

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
THOMAS J. STEIN : DECISION
for Review of a Notice of Proposed Driver's License : DTA NO. 828494
Suspension Referral under Tax Law § 171-v. :

Petitioner, Thomas J. Stein, filed an exception to the determination of the Administrative Law Judge issued on July 12, 2018. Petitioner appeared by Andreozzi Bluestein LLP (Michael J. Tedesco, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Hannelore F. Smith, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation and Finance filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on November 2, 2018, the date petitioner's reply brief 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 license suspension referral issued to petitioner should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact 6, which we have modified to more clearly reflect the record. In addition, we have omitted findings

of fact 9 through 12 as these findings represent summaries of the parties' legal arguments. These facts, so modified, are set forth below.

1. The Division of Taxation (Division) issued to petitioner, Thomas J. Stein, a notice of proposed driver's license suspension referral (form DTF-454), collection case ID: E-020148545-CL01-1 (60-day notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v.

2. The 60-day notice is dated February 15, 2017, and is addressed to petitioner at his Pelham, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated February 15, 2017, setting forth an unpaid assessment. The assessment was for personal income tax, assessment ID L-045787016, for the tax period ended December 31, 2015. The assessment was for tax in the amount of \$206,420.00, interest in the amount of \$13,317.09 and penalty in the amount of \$10,321.00, for a total balance due of \$230,058.09.

3. The 60-day notice indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles (DMV) and petitioner's driver's license would be suspended. The front page of the 60-day notice informed petitioner that unless one of the exemptions on the back page of the 60-day notice applied to him, he was required to pay the amount due, or set up a payment plan, in order to avoid suspension of his license.

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.

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.

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 or a petition with the Division of Tax Appeals.

4. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the 60-day notice. By conciliation order dated September 1, 2017, the conferee sustained the notice of proposed driver's license suspension referral.

5. Thereafter, petitioner filed a petition with the Division of Tax Appeals on November 28, 2017. The petition does not raise a challenge to the issuance or validity of the tax assessment above as a past-due fixed and final liability giving rise to the proposed suspension of his license. Likewise, the petition does not challenge the Division's issuance or his receipt of the 60-day notice. Instead, the petition states that petitioner does not have the ability to make a monthly payment and, thus, does not qualify for a payment arrangement. Furthermore, petitioner alleges that he is in the process of submitting an offer in compromise (OIC), and that suspension of his license will hinder his ability to care for himself and his family.

6. The Division filed a motion to dismiss the petition, or, in the alternative, for summary determination, on March 16, 2018. The Division submitted with its motion an affidavit, dated March 13, 2018, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis' 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.

7. Mr. Lewis' 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 Tax Law § 171-v. These steps are summarized as follows:

a) The “Initial Process” involves the Division’s identification of taxpayers who may be subject to the issuance of a 60-day notice of proposed driver license suspension referral under Tax Law § 171-v. First, the Division internally sets the following selection criteria: the taxpayer has an outstanding cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessment used to determine the cumulative total must be less than 20 years from the notice and demand issue date; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are excluded; and any taxpayer with a “taxpayer deceased” record on his or her collection case is excluded.

Next, the criteria are utilized to search the Division’s databases on a weekly basis, and a file is created of possible taxpayers to whom a 60-day notice of proposed driver license suspension referral could be sent. This process involves first utilizing the criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00 in the relevant time frame, and then for each such identified candidate, determining whether that candidate would be excluded under any of the following criteria:

- a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment(s) would leave the balance of such liability below the \$10,000.00 threshold for license suspension;
- the taxpayer is in bankruptcy;
- the taxpayer is deceased; or
- the taxpayer is on an active approved payment plan.

b) The “DMV Data Match” involves the Division providing identifying information to DMV for each taxpayer not already excluded under the foregoing criteria to determine whether the taxpayer has a qualifying driver’s license potentially subject to suspension per Tax Law § 171-v. DMV then conducts a data match of the information provided by the Division with its information and returns the following information to the Division: (1) social security number; (2) last name; (3) first name; (4) middle initial; (5) name suffix; (6) DMV client ID; (7) gender; (8) date of birth; (9) street; (10) city; (11) state; (12) zip code; (13) license class; and (14) license expiration date.

Once the Division determines that a taxpayer included in the DMV Data Match has a qualifying driver’s license, that taxpayer is put into the suspension process.

c) The “Suspension Process” commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension detailed above in (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver’s 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.¹

¹ 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’s 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.

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 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.

8. Mr. Lewis' affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice of proposed driver's license suspension referral and the consolidated statement of tax liabilities described in findings of fact 1 and 2, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Lewis'

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 on February 15, 2017 to petitioner of the 60-day notice 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.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by noting the notice requirements under the section of the Tax Law providing for the suspension of drivers' licenses for past-due liabilities. She observed that the notice dated February 15, 2017 advised petitioner of a possible driver's license suspension and that the notice was in facial compliance with the terms of Tax Law § 171-v.

The Administrative Law Judge next set forth the procedural history of petitioner's protest of the proposed driver's license suspension from petitioner's request for a conference with BCMS through the administrative appeal with the Division of Tax Appeals. The Administrative Law Judge indicated that the Division had brought a motion to dismiss, or, in the alternative, for summary determination. The Administrative Law Judge described the legal standard for granting a motion for summary determination, noting that a proponent of summary determination must show entitlement to judgment as a matter of law and tender evidence that eliminates any material issues of fact. Further, according to the Administrative Law Judge, the opponent must produce evidence sufficient to require a trial of material questions of fact on which he rests his claim in order to defeat a motion for summary determination.

The Administrative Law Judge then enumerated the statutorily-defined grounds for challenging a proposed driver's license suspension under Tax Law § 171-v. The Administrative Law Judge reasoned that while it was undisputed that petitioner submitted an OIC to the Division, the offer had not been accepted and thus does not satisfy the criterion of making payment arrangements satisfactory to the commissioner so as to avoid a driver's license suspension. The Administrative Law Judge then addressed petitioner's argument that the Division's suspension of his driver's license before his OIC is evaluated would result in a violation of his due process rights. Citing to a prior case of this Tribunal, the Administrative Law Judge concluded that the determination of whether to accept an OIC of a fixed and final liability is a collection activity of the Division and thus the Division of Tax Appeals lacks authority to review the Division's actions in connection thereto. The Administrative Law Judge also rejected petitioner's argument that his driver's license should not be suspended because such suspension would interfere with his pursuit of a livelihood by observing that economic hardship is not a statutorily enumerated ground for challenging a proposed driver's license suspension.

The Administrative Law Judge concluded by granting the Division's motion for summary determination, denying the petition in this matter, and sustaining the Division's notice of proposed driver's license suspension.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge failed to consider the effect his amended 2015 tax return had on the assessment here at issue. He also argues that the statute as applied to him violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner argues that his inability to pay his past-due liabilities due to

insolvency renders the Division's determination to suspend his driver's license irrational, since it would not result in collection of the past-due tax and additions. He also argues that the statutory requirement of making a payment arrangement satisfactory to the commissioner to avoid the suspension of his driver's license implies that the Division's denial of an OIC is reviewable by this Tribunal.

The Division argues that the Administrative Law Judge correctly determined the issues in this matter and the determination should be affirmed. The Division states that the requirements of the statute providing for the suspension of drivers' licenses due to past-due tax liabilities were met. The Division also notes that petitioner is not challenging the validity or issuance of the assessment itself; even if the amount of past-due liabilities changed after petitioner's filing of an amended 2015 return, the amount of past-due tax remaining met the statutory threshold. The Division argues that this Tribunal lacks jurisdiction to consider facial challenges to the constitutionality of a statute. The Division states that petitioner failed to show that any of the enumerated grounds for challenging a driver's license suspension applied to the instant case. The Division argues that the Administrative Law Judge's finding that there was no dispute regarding material issues of fact was correct, and thus the Division urges us to affirm the determination of the Administrative Law Judge and deny petitioner's exception.

OPINION

We begin our decision in this matter by noting our agreement with the Administrative Law Judge that the Division's alternative motion for summary determination rather than dismissal is the proper vehicle for accelerated determination under our Rules (20 NYCRR 3000.9 [b]). 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 have held in our prior cases, because 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 a material issue of fact is arguable (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

Turning to the substantive issue in this matter, the suspension of drivers’ licenses of taxpayers with past-due tax liabilities equal to or in excess of \$10,000.00 is authorized pursuant to Tax Law § 171-v. 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.*).

The notice provisions of Tax Law § 171-v require the Division to issue a notice to 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 proposed driver’s license suspension (Tax Law § 171-v [3]). Tax Law § 171-v (3) also requires that the notification include the following: 1) a clear statement of the past-due tax liabilities, together with notice that the taxpayer’s information will be provided to the 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 apply for alternative payment arrangements; 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]-[d]).

There are only six enumerated grounds under Tax Law § 171-v 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” (Tax Law § 171-v [5]).

In this case, petitioner does not dispute that the tax, penalty and interest subject to collection were past-due tax liabilities in excess of the \$10,000.00 threshold established under Tax Law § 171-v. Petitioner does, however, argue that the Administrative Law Judge failed to consider the effect of his amended 2015 income tax return on the total amount of past-due liabilities. We note that petitioner does not argue that the amended income tax return had the effect of reducing his past-due liabilities to less than the statutory threshold for inclusion in the Division’s driver’s license suspension program. Petitioner thus failed to establish that the

amount of his past-due liabilities after filing the amended 2015 income tax return disqualified him for suspension of his driver's license pursuant to Tax Law § 171-v (1).

Petitioner argues that his insolvency renders the Division's determination to issue to him a proposed driver's license suspension referral irrational because suspending his driver's license would not result in collection of the past-due liabilities that triggered the notice of suspension. Thus, petitioner is arguing that the notice of proposed driver's license suspension referral lacks a rational basis. We have held in our prior cases that a taxpayer bears a heavy burden to prove a determination of the Division to be erroneous as courts regularly defer to such determinations that have a rational basis (*see Executive Land Corp. v Chu*, 150 AD2d 7, 9 [2d Dept 1989], *appeal dismissed* 75 NY2d 946 [1990]; *Baird v New York State Tax Commn.*, 102 AD2d 958, 959 [3d Dept 1984]; *Matter of Eastman Kodak Co. v State Tax Commn.*, 33 AD2d 298, 303 [3d Dept 1970], *affd* 30 NY2d 558 [1972]; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). If there are any facts or reasonable inferences from the facts to support the Division's determination, the determination should be confirmed (*Matter of Levin v Gallman*, 42 NY2d 32, 34 [1977]). Although a determination to impose a tax or penalty must have a rational basis in order to be sustained upon review (*Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d 948 [3d Dept 1986]), the presumption of correctness raised by the issuance of the determination provides such rational basis (*Matter of Atlantic & Hudson Ltd. Partnership*).

We cannot agree with petitioner that the notice of a proposed driver's license suspension referral lacked a rational basis. We recognize that a presumption of correctness attaches to the notice here at issue and provides the rational basis that petitioner claims is lacking (*see Matter of Atlantic & Hudson Ltd. Partnership; Matter of Leogrande*, Tax Appeals Tribunal, June 18,

1991, *confirmed* 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Tavolacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]; *see also Berry v New York State Dept. of Taxation & Fin.*, 162 AD3d 606 [1st Dept 2018], *appeal dismissed* 32 NY3d 1039 [2018] [holding that suspension of a driver’s license for past due tax liabilities has a rational basis in law due to the government’s legitimate interest in tax collection]). Petitioner stating that the purpose of the statute would be frustrated by his insolvency is insufficient to overcome this presumption.

Petitioner also argues that his procedural due process rights under the United States Constitution were violated because the Division denied him a reasonable opportunity to be heard at a meaningful time or in a meaningful manner at a time when the deprivation can still be prevented (*see Bell v Burson*, 402 US 535 [1971]; *Dixon v Love*, 431 US 105 [1977]; *Fuentes v Shevin*, 407 US 67 [1972]). First, we note that our jurisdiction does not encompass challenges to the constitutionality of a statute on its face (*see Matter of A&A Serv. Sta., Inc.*, Tax Appeals Tribunal, October 15, 2009). We are, however, empowered to consider whether the application of a statute to a particular set of facts violates the constitution (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003). Legislative enactments are presumed to be constitutional at the administrative level (*Matter of Mary Jacobi*, Tax Appeals Tribunal, May 12, 2016, *confirmed* 156 AD3d 1154 [3d Dept 2017], *lv denied* 31 NY3d 1061 [2018]; *Matter of Finch, Pruyn & Co.*, Tax Appeals Tribunal, April 22, 2004), and it is the taxpayer who ultimately bears the burden of proving that a statute, as applied to the specific facts of the case, is unconstitutional (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

While we agree with petitioner that the Supreme Court of the United States has recognized a driver’s license to be a “substantial property interest that cannot be deprived without

due process of law” (*Bell* at 539), we find that the procedural requirements of notice under Tax Law § 171-v provided petitioner with such due process. Tax Law § 171-v (3) provides the requirements of notice on taxpayers whose driver’s licenses would be suspended at least 60 days before sharing information with the DMV. We note that these notice requirements were complied with, as attested to in Mr. Lewis’ affidavit. Petitioner requested and took part in a BCMS conference to review the proposed driver’s license suspension before the suspension took effect. Petitioner then timely protested the BCMS conciliation order to the Division of Tax Appeals and took an exception to the determination of the Administrative Law Judge. These forums provided petitioner with opportunity to be heard on the issue of whether any of the grounds for challenging the proposed driver’s license suspension applied and thus appropriate due process was provided in this case (*see Matter of Jacobi*).

At the heart of petitioner’s argument is the presumption that rejection of an OIC is an action that is reviewable by this Tribunal. We have held in our prior decisions that this is not the case (*Matter of Jacobi*). This is due to our limited jurisdiction, which is statutorily defined (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991]). In the absence of legislative action, this Tribunal cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

As we previously noted, petitioner does not argue here that the tax liabilities giving rise to the notice of proposed driver’s license suspension were not fixed and final or that such liabilities were still open to administrative review, and thus within the jurisdiction of this Tribunal (*see* Tax Law §§ 2008, 681). As such, we recognize that the proposed driver’s license suspension is

predicated on the existence of past-due liabilities, and thus constitutes a collection action of the Division, an area over which we have no authority because the Division of Tax Appeals lacks jurisdiction to consider the merits of protests of fixed and final liabilities (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas J. Stein is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Thomas J. Stein is denied; and
4. The notice of proposed driver's license suspension referral dated February 15, 2017, is sustained.

DATED: Albany, New York
May 2, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner