

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ANDREA J. COLEMAN</b>	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 828743
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2012 and for Review of a	:	
Notice of Proposed Driver's License Suspension Referral	:	
under Tax Law § 171-v.	:	

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Petitioner, Andrea J. Coleman, filed an exception to the determination of the Administrative Law Judge issued on May 2, 2019. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Hannelore Smith, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. On January 6, 2020, the Tax Appeals Tribunal sent correspondence to the parties seeking input regarding whether an amendment to Tax Law § 171-v (5) that became effective during the pendency of petitioner's exception is applicable to these proceedings. Both petitioner and the Division filed timely responses to that request. The six-month period for issuance of this decision began on February 5, 2020, the due date for such responses.

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

***ISSUES***

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

II. Whether the Division of Taxation's notice of proposed driver's license suspension referral should be sustained.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. We have also made additional findings of fact, numbered 25, 26, 27 and 28 herein. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

1. The Division of Taxation (Division) filed a motion on November 13, 2018, seeking an order dismissing the petition or, in the alternative, granting summary determination. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated November 7, 2017 and bearing assessment identification number L-047095598 (notice), and the validity of the Division's subsequent issuance of a notice of proposed driver's license suspension referral (form DTF-454), collection case ID: E-047095598-CL01-5 (60-day notice), advising that petitioner must pay her New York State tax debts or face the possible suspension of her driver's license pursuant to Tax Law § 171-v.

2. The 60-day notice is dated April 18, 2018, and is addressed to petitioner at her Brooklyn, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated April 18, 2018, setting forth one unpaid assessment subject to collection. The assessment was for personal income tax, assessment ID L-047095598 for the tax period ended December 31, 2012 (*see* finding of fact 1). The assessment was for tax in the amount of \$5,432.00, interest in the amount of \$2,495.54, penalty in the amount of

\$2,817.09, and acknowledged a payment/credit of \$21.40, leaving a total balance due of \$10,723.23.

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, she was required to either pay the amount due or set up a payment plan in order to avoid suspension of her license.

4. The back page of the 60-day notice is titled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that "[i]f any of the following apply," he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim.

5. The first two headings under the title, "How to respond to this notice," are "child support exemption" and "commercial driver's license exemption." The third heading, "Other grounds," states that the recipient's driver's license will not be suspended if any of the following apply:

"You are not the taxpayer named in the notice. The tax debts have been paid. The Tax Department [Division] is already garnishing your wages to pay these debts. Your license was previously selected for suspension for unpaid tax debts **and**: you set up a payment plan with the Tax Department [Division], **and** the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period."

Also listed under "Other grounds" is the statement that the recipient may contact the Division to establish that he or she is eligible for innocent spouse relief under Tax Law § 654, or that enforcement of the underlying tax debts has been stayed by the filing of a bankruptcy petition.

6. Under the heading, “Protests and legal actions,” it is explained that if the recipient protests with the Tax Department, or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, “If you do not respond within 60 days,” the recipient is informed the Division will provide DMV with the information necessary to suspend the recipient’s driver’s license, unless the recipient does one of the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or her license by either filing a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS), or filing a petition with the Division of Tax Appeals.

7. On June 11, 2018, the Division of Tax Appeals received a petition protesting both the 60-day notice and the notice. The petition was delivered by United States Postal Service (USPS) mail and the envelope containing the petition bore sufficient postage. There is no postmark on the envelope. Petitioner signed and dated the petition June 6, 2018.

8. The petition does not challenge the Division’s issuance, or petitioner’s receipt of, either the 60-day notice or the notice. Instead, the petition states that petitioner was unable to file her taxes due to severe health and other issues and that the Division’s assessment of her income for 2012 is erroneous.

#### The Notice

9. In support of its motion, the Division submitted: (i) an affidavit, dated November 9, 2018, of Hannelore Smith, Esq., an attorney employed in the Division’s Office of Counsel; (ii) an affidavit, dated November 2, 2018, 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 pages 1, 793 and 1,554 of a “Certified Record For - DTF-962-F-

E - Not of Def Follow Up DTF-962-F-E - Not of Def Follow Up” (CMR); (iv) an affidavit, dated November 2, 2018, of Fred Ramundo, a supervisor in the Division’s mail room; (v) a copy of the November 7, 2017 notice with the associated cover sheet addressed to petitioner; (vi) an affidavit, dated October 30, 2018, of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel; (vii) a Request for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the USPS response to such request dated October 22, 2018; and (viii) a copy of petitioner’s 2011 New York State resident income tax return (form IT-201), electronically filed on October 15, 2012, which lists the same address for petitioner as that listed on the notice and the petition, and was the last return filed with the Division prior to the issuance of this notice.

10. The affidavit of Deena Picard, who has been in her current position since May 2017 and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard, as the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, 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. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of “11/7/17.” It is also the Division’s general practice that 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.

11. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures is a discrete unit within the batch of notices, and the mailing cover sheet is the first sheet in the unit.

12. The CARTS-generated CMR for each batch of notices lists each notice in the order the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled “Certified No.” 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.” Each CMR and associated batch of statutory notices are forwarded to the Division’s mail room together.

13. The CMR for the batch of notices to be issued on November 7, 2017, including the notice addressed to petitioner herein, allegedly consisted of 1,554 cut sheet pages. As noted, the Division included herein only page “1” (the first page), page “793” (the page on which information pertaining to petitioner appears) and page “1,554” (the last page of the CMR). Each of these three pages includes in its upper left corner the preprinted year/day/time “run” listing of “20173050635.” Appearing in the upper right corner of the pages 1 and 1,554 is the handwritten date “11/7/17,” reflecting the manual change made by the Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory

notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated November 7, 2017, of the USPS Albany, New York, General Mail Facility. Pages 1 and 793 each include 15 entries, and page 1,554 includes eight entries. Ms. Picard noted that the portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

14. Page 793 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 3910 1830, and reference number L-047095598, was mailed to petitioner at the Brooklyn, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this same certified control number and petitioner's name and address as noted.

15. Appearing below the eight entries on page 1,554 of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS," next to which the preprinted number "22,662" and the handwritten number "22,662" appear. Immediately below this heading is the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," next to which are the initials of the USPS employee.

16. The affidavit of Fred Ramundo, a supervisor in the Division's mail room and whose current title is Stores and Operations Supervisor, describes the general operations and procedures of the Division's mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each

batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope, so that the address and certified number from the mailing cover sheet show through the window. The staff member then weighs, seals and places postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

17. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business, the CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention.

18. Based upon his review of the affidavit of Ms. Picard, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on November 7, 2017, an employee of the mail room delivered an item of certified mail addressed to petitioner at her Brooklyn, New York, address to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail. He states that he can also determine that a member of the mail room staff



obtained the CMR delivered to and accepted by the USPS on November 7, 2017 to be kept as part of the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the mail room in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner on November 7, 2017.

19. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (request for delivery information/return receipt after mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9735 3910 1830 on November 7, 2017, from the Albany, New York, branch of the USPS to "Coleman-Andrea J" at a Brooklyn, New York, address. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 3910 1830 on November 10, 2017 at 3:55 p.m. in Brooklyn, New York 11238. The scanned image of the recipient's signature as shown on the USPS response is illegible. The scanned address of the recipient indicates the same Brooklyn, New York, address as listed on the notice.

#### The 60-Day Notice

20. The Division also submitted with its motion an affidavit, dated November 9, 2018, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis's responsibilities and duties include overseeing the operations of the CED's Operations Analysis and Support Bureau and working with the Office of Information Technology Services. His affidavit is based upon his personal knowledge of the

facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

21. Mr. Lewis's affidavit details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process undertaken by the Division in carrying out the license suspension program authorized by § 171-v of the Tax Law. These steps are summarized as follows:

a) The "Initial Process" involves the Division's identification of taxpayers who may be subject to the issuance of a 60-day notice of proposed driver's 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's 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.<sup>1</sup> Such case data is sent daily,

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<sup>1</sup> 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.

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.

22. Mr. Lewis's affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice 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's affidavit. Mr. Lewis avers that, based upon his review of Division records and his

personal knowledge of Departmental policies and procedures regarding driver's license suspension referrals, the issuance of the 60-day notice to petitioner on April 18, 2018 comports with statutory requirements, petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5) and, therefore, the 60-day notice has not been, and should not be, canceled.

23. In its answer to the petition, and in its representative's affirmation submitted in support of the motion, the Division maintained that petitioner: a) had not argued or provided any basis to establish that the liability asserted in the notice (L-047095598) is not fixed, final and outstanding (*see* finding of fact 2), and b) had not sought relief from the proposed suspension of her driver's license under any of the six specifically enumerated grounds for such relief set forth at Tax Law § 171-v (5) (i) - (vi). The Division thus argued below that the proposed suspension is proper, and that there is no basis for administrative or judicial review of such proposed suspension, including review by the Division of Tax Appeals. Accordingly, the Division sought dismissal of the petition for lack of jurisdiction or summary determination in its favor.

24. Petitioner responded to the Division's motion by letter, dated January 30, 2019. Petitioner did not contest the issuance of either the November 7, 2017 notice or the 60-day notice but asserted that she failed to timely respond to the November 7, 2017 notice because of numerous financial and legal issues. Petitioner stated, "[a]s to the Notice of Suspension, the only arguments I could make pertain to the substance of the assessment, i.e., that it is erroneous, or that the totality of the circumstances make the application of this section of the law to me unfair."

25. Chapter 59 of the Laws of 2019 was signed into law on April 12, 2019. Part EEE, section 1, of that chapter amended Tax Law § 171-v by adding two new grounds upon which a

taxpayer may challenge a notice of driver's license suspension referral. That chapter became effective on July 11, 2019, during the pendency of petitioner's exception.

26. On January 6, 2020, the Tax Appeals Tribunal sent correspondence to the parties seeking input regarding whether the Tax Law amendment referred to in finding of fact 25 was applicable to the instant proceedings.

27. Petitioner responded to the Tribunal's January 6, 2020 correspondence by letter dated January 27, 2020. Attached to petitioner's letter was a notice of approval for public assistance, dated December 30, 2019.

28. The Division granted petitioner an exemption from the New York State driver's license suspension program on the basis of the evidence produced by petitioner demonstrating that she is a recipient of public assistance.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first noted the standard of review for a motion seeking an order dismissing the petition or, in the alternative, granting summary determination.

Next, the Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition for hearing or a request for a conciliation conference following the issuance of a notice of deficiency and that the Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit. The Administrative Law Judge noted the statutory requirements for the mailing of a notice of deficiency and observed that the Division may meet its burden of proving proper mailing by establishing its standard mailing procedure and that such procedure was followed in this specific case. The Administrative Law Judge determined that, while the Division had established its standard mailing procedure through the affidavits of Ms. Picard and Mr. Ramundo, it had failed to prove that such procedure was

followed in issuing the subject notice since it introduced only three pages of the 1,554-page CMR. The Administrative Law Judge next observed that such an inadequacy in the evidence of mailing may be overcome by evidence of delivery of the subject notice to the taxpayer. Specifically, the Administrative Law Judge determined that the affidavit of Ms. Corina and the accompanying USPS delivery information established that the notice was delivered to petitioner on November 10, 2017. The Administrative Law Judge concluded that, under such circumstances, the 90-day period for filing a petition or a request for a conciliation conference began on the date of such delivery. He determined that the latest day to file or mail the petition was February 8, 2018.

The petition was not received by the Division of Tax Appeals until June 11, 2018; however, the Administrative Law Judge observed that the envelope containing the petition did not bear a USPS postmark, which would have indicated the date of mailing. The Administrative Law Judge referred to Division of Tax Appeals' regulations governing the procedure to be followed in such circumstances and determined that, if petitioner mailed her petition on the last timely day, i.e., February 8, 2018, it should have been received by the Division of Tax Appeals on or before February 13, 2018. He found that petitioner offered no evidence as to the actual date on which the petition was deposited in the mail or as to any delay in transmission of the mail or reasons therefore. Accordingly, he granted the Division's motion to dismiss as to the notice, finding that the petition was untimely and the Division of Tax Appeals lacks jurisdiction to provide administrative review of same.

Next, the Administrative Law Judge addressed petitioner's challenge to the 60-day notice proposing the suspension of her driver's license. He first determined that the petition was timely as to the 60-day notice and that the Division of Tax Appeals has jurisdiction to hear the protest.

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. He found that petitioner did not raise a challenge based on any of the grounds listed in that section. He also found that the Division had established that petitioner met the requirements for license suspension and that petitioner presented no evidence to contest the facts alleged by the Division. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination as to the 60-day notice.

***ARGUMENTS ON EXCEPTION***

As in the proceeding below, petitioner continues to argue that her failure to respond to the notice of deficiency in a timely manner was caused by a series of extreme hardships and other difficulties. She claims that the Division's assessment is incorrect in that the proceeds from the sale of various bonds were incorrectly treated as income. Petitioner argues that the untimeliness of her protest should be excused given the serious problems she was facing and the fact that the assessment is incorrect. Petitioner asserts that a letter she sent to the Division on October 10, 2016 could be deemed an informal protest of the Division's determination of her income for the 2012 tax year. She also contends that her driver's license should not be suspended because the assessment is erroneous and that the totality of the circumstances make the application of this section of law to her unfair. She has provided evidence to the Tribunal that she is currently a recipient of public assistance.

The Division contends that the petition was untimely and that the Division of Tax Appeals is without jurisdiction to provide administrative review of the same. The Division also claims that petitioner, in her response to the motion below, did not deny receiving the notice of deficiency and did not deny that the petition was filed late. Regarding the 60-day notice, the



Division has granted petitioner an exemption from the New York State driver's license suspension program based upon evidence that petitioner is currently a recipient of public assistance.

### ***OPINION***

The present matter came before the Administrative Law Judge as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). A motion for summary determination is properly 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]).”

The standard of review on a motion to dismiss is the same as that for a summary determination motion (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). Tax Law § 681 (a) authorizes the Division to issue notices of deficiency. That section also requires that the Division mail such notices by certified or registered mail to the taxpayer at his or her last known address. With certain exceptions not relevant here, there is a 90-day statutory time limit for filing either a request for a conciliation conference or a petition following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one-day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the substantive merits of a petition filed beyond the 90-day time limit (*see e.g. Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

Where, as here, the timeliness of a taxpayer's petition is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of such

notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by “producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016). We agree with the Administrative Law Judge’s conclusion that the Picard and Ramundo affidavits establish the Division’s standard mailing procedure. We also agree with the Administrative Law Judge’s conclusion that the submission of a partial CMR is insufficient to establish that the Division’s standard mailing procedure was followed (*see Matter of Tuohy*, Tax Appeals Tribunal, November 22, 2017; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000 [a truncated CMR does not establish that the standard mailing procedure was followed]).

Such an inadequacy in the evidence of mailing may be overcome by evidence of delivery of the actual notice and receipt by the taxpayer (*see Agosto v Tax Commn. of State of N.Y.* 68 NY2d 891, 893 [1986]; *Matter of Ankh-Ka-Ra Sma-Ntr*, Tax Appeals Tribunal, April 14, 2016). We agree with the Administrative Law Judge’s conclusion that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response thereto, that the subject notice of deficiency was delivered to petitioner’s last known address and accepted by petitioner on November 10, 2017. As a result, the period within which to challenge the subject notice of deficiency commenced on the date of actual receipt, i.e., November 10, 2017, and in order to be timely, a petition with the Division of Tax Appeals or a request for conciliation conference with BCMS had to have been filed within

90 days thereafter (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011). As correctly determined by the Administrative Law Judge, the ninetieth day thereafter was February 8, 2018.

As a general rule, our regulations provide that the date of the USPS postmark stamped on the envelope containing a document filed with the Division of Tax Appeals will be deemed to be the date of filing (20 NYCRR 3000.22 [a] [1]). In this case, however, the envelope containing the petition did not bear a USPS postmark. Under circumstances where the envelope containing the document bears sufficient postage (as was the case here, *see* finding of fact 7) and is missing a USPS postmark, section 20 NYCRR 3000.22 (b) (1) (ii) provides that:

(ii) the document must be received....not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing...”

We have held that five days is not later than the date a document would ordinarily be received when mailed through the USPS (*see Matter of Harron's Elec. Svc., Inc.*, Tax Appeals Tribunal, February 19, 1988). Applying that standard in this case, if petitioner had mailed her petition on the last timely day, i.e., February 8, 2018, it should have been received by the Division of Tax Appeals within five days, or on or before February 13, 2018. However, it was not received until June 11, 2018, almost four months later. Clearly, this is later than a document would ordinarily be received when mailed through USPS.

Under the present circumstances, however, the petition still could have been deemed timely if petitioner had established:

“(i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

(iii) the cause of the delay (20 NYCRR 3000.22 [b] [2]).”

In the proceeding below, the Administrative Law Judge found that petitioner offered no evidence as to the actual date on which the petition was deposited in the mail, or as to any delay in transmission of the mail or reasons therefor, as required by the provisions of 20 NYCRR 3000.22 (b) (2). Furthermore, in her affirmation in opposition to the Division’s motion below and on exception, petitioner did not deny receiving the subject notice and failing to respond within the 90-day statutory limitation period. Instead, petitioner argued the merits of her protest asserting that the assessment was incorrect and that her personal and financial hardships should allow for some equitable relief.

The Tax Appeals Tribunal is an adjudicative body with limited jurisdiction and power granted by statute (*see* generally Tax Law § 2000). Therefore, absent legislative action to provide such jurisdiction, we cannot extend our authority to areas not specifically delegated to us. While we are sympathetic to petitioner’s personal and financial circumstances, we must decline to consider the merits of petitioner’s protest of the assessment, as the Division of Tax Appeals lacks jurisdiction over petitioner’s protest of the November 7, 2017 notice of deficiency. We have considered petitioner’s assertion that a letter she sent to the Division on October 10, 2016 could be deemed an informal protest of the Division’s determination of her income for the 2012 tax year. A copy of that letter was attached to her petition but, unfortunately, predates the mailing of the subject notice of deficiency. Therefore, to the extent that the substance of the letter could be deemed an informal protest, and we make no judgement on that question, such a protest would be deemed premature because it is the issuance of the notice of deficiency that

gives rise to the right to a hearing in the Division of Tax Appeals (*see Matter of Sawlani*, Tax Appeals Tribunal, September 14, 1995).

Turning now to petitioner's protest of the proposed suspension of her driver's license, it is undisputed that the petition was timely filed with respect to that notice and, therefore, the Division of Tax Appeals has jurisdiction to address the protest. Tax Law § 171-v authorizes the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of \$10,000.00. 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]). Here, the suspension notice and the consolidated

statement of tax liabilities attached to the Lewis 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) provides that a taxpayer may challenge a driver's license suspension or referral on the following grounds:

“(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;

(vii) the taxpayer receives public assistance or supplemental security income; or

(viii) the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship.”

Tax Law § 171-v (5) was amended by chapter 59 of the Laws of 2019, which was signed into law on April 12, 2019 and became effective on July 11, 2019. Section 1, part EEE of that chapter added new subparagraphs (vii) and (viii), which include additional grounds upon which a taxpayer may challenge a notice of driver's license suspension referral. Since the law was amended during the pendency of petitioner's exception (the exception was filed on May 23, 2019), the Tribunal contacted the parties to seek their input as to whether the amendment was

applicable to the instant proceedings (*see* finding of fact 26). In response to the Tribunal's request, petitioner provided the Tribunal and the Division with a copy of a notice dated December 30, 2019, which indicates that her application for public assistance had been accepted for the period December 20, 2019 to May 31, 2020. Thereafter, by correspondence, dated February 3, 2020, the Division advised petitioner that she was approved for an exemption from the New York State driver's license suspension program because the evidence produced by petitioner demonstrated that she is a recipient of public assistance.

Since petitioner has demonstrated that she is a recipient of public assistance, one of the grounds enumerated in Tax Law § 171-v (5) for challenging a 60-day notice, and since the Division has already exempted petitioner from the driver's license suspension program based upon her status as a recipient of public assistance, petitioner's challenge of the 60-day notice is deemed moot. Given these facts, it is not necessary to address petitioner's claims of unfairness regarding the potential suspension of her driver's license. We do note, however, that the Tribunal has previously determined that Tax Law § 171-v as applied in other cases meets 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).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Andrea J. Coleman is denied with regard to the November 7, 2017 notice of deficiency and granted with regard to the 60-day notice, dated April 18, 2018;

2. The determination of the Administrative Law Judge is affirmed with regard to the November 7, 2017 notice of deficiency and reversed with regard to the 60-day notice, dated April 18, 2018;

3. The petition of Andrea J. Coleman is dismissed with regard to the November 7, 2017 notice of deficiency and granted with regard to the 60-day notice, dated April 18, 2108; and

4. The notice of proposed driver's license suspension referral, dated April 18, 2018, is canceled.



DATED: Albany, New York  
June 8, 2020

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner