

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SURVIR S. SALARIA	:	DECISION
	:	DTA NO. 827886
For Review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.	:	

Petitioner, Survir S. Salaria, filed an exception to the determination of the Administrative Law Judge issued on September 28, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Hannelore F. Smith, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. The parties were each permitted to file an additional written submission in response to petitioner's attachment to his reply letter brief of documents not included in the record below. Neither party requested oral argument. The six-month period for the issuance of this decision began on April 2, 2018, the date that the last such additional written submission was received.

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's license suspension referral issued to petitioner should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 3 and we have added an additional finding of fact, numbered 9 herein. We have made these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified finding of fact, and the additional finding of fact appear below.

1. The Division of Taxation (Division) issued to petitioner, Survir S. Salaria, a notice of proposed driver's license suspension referral (suspension notice), dated August 27, 2015, which notified petitioner that new legislation allows New York State to suspend the driver's licenses of persons who have delinquent unpaid tax debts. The suspension notice informed petitioner of how to avoid such suspension, how to respond to the suspension notice, and what would ensue if he failed to take action. Attached to the suspension notice was a consolidated statement of tax liabilities listing petitioner's tax assessments subject to collection, as follows:

Assessment No.	Tax period ended	Tax Amount Assessed	Interest Assessed	Penalty Assessed	Payments and credits	Current Balance Due
L-041816771-7	12/31/12	\$0.00	\$409.27	\$8,005.08	\$10.48	\$8,403.87
L-041816770-8	3/31/13	\$0.00	\$334.49	\$6,533.65	\$0.00	\$6,868.14
L-041816769-8	6/30/13	\$0.00	\$260.17	\$5,081.93	\$0.00	\$5,342.10
Total						\$20,614.11

2. On October 12, 2016, following the issuance of a conciliation order, dated July 15, 2016, sustaining the suspension notice, petitioner filed a petition with the Division of Tax Appeals. The petition alleges that:

“1. The Commissioner of Taxation & Finance has not replied to petitioner's letter dated September 18, 2015 in response to Notice of Proposed Drivers License Suspension Referral dated August 27, 2015 (copy attached) and letter dated October 3, 2015 (copy attached).

2. There are 2 shareholders of Venus Pharmaceuticals International, Inc. with 50% stock ownership each. The Commissioner of Taxation and Finance is not being transparent regarding the reasoning of determination of personal liability.

3. As the case involves extraordinary circumstances, the Commissioner of Taxation and Finance has not consulted with New York State government, federal government and related government organizations, before reaching to the determination.”

3. The Division filed its answer to the petition on December 7, 2016 and brought a motion to dismiss the petition or, in the alternative, for summary determination in its favor, on February 14, 2017. In response, petitioner filed a cross motion to dismiss the notice of proposed driver license suspension referral or, in the alternative, for summary determination in his favor. The Division submitted with its motion an affidavit, sworn to February 10, 2017, made by Ronald Catalano, who is employed as a Tax Compliance Manager 2 with the Division’s Civil Enforcement Division (CED). Mr. Catalano’s responsibilities and duties include overseeing the operations of the Training Unit 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. Mr. Catalano’s affidavit details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law § 171-v.

4. 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; 4) the outstanding assessments not be the subject of an approved payment arrangement; and 5) deceased taxpayers are excluded. The Division searches its electronic database on a weekly basis for taxpayers who meet the above criteria.

5. 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's license suspension.

6. After receipt of a match from DMV, but prior to issuance of a proposed suspension notice, an additional compliance check is run by the Division to ensure that the case still meets the aforementioned criteria and is still eligible for suspension. If so, the Division issues the proposed suspension notice to the taxpayer.

7. If the taxpayer does not respond to the Division or there has been no change in his or her status, the case is electronically sent to DMV for the license to be suspended.

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

9. In support of his cross motion to dismiss the notice of proposed driver's license suspension referral or, alternatively, for summary determination in his favor, petitioner submitted his own affidavit in which he asserted that there were two shareholders of Venus Pharmaceuticals International, Inc.; that he and another individual each owned 50% of that corporation; and that each owner had equal responsibility for the collection and payment of the corporation's withholding taxes. Petitioner thus asserted that the Division's assessments against him, which consist of penalties in an amount equal to the corporation's unpaid withholding tax liabilities pursuant to Tax Law § 685 (g), are unfair. Petitioner also asserted in his affidavit that

“the individual to whom the notice was provided is not the taxpayer at issue” pursuant to Tax Law § 171-v. He described the taxpayer at issue as the corporation, along with two equal shareholders.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first observed that the Division’s motion is properly treated as one for summary determination, considering that the Division of Tax Appeals has subject matter jurisdiction in the present matter. She then noted that the Division, as the party bringing the motion, must establish that no material issues of fact exist in the case. The Administrative Law Judge found that the Division, through the evidence submitted in support of its motion, made a prima facie showing that petitioner had fixed and final outstanding tax liabilities in excess of \$10,000.00 and that it had provided petitioner with notice of the proposed license suspension referral as required. The Administrative Law Judge then reviewed the limited grounds upon which a taxpayer may challenge a driver’s license suspension notice under Tax Law § 171-v. She found that petitioner did not raise a challenge based on any of the grounds listed in that section. Accordingly, the Administrative Law Judge granted the Division’s motion, denied petitioner’s cross motion and denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner makes the same arguments as he made before the Administrative Law Judge. Petitioner objects that the Division did not respond to his letters dated September 18, 2015 and October 3, 2015. Through those letters, petitioner explained that the tax assessments against him arose from the operation of a corporation in which he had a 50% ownership interest; that the corporation was a victim of financial fraud through false promises of funding; and that the financial losses caused by the fraud resulted in an inability by the corporation to pay its

withholding taxes. Petitioner contends that, under these circumstances, the suspension of his driver's license is an unreasonably harsh penalty.

Petitioner also asserts that he was one of two shareholders of the corporation and argues that it is unfair to single him out for enforcement by suspending his driver's license.

Petitioner further argues that the circumstances that have led to his liability are so extraordinary that it is unfair to proceed in the present matter without the person who committed the fraud against the corporation. Petitioner contends that this person is connected with the U.S. intelligence community and that the defrauding of the corporation is a national security matter.

Petitioner asserts that the failure to address his complaints denies him his right to due process and that, by virtue of this denial, the Division has failed to demonstrate that petitioner is the taxpayer at issue.

The Division contends that it established the threshold requirements for the suspension of petitioner's driver's license and that petitioner failed to challenge the notice of suspension on one of the permitted grounds for such a challenge as set forth in Tax Law § 171-v. The Division thus contends that its motion for summary determination was properly granted and petitioner's cross motion was properly denied.

OPINION

On the point of procedure, we agree with the Administrative Law Judge's decision to treat the motion and cross motion as one for summary determination, as there is no question that the Division of Tax Appeals has subject matter jurisdiction over the petition. A motion to dismiss would be proper where such jurisdiction is lacking.

A motion for summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted)” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In contrast, the opponent of such a motion “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] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Tax Law § 171-v (1) authorizes the 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 (*id.*). Past-due tax liabilities means any liabilities that have become “fixed and final such that the taxpayer no longer has any right to administrative or judicial review” (*id.*).

Here, the Division’s motion papers show, and petitioner does not dispute, that the penalties and interest listed in the statement of consolidated tax liabilities as subject to collection action were past-due tax liabilities in excess of \$10,000.00. Petitioner’s driver’s license was thus subject to suspension under Tax Law § 171-v.

Tax Law § 171-v (3) requires the Division to notify a taxpayer that he or she is 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) requires that such 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 a taxpayer can go about this; 3) a statement that a taxpayer can only protest the 60-day notice based upon the grounds 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]-[d]).

Here, the suspension notice and the consolidated statement of tax liabilities attached to the Catalano affidavit submitted with the Division's motion papers show that the Division has complied with the notice requirements of Tax Law § 171-v (3).

Tax Law § 171-v (5) limits the grounds upon which a taxpayer may contest a notice of suspension as follows:

“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 [Division] or the department of motor vehicles regarding a notice issued by the [Division] pursuant to this section and the referral by the [Division] 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 the purposes of subdivision three of this section.”

As noted, petitioner claims that he is “not the taxpayer at issue” and thus frames his objection as a permissible ground upon which to contest the proposed license suspension. As the Administrative Law Judge observed, however, petitioner does not claim that this is a case of mistaken identity. Rather, petitioner claims that the corporation and the other 50% shareholder are also responsible for the underlying liability. Petitioner also contends that it is inappropriate for the Division to suspend his driver’s license without also considering the facts and circumstances surrounding the asserted criminal fraud perpetrated on the corporation, one apparent consequence of which was unpaid withholding taxes. Given these arguments, it is clear, as the Administrative Law Judge determined, that petitioner is actually arguing against the legal and equitable merits of the unpaid assessments that are the basis of the proposed driver’s license suspension. Petitioner’s objections to the proposed suspension notice thus do not fall within any of the specified permissible grounds to contest such a notice. Hence, the Division’s motion for summary determination must be granted.

We note that we lack authority to consider the merits of the unpaid assessments against petitioner. The Division has made a prima facie showing that the past-due tax liabilities that are the basis of the proposed license suspension are “fixed and final such that the taxpayer no longer has any right to administrative or judicial review” (Tax Law § 171-v [1]). In other words, petitioner’s time to petition for a prepayment hearing in the Division of Tax Appeals on the merits of the assessments has expired (*see* Tax Law § 689 [b]).

Even if we could consider the merits of the assessments, we agree with the Administrative Law Judge that petitioner’s case appears to lack merit. As noted, petitioner does not dispute that

he was personally responsible for the corporation's withholding taxes, but contends that another officer of the corporation is equally responsible. This is not a defense to petitioner's liability, however, as persons responsible for the collection and payment of an entity's withholding taxes are jointly and severally liable (*see* Tax Law § 685 [g]; *Matter of Hopwood*, Tax Appeals Tribunal, February 9, 2017). That the corporation may have been defrauded by a false promise to provide it funding is also not a defense to responsible officer liability. This is because economic problems are generally not an excuse for a business's failure to pay withholding taxes, even where such problems occur through no fault of the business or its officers (*see Matter of Anzilotti*, Tax Appeals Tribunal, February 22, 1996 [business failed to pay withholding taxes because its principal client was late with its payment]; *Matter of Byram*, Tax Appeals Tribunal, August 11, 1994 [not-for-profit hospital failed to pay withholding taxes because of inadequate Medicare and Medicaid reimbursement rates]).

We find no basis in the record to support petitioner's generic claim that he was denied due process in connection with this matter. Petitioner had the opportunity to contest the assessments themselves, but did not do so. Petitioner's protest of the suspension notice in the present matter has been considered and found wanting. We note also that we have determined that Tax Law § 171-v as applied in other cases met constitutional due process requirements (*see Matter of Jacobi*, Tax Appeals Tribunal, March 8, 2018; *Matter of Jacobi*, Tax Appeals Tribunal, May 12, 2016, *confirmed* 156 AD3d 1154 [3d Dept 2017], *lv denied* 31 NY3d 1061 [2018]; *Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016).

Finally, we note that petitioner submitted some documents with his letter reply brief on exception. Such documents were not included in the record before the Administrative Law Judge. Our position on the submission of evidence on exception may be summarized as follows:

“We have held that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]’ (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *confirmed* 116 AD3d 1176 [3d Dept 2014]). Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991)” (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014).

We thus do not accept into the record the documents submitted with petitioner’s letter reply brief and have not considered such documents in the rendering of this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Survir S. Salaria is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Survir S. Salaria is denied; and
4. The notice of proposed driver’s license suspension referral, dated August 27, 2015, is sustained.

DATED: Albany, New York
September 28, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner