of the outstanding liability either by payment or establishment of a payment plan; 2) notification to the Division of petitioner's eligibility for an exemption; or 3) a protest of the suspension notice by the filing of a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals.

2. Petitioner requested a conference before BCMS, and a conciliation conference was

¹ The subject assessments were identified as the following:

Tax Type	Assessment ID Number	Tax Period Ended	Tax Amount	Interest Amount	Penalty Amount	Payment Credit	Current Balance
Income	L-039575472-5	12/31/04	\$92,818.00	\$103,999.14	\$23,204.00	\$11,742.00	\$208,279.14
Income	L-039564194-4	12/31/01	\$23,230.00	\$40,259.86	\$5,806.00	\$6,750.00	\$62,545.86

held on August 12, 2015. On October 2, 2015, BCMS issued to petitioner a conciliation order, CMS number 266746, that sustained the notice of proposed driver license suspension referral dated April 1, 2015.

3. On December 29, 2015, the Division of Tax Appeals received a petition challenging the suspension notice. According to the petition, petitioner and his spouse are currently unemployed and do not receive any unemployment benefits. Petitioner stated that he does not have any current income, that his spouse receives only periodic installment disbursements resulting from her sale of certain business interests in 2013, and that they are insolvent and do not have any excess monthly income to pay their unpaid taxes from prior years. According to petitioner, he has no current federal or New York State tax obligations. He also maintains that his existing tax debt is currently uncollectible.

4. In support of its motion, the Division submitted the affidavit of Ronald Catalano, a Tax Compliance Manager 2 in its Civil Enforcement Division (CED) during the relevant time. His responsibilities include overseeing the operations of the training unit of the CED's Operations Analysis and Support Bureau. Mr. Catalano's affidavit details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law § 171-v.

5. In his affidavit, Mr. Catalano describes the Division's process for selection of candidates who could be sent notices of proposed driver license suspension pursuant to Tax Law § 171-v. The initial search criteria includes that 1) the taxpayer have an outstanding balance of tax, penalty, and interest in excess of \$10,000.00; 2) all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) there must be less than 20 years from the issuance of the particular notice and demand; and 4) the outstanding assessments not be the

subject of an approved payment arrangement. The Division searches its electronic database on a weekly basis for those taxpayers that meet the above criteria.

6. Once candidates have been identified by the Division, the necessary information is sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer has a qualifying driver's license and is eligible for a notice of proposed driver license suspension.

7. Mr. Catalano avers that based on his review of the Division's records, his knowledge of its policies and procedures, and personal knowledge of the facts in this matter, issuance of the suspension notice to petitioner was proper.

8. In its answer to the petition, the Division asserts that petitioner has not sought relief from the suspension of his driver's license under any of the six specifically enumerated grounds for such relief set forth at Tax Law § 171-v (5) (i)-(vi), and thus has raised no basis for administrative or judicial review of the proposed suspension of his license, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition for lack of jurisdiction or summary determination in its favor.

9. In response to the Division's motion, petitioner points out that the notice of proposed driver license suspension referral, under the heading "How to avoid suspension of your license," instructs taxpayers to "pay the amount due or set up a payment plan to avoid suspension of your license." The notice also advises taxpayers that a driver's license suspension referral will be provided to the DMV unless the taxpayer, among other things, sets up a payment plan, or protests the proposed suspension of the license by filing a request for conciliation conference or a petition with the Division of Tax Appeals.

10. On June 3, 2014, petitioner (together with his spouse) filed an offer in compromise

(OIC) with New York State (form DTF-4.1), accompanied by a payment of \$750.00 and the proposal that they will make continuing payments in such amount for a period of 48 months in satisfaction of their outstanding liabilities. A statement of financial condition and other information (form DTF-5) was filed with the OIC. Petitioner and his spouse continued making voluntary payments of \$750.00 per month toward their outstanding tax liabilities while their OIC was pending before the Division.

11. By a letter dated January 26, 2015, the Division rejected the OIC, citing Tax Law § 171 (Fifteenth) in support thereof. Specifically, the letter advises that the “offer does not reflect what [the Division] could reasonably collect with a combination of collection techniques.” The letter further states that “[a]cceptance of [the] offer would not be in the best interest of New York State. Public knowledge of such an offer would be seriously detrimental to voluntary compliance.”²

12. In support of his position, petitioner’s representative, Randall P. Andreozzi, Esq., filed an affirmation in opposition to the motion for summary determination, together with an accompanying memorandum of law. Petitioner’s memorandum contends that there are material issues of fact that preclude the granting of summary determination. Petitioner states specifically that he relied upon the Division’s advice and followed the instructions on how to avoid a suspension of his license, as set forth in the suspension notice, by requesting a conciliation conference, submitting an OIC and, thereafter, by filing a petition.

13. Petitioner notes that an accepted offer in compromise would serve to prevent his

² The OIC proposed to settle the outstanding liabilities of petitioner and his spouse, listed as \$856,719.00, upon payment of \$36,000.00, via monthly payments of \$750.00 over a period of four years.

driver's license from being suspended. At the same time, petitioner admits that his OIC has been rejected by the Division. However, petitioner claims that the rejection of his OIC was summarily made without specific or meaningful explanation for such rejection, and without affording petitioner an opportunity to be heard with respect to the Division's refusal to accept the OIC. According to petitioner, the loss of his driving privileges will dramatically impact petitioner's ability to care for himself and his family, including specifically his ability to transport his spouse to her necessary ongoing medical treatments.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began the determination in this matter by noting that as the petition was timely filed with the Division of Tax Appeals following the issuance of the conciliation order by BCMS, the Division of Tax Appeals has jurisdiction over this matter. Consequently, the Administrative Law Judge noted that the correct vehicle for accelerated determination in this case is a motion for summary determination rather than one for dismissal.

The Administrative Law Judge continued by describing the legal standard for granting summary determination, noting that it should only be granted where the administrative law judge finds that it has been sufficiently established that there is no material and triable issue of fact and can therefore, as a matter of law, issue a determination in favor of any party.

The Administrative Law Judge next reviewed the section of the Tax Law providing for referrals for suspensions of drivers' licenses of taxpayers with past-due tax liabilities and described the criteria for referring taxpayers for such suspensions. In addition, the Administrative Law Judge noted that the Commissioner of Taxation must provide notice to the taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to

the date that the Division intends to refer a taxpayer to DMV for a driver's license suspension.

The Administrative Law Judge then described the grounds on which a driver's license suspension for past-due tax liabilities may be challenged, namely, if: 1) the taxpayer named in the notice is not the taxpayer at issue; 2) the past-due liabilities were satisfied; 3) the taxpayer's wages are being garnished to satisfy the tax liability at issue or for past-due child or spousal support; 4) the taxpayer is subject to a wage garnishment pursuant to CPLR § 5241; 5) the taxpayer's driver's license is a commercial driver's license; or 6) the Division incorrectly determined that the taxpayer failed to comply with the terms of a payment agreement with the Division for the past-due tax liabilities more than once in a twelve-month period. The Administrative Law Judge also described some content of the notice of driver's license suspension, including the fact that the suspension will remain in effect until the past-due tax liabilities are fully paid or the taxpayer has made payment arrangements satisfactory to the Division.

The Administrative Law Judge observed that petitioner does not dispute that the Division rejected his OIC. The Administrative Law Judge noted that a mere application for an OIC, without the Division's acceptance thereof, fails to satisfy the requirement that a taxpayer make payment arrangements satisfactory to the Division in order to avoid a driver's license suspension. Contrary to petitioner's contention, according to the Administrative Law Judge, there is no process under the Tax Law by which a taxpayer may challenge an adverse decision regarding an OIC, leaving only the six enumerated grounds upon which a challenge of the referral for driver's license suspension may be based. The Administrative Law Judge found that there was no basis in the law to grant petitioner relief as there is no mechanism under law to challenge the driver's

license suspension except those specifically enumerated grounds under the Tax Law.

The Administrative Law Judge concluded that the granting of summary determination in this case was appropriate, denied petitioner's protest of the BCMS order and sustained the Division's notice of proposed driver license suspension.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioner contends that, by providing that a taxpayer may avoid a driver's license suspension by making payment arrangements satisfactory to the Commissioner, the statute presumes that taxpayers will be afforded due process of law in establishing such payment arrangements. Petitioner asserts that the absence of any such due process would allow the Division, in its sole discretion, to unreasonably deprive taxpayers of the right to a driver's license and leave taxpayers such as petitioner without recourse if the Division arbitrarily or unreasonably declines to accept an application for an OIC. Petitioner contends that this is precisely what has occurred in the present matter.

Specifically, petitioner asserts that he has made a good faith effort to establish a payment arrangement satisfactory to the Commissioner by filing an OIC reflecting his present ability to pay. However, petitioner argues that the Division failed to establish that it properly considered the proposed payment arrangement and thus failed to show that it provided petitioner with a meaningful and fair opportunity to enter into such an arrangement. Petitioner asserts that, in considering whether to enter into such a payment arrangement, the Division must examine a taxpayer's assets and also the impact that a license suspension will have on the taxpayer and his or her family. According to petitioner, the Division's reliance on public policy considerations without further rationale in rejecting his OIC violated his due process rights under the U.S.

Constitution, in effect arguing that if the statute does not allow for due process as described above, then it is unconstitutional. Petitioner also contends that, by allowing the Division to make a suspension referral without affording a taxpayer a meaningful opportunity to enter into a payment arrangement, the determination effectively permits the Commissioner to enhance his bargaining position in demanding payment of past-due taxes without considering whether taxpayers have the means to pay.

The Division argues that the Administrative Law Judge correctly determined that there were no payment arrangements in place that were satisfactory to the Commissioner as required under the statute in order for petitioner to avoid the referral to DMV for suspension of petitioner's driver's license. Furthermore, according to the Division, petitioner has not asserted any of the specific grounds for relief from suspension set forth in the statute. The Division contends that petitioner's assertions that he has no assets that can be levied upon and that a driver's license suspension would hinder his ability to care for his family do not fall under the enumerated grounds for relief under the statute. Thus, the Division states that the Administrative Law Judge properly granted the motion and denied the petition.

The Division notes that an OIC seeks a reduction in liability and contends that the acceptance or rejection of such an offer is strictly within the discretion of the Commissioner. The Division asserts that the Division of Tax Appeals lacks jurisdiction to consider whether the rejection of an OIC was reasonable because the Division's determination of whether to accept an OIC is a collection activity and as such is a matter outside the Division of Tax Appeals' jurisdiction to review.

The Division argues that petitioner's claim that his due process rights have been violated

should be rejected. To the contrary, the Division asserts that petitioner received notice and an opportunity to be heard with respect to the suspension notice.

OPINION

From the outset, we agree with the Administrative Law Judge's conclusion of law that the Division's motion to dismiss is not the proper vehicle for reaching a resolution of this matter.

Accordingly, we decide the Division's alternative motion for summary determination. Under our rules, such a motion 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]).

As we previously 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).

In determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*see Rizk v Cohen*, 73 NY2d 98, 103 [1989]); *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573-74 [2d Dept 1989]; *see also Weiss v Garfield*, 21 AD2d 156, 158 [3d Dept 1964]). However, “[u]nsubstantiated allegations or assertions are insufficient to raise an issue of fact” (*Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011, *citing Alvord & Swift v Muller Constr. Co.*, 46

NY2d 276 [1978]).

Tax Law § 171-v (1) authorizes suspension of driver's licenses of taxpayers with past-due tax liabilities equal to or in excess of \$10,000.00 to improve tax collection. Tax liabilities include penalties and interest due on any tax amounts (Tax Law § 171-v [1]). The phrase "past-due tax liabilities" is defined 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" (*id.*).

Here, petitioner does not dispute that the tax, penalty and interest listed in the consolidated statement of tax liabilities as subject to collection action were past-due tax liabilities in excess of the \$10,000.00 threshold. Petitioner's driver's license was therefore subject to suspension pursuant to Tax Law § 171-v.

Tax Law § 171-v (3) requires the Division to notify a taxpayer that he or she is going to be included in the driver's license suspension program by first class mail to the taxpayer's last known address no later than 60 days prior to the Division informing DMV of the taxpayer's inclusion. Tax Law § 171-v (3) also requires that the notification include: 1) a clear statement of the past-due tax liabilities, together with notice that the taxpayer's information will be provided to DMV 60 days after the mailing of the notice; 2) a statement that the taxpayer can avoid license suspension by paying the debt or entering into a payment agreement acceptable to the Division and information as to how the taxpayer can go about this; 3) a statement that a taxpayer can only protest the 60-day notice based upon the issues set forth in Tax Law § 171-v (5); and 4) a statement that the suspension will remain in effect until the fixed and final liabilities are paid or the taxpayer and the Division agree to a payment arrangement (Tax Law § 171-v [3] [a] through [d]). As evidenced by the suspension notice and the consolidated statement of tax liabilities

attached to the Catalano affidavit in support of the Division's motion for summary determination, the Division has shown that all of the notice requirements of Tax Law § 171-v (3) have been met.

Tax Law § 171-v (5) provides only for six enumerated grounds upon which a taxpayer may protest a notice of suspension:

“Notwithstanding any other provision of law, and except as specifically provided herein, the taxpayer shall have no right to commence a court action or proceeding or to any other legal recourse against the department or the department of motor vehicles regarding a notice issued by the department pursuant to this section and the referral by the department of any taxpayer with past-due tax liabilities to the department of motor vehicles pursuant to this section for the purpose of suspending the taxpayer's driver's license. A taxpayer may only challenge such suspension or referral on the grounds that (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 section five thousand two hundred forty-one of the civil practice law and rules; (v) the taxpayer's driver's license is a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law; or (vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for purposes of subdivision three of this section.”

Before addressing petitioner's arguments, we first note our agreement with the Administrative Law Judge's conclusion that a rejected OIC does not satisfy the statutory requirement of “making payment arrangements satisfactory to the commissioner” to avoid a driver's license suspension referral (*see* Tax Law § 171-v [3] [b]). Petitioner argues that the Division unreasonably rejected his proposed OIC without considering his ability to pay and that he must be given a meaningful opportunity to be heard with respect to the Division's action. We disagree. Tax Law § 171-v does not provide a process by which a taxpayer may challenge a decision by the Commissioner to reject an OIC or a proposed payment arrangement. Tax Law

§ 171-v (5) provides that a suspension notice may be challenged only upon the specific grounds listed in that subdivision. Neither the reasonableness of the Commissioner's determination to reject an offer in compromise nor the equitable considerations presented by petitioner are listed among the grounds for relief from a driver's license suspension referral for past-due tax liabilities (id.). However, in this case petitioner is challenging the Division's denial of his application for an OIC rather than any of the grounds for relief provided under Tax Law § 171-v (5). As we observed in a related matter, an offer in compromise of a fixed and final liability is a collection activity of the Division of Taxation (*see Matter of Jacobi*, Tax Appeals Tribunal, May 12, 2016, *confirmed* 156 AD3d 1154 [3d Dept 2017]; *see also* Tax Law § 171 [Fifteenth]; 20 NYCRR 5005.1). As a forum of limited jurisdiction, the Division of Tax Appeals lacks statutory authority to review collection activities (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *see also Matter of Williams*, Tax Appeals Tribunal, September 1, 1994 [Tax Appeals Tribunal "lacks statutory authority to accept or even consider" an offer in compromise])³

As we have previously held, Tax Law § 171-v is a unique tax collection statute because it involves the suspension of a taxpayer's driver's license (*see Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016). As we noted in *Balkin*, a taxpayer has a property right in his or her driver's license that normally gives rise to the due process protections of notice and a right to be heard if the State attempts to suspend that license (*see Bell v Burson*, 402 US 535, 539 [1971] [driver's licenses are important interests to the licensees because once issued, they may become

³ We observe that petitioner is not left without remedy to challenge his driver's license suspension referral. A taxpayer may appeal the Division's determination to deny an OIC by filing for a proceeding in state court to review the denial pursuant to Article 78 of the CPLR (*see* CPLR § 7801 et seq.).

essential to the “pursuit of a livelihood”]). As we also noted in *Balkin*, however, a taxpayer whose license has been suspended pursuant to Tax Law § 171-v is eligible for a restricted use driver’s license (*see* Vehicle and Traffic Law § 510 [4-f] [5] [a person whose license has been suspended for failure to pay past-due tax liabilities may apply for the issuance of a restricted use license] and Vehicle and Traffic Law § 530 [5-b] [implying that a restricted use license cannot be denied to a person whose license has been suspended for failure to pay past-due tax liabilities]). Pursuant to Vehicle and Traffic Law § 530 (1), a restricted use license may be issued if such a license is necessary for certain employment or education reasons for the person whose driver’s license has been suspended, or as required for medical treatment for that person or member of his or her household. As we found in *Balkin*, these Vehicle and Traffic Law provisions preserve petitioner’s right to drive for reasons of employment, education or medical treatment for him or his family, and thereby ameliorate the necessity for petitioner to be provided with notice and an opportunity to be heard with respect to a denial of an OIC in the context of a license suspension pursuant to Tax Law § 171-v.

Accordingly, we reject petitioner’s argument that Tax Law § 171-v as applied to him in the present matter constitutes a denial of due process. To the extent that petitioner argues that Tax Law § 171-v is unconstitutional on its face, we decline to address this issue as it is not within our jurisdiction (*Matter of Balkin*).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph J. Jacobi is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Joseph J. Jacobi is denied; and,
4. The conciliation order, dated October 2, 2015, is sustained.

DATED: Albany, New York
March 8, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner