

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
JEFFREY S. FAUPEL
for Review of a Notice of Proposed Driver
Licence Suspension Referral under Tax Law,
Article 8, § 171-v.

DETERMINATION
DTA NO. 826255

Petitioner, Jeffrey S. Faupel, filed a petition for review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.¹

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele Milavec, Esq., of counsel), brought a motion filed December 1, 2014, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Michele Milavec, Esq., dated December 1, 2014, and annexed exhibits, and the affidavit of Matthew McNamara, also dated December 1, 2014, and an annexed exhibit. Petitioner, appearing pro se, submitted a response to the Division’s motion on January 26, 2015. The 90-day period for issuance of this determination began on January 30, 2015, the latest due date for the filing of a response to the Division’s motion (20 NYCRR 3000.5[d]). Based upon the motion papers, the affidavits and documents submitted therewith, petitioner’s response, and all pleadings and documents submitted

¹ The title of the subject notice uses the phrase “driver license,” while the statute at issue, Tax Law § 171-v, uses the phrase “driver’s license.”

in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation’s Notice of Proposed Driver License Suspension Referral issued to petitioner should be sustained.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Jeffrey S. Faupel, a Notice of Proposed Driver License Suspension Referral (Form DTF-454), Collection case ID: E-028961604-CL01-4, (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. This 60-Day Notice is dated August 30, 2013, and is addressed to petitioner in White Plains, New York. Included with the 60-Day Notice was a Consolidated Statement of Tax Liabilities (Form DTF 967-E), also dated August 30, 2013, setting forth a list of four unpaid assessments subject to collection as follows:

Tax Type	Assessment ID	Period Ended	Tax Assessed	Interest	Current Balance
Sales	L-030671578-5	02/29/08	\$13,744.75	\$7,139.64	\$20,914.39
Sales	L-030408906-5	11/30/07	\$19,585.99	\$10,828.05	\$30,414.04
Sales	L-028961604-8	02/28/07	\$16,984.00	\$11,453.08	\$28,437.08
Sales	L-028961603-9	05/31/07	\$13,899.70	\$8,794.00	\$22,693.70
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2. 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. Among the response options listed for petitioner to undertake within 60 days were the following:

“-resolve your tax debts or set up a payment plan.
-notify the Tax Department of your eligibility for an exemption, or
-protest the proposed suspension of your license by:
-filing a Request for a Conciliation Conference (Form CMS-1-MN,
available of our Web site) with the Tax Department; or
-filing a petition (Form TA-10) with the Division of Tax Appeals,
available at www.nysdta.org.”

3. By an Order of Suspension or Revocation (Order of Suspension) dated November 6, 2013, DMV advised petitioner that his driver’s license would be suspended, effective November 20, 2013, based upon “delinquent unpaid tax debt with the NYS Department of Taxation and Finance—case number E-028961604.”

4. Petitioner filed a Request for Conciliation Conference (Request) challenging the proposed suspension of his license with the Division’s Bureau of Conciliation and Mediation Services (BCMS). As a consequence of this filing, the foregoing Order of Suspension was placed on hold pending resolution of petitioner’s challenge. On February 12, 2014, a conciliation conference was held and in turn, a Conciliation Order (CMS No. 259515) dated April 4, 2014 (Conciliation Order) was issued denying petitioner’s Request and sustaining the proposed suspension of his license.

5. Following issuance of the Conciliation Order, DMV again issued an Order of Suspension, dated April 16, 2014, advising petitioner that his driver’s license would be suspended, effective April 30, 2014, upon the same basis as was previously stated.

6. Petitioner challenged the Conciliation Order by filing a petition with the Division of Tax Appeals. The petition, mailed by certified mail, is dated as signed on April 26, 2014, bears a United States Postal Service (USPS) postmark dated April 30, 2014, and is date stamped as received by the Division of Tax Appeals on May 2, 2014. The petition lists the same White Plains,

New York, address for petitioner as is set forth above on the 60-Day Notice, the Order of Suspension, the cover letter accompanying petitioner's BCMS Request and the cover letter accompanying the BCMS Conciliation Order. As a consequence of this filing, DMV's April 16, 2014 Order of Suspension would appear to have been placed on hold, as before, pending resolution of petitioner's challenge.

6. The petition raises no challenge to the issuance or validity of the four identified tax assessments listed above as past-due fixed and final liabilities giving rise to the proposed suspension of petitioner's license. Likewise, the petition does not challenge the Division's issuance or petitioner's receipt of the 60-Day Notice. Instead, the petition, and petitioner's response to the subject motion, seeks to avoid license suspension upon the basis that petitioner requires a "full" driver's license in order to transport his spouse to and from work assignments, and so that he is able to pursue employment opportunities that may occur on weekends, early mornings or late at night.²

7. The Division filed its answer to the petition on July 16, 2014, and in turn brought the subject motion on December 1, 2014. The Division submitted with its motion an affidavit, dated December 1, 2014, made by Matthew McNamara, who is employed as a Business Systems Analyst 1 in the Division's Civil Enforcement Division (CED). Mr. McNamara's duties involve maintenance of the CED internal website, and include creation and modification of pages on the site itself. His duties further involve the creation and maintenance of programs and reports run on a scheduled basis that facilitate and report on the movement of cases, including the creation of

² The Order of Suspension indicates, among other items, that petitioner was eligible for a restricted use license, and advises petitioner to contact DMV concerning such eligibility. The record does not disclose whether petitioner has availed himself of this option.

event codes based on criteria given by end users. Mr. McNamara's affidavit fully details the sequential actions or steps, to wit, 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, Article 8, § 171-v, both in general and with particular reference to the instant matter concerning the 60-Day Notice issued to petitioner. Mr. McNamara avers that his review of Division records concerning the matter at issue reveals the same to comport with all of the requirements for establishing a valid basis for referral to DMV for licence suspension and indicates no basis upon which the proposed license suspension should be canceled.

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

CONCLUSIONS OF LAW

A. Tax Law § 171-v, effective March 28, 2013, provides for the enforcement of past-due tax liabilities through the suspension of drivers' licenses. The Division must provide notice to a taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to the date the Division intends to refer the taxpayer to DMV for action (Tax Law § 171-v[3]). At issue in the instant matter is a Notice of Proposed Driver License Suspension Referral, dated August 30, 2013, addressed to and advising petitioner of the possible suspension of his driver's license. This 60-Day Notice is in facial compliance with the terms of Tax Law § 171-v. That is, the Notice is

specifically based on: a) the Division's claim that four sales tax assessments pertaining to petitioner and reflecting tax and interest due in the cumulative amount of \$102,459.21, remain outstanding and unpaid, and b) petitioner does not meet (and has not raised) any of the six specifically enumerated grounds set forth at Tax Law § 171-v(5)(i)-(vi) allowing for relief from license suspension.

B. Petitioner initially challenged the proposed suspension of his license by filing a timely Request with BCMS. This Request was denied by BCMS and the 60-Day Notice was sustained. Petitioner, in turn, challenged the BCMS Conciliation Order by filing a timely petition with the Division of Tax Appeals, i.e., within the 90 day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Since the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition.

C. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). A motion 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]).

D. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc., v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*). As detailed hereafter, there are no material and triable issues of fact in dispute, and the Division is entitled to summary determination in its favor as a matter of law.

E. A taxpayer’s right to challenge a 60-Day Notice issued pursuant to Tax Law § 171-v is specifically limited to a petition with the Division of Tax Appeals, and must be based 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" (Tax Law § 171-v[5]).

F. As noted earlier, petitioner does not dispute the Division's proper issuance or his subsequent receipt of the 60-Day Notice, nor does he challenge the basis for its issuance, i.e., the existence of past-due fixed and final tax liabilities owed by petitioner in an amount equal to or greater than \$10,000.00, per Tax Law § 171-v(1). The 60-Day Notice thus meets the fundamental requirements necessary to support the validity of its proposed sanction of license suspension. Further, petitioner has not raised any of the foregoing six specifically enumerated substantive bases for relief from an otherwise facially valid notice of proposed license suspension (Tax Law § 171-v[5][i]-[vi]). Instead, petitioner solely argues that a suspension of his driver's license would present hardship in his ability to pursue employment and to carry out other obligations. Accordingly, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination is appropriate.

G. The Division's motion for summary determination is hereby granted, the petition of Jeffrey S. Faupel is denied, and the Division's Notice of Proposed Driver License Suspension, dated August 30, 2013, is sustained.

DATED: Albany, New York
April 16, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE