

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAK K. LIU	:	DETERMINATION
for Revision of a Notice of Proposed Driver License	:	DTA NO. 826291
Suspension Referral Under Tax Law, Article 8,	:	
§ 171-v.	:	

Petitioner, Tak K. Liu, filed a petition for revision 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 W. Milavec, Esq., of counsel), brought a motion filed January 6, 2015, seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to section 3000.5, 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Michele W. Milavec, Esq., dated January 5, 2015, and annexed exhibits, and the affidavit of Matthew McNamara dated January 5, 2015 and an attached exhibit. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on February 5, 2015, the due date for petitioner's response. Based upon the motion papers, the affirmation, the affidavit and attached documents, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

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."

ISSUE

Whether the Notice of Proposed Driver License Suspension Referral should be sustained.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Tak K. Liu, a Notice of Proposed Driver License Suspension Referral (Form DTF-454), dated August 9, 2013, Collection case ID: E-030351943-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. The suspension notice informed petitioner that he had outstanding tax liabilities in excess of \$10,000.00 owed to the State of New York, and that unless he responded within 60 days from its mailing date, his driver's license would be suspended. According to the 60-Day Notice, an adequate response within that time period would consist of 1) resolution of the outstanding liability either by payment or establishment of a payment plan; 2) notification to the Division of petitioner's eligibility for an exemption; or 3) a protest of the 60-Day Notice by the filing of a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals. This 60-Day Notice was addressed as sent to petitioner in Brooklyn, New York, the same address used by petitioner on the request for a conciliation conference he filed in response. The Brooklyn, New York, address also appears on the petition filed by petitioner in this matter. Petitioner has not denied receipt of the 60-Day Notice.

Attached to the 60-Day Notice was a Consolidated Statement of Tax Liabilities (Form DTF 967-E) listing petitioner's assessments subject to collection as follows:

Tax Type	Assessment ID Number	Tax Per. Ended	Tax Amt. Assessed	Interest Amt. Assessed	Penalty Amt. Assessed	Payments/ Credits	Current Balance
Income	L-035871322-6	12/31/10	\$ 595.00	\$ 79.91	\$ 56.16	\$200.00	\$ 531.07
Income	L-033898734-9	12/31/09	\$10,715.00	\$3,372.51	\$2,498.08	\$386.01	\$16,199.58
Total							\$16,730.65

2. On March 7, 2014, BCMS issued to petitioner a Conciliation Order, CMS No. 259099, sustaining the Notice of Proposed Driver License Suspension Referral.

3. On May 27, 2014, petitioner mailed a petition via United States Postal Service (USPS) Certified Mail to the Division of Tax Appeals that was date stamped as received on May 29, 2014. The petition challenges the Notice of Proposed Driver License Referral and the Conciliation Order sustaining the same. In the petition, petitioner seeks relief from the tax imposed by the Division for the 2009 tax year because he withdrew money from his 401-K retirement account for emergency purposes during that tax year. In the petition, petitioner also claims to have filed for bankruptcy. Attached to the petition is the completed "Certificate of Counseling" required to be filed under title 11 of the United States Bankruptcy Code. Review of the Certificate of Counseling indicates that an individual briefing was conducted by internet and telephone, and "[a] debt repayment plan was not prepared." No other documents regarding petitioner's alleged bankruptcy filing were attached to the petition.

4. In support of its motion, the Division submitted the sworn affidavit of Matthew McNamara, Information Technology Specialist 3 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 event codes based upon the criteria given by end

users. Mr. McNamara's affidavit describes the process by which the Division, as authorized by Tax Law, Article 8, § 171-v, searches for and refers taxpayers with delinquent tax liabilities to the New York State Department of Motor Vehicles (DMV).

5. Based upon pre-determined selection criteria, a file of candidates who could be sent a 60-Day Notice is produced. Then, the Division excludes any such taxpayers from being selected for suspension if 1) the taxpayer is deceased; 2) the taxpayer is in bankruptcy; 3) a new formal or informal protest has been added to any assessment, the result of which is the balance of fixed and final tax liabilities falls below the \$10,000.00 threshold for suspension; or 4) the taxpayer is on an active payment plan. Thereafter, the Division sends a file with certain identifying information for candidates not excluded to the DMV to obtain their driver's license details. The DMV performs the match and returns the detailed information to the Division. When the Division determines that the taxpayer has a qualifying driver's license that taxpayer is put into the suspension process. Before a 60-Day Notice is issued, a further compliance check is run against the taxpayer's information to assure he or she still meets the criteria for suspension, in order to allow for any lapse in time between the DMV match and the mailing of the 60-Day Notice. The taxpayer is sent the 60-Day Notice via regular U. S. mail to the taxpayer's mailing address. 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, the matter will be electronically sent to the DMV for suspension after another compliance check is performed by the Division to be sure the case still meets the requisite criteria. If the case passes all the compliance checks, the taxpayer is added to the file to be sent to the DMV for suspension. If successfully processed, the DMV will send a 15-day letter to the taxpayer advising him or her of the impending license suspension. If there is no response from the taxpayer and the DMV does not receive a cancellation record from

the Division, the taxpayer's license or permit will be marked as suspended on the DMV's database. The Division continues to monitor events subsequent to the 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 the filing of a request for conciliation conference with BCMS, a bankruptcy filing, the creation and approval of an installment payment agreement, and the filing of a petition with the Division of Tax Appeals. Where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by the DMV and the matter would not be referred back to the DMV by the Division for resuspension until resolution of the "on-hold" status (the 60-Day Notice would remain in the Division's system). If the subsequent event resulted in "closed" status, the 60-Day Notice would be canceled.

6. A copy of the 60-Day Notice at issue in this matter, the Consolidated Statement of Tax Liabilities described in Finding of Fact 1, and a Payment Document (Form DTF-968.4), by which petitioner could remit payment against the liabilities in question, were included with Mr. McNamara's affidavit. Mr. McNamara avers, based upon his knowledge of Division policies and procedures regarding driver's license suspension referrals, and upon his review of the Division's records, that on August 9, 2013 the Division issued to petitioner a 60-Day Notice. Mr. McNamara states that such 60-Day Notice comports with statutory requirements, that petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v(5), and that therefore the 60-Day Notice has not and should not be canceled.

7. Petitioner did not submit a response to the Division's motion.

CONCLUSIONS OF LAW

A. Effective March 28, 2013, Tax Law § 171-v provides, in relevant part, as follows:

“(1) The commissioner shall enter into a written agreement with the commissioner of motor vehicles, which shall set forth the procedures for the two departments to cooperate in a program to improve tax collection through the suspension of drivers’ licenses of taxpayers with past due tax liabilities equal to or in excess of ten thousand dollars. For the purposes of this section, the term ‘tax liabilities’ shall mean any tax, surcharge, or fee administered by the commissioner, or any penalty or interest due on these amounts owed by an individual with a New York driver’s license, the term ‘driver’s license’ means any license issued by the department of motor vehicles, except for a commercial driver’s license as defined in section five hundred one-a of the vehicle and traffic law, and the term ‘past due tax liabilities’ means 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.

* * *

(3) The department shall provide notice to the taxpayer of his or her inclusion in the license suspension program no later than sixty days prior to the date the department intends to inform the commissioner of motor vehicles of the taxpayer’s inclusion. . . . Notice shall be provided by first class mail to the taxpayer’s last known address as such address appears in the electronic systems or records of the department.

* * *

(5) 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.

However, nothing in this subdivision is intended to limit a taxpayer from seeking relief from joint and several liability pursuant to section six hundred fifty-four of this chapter, to the extent that he or she is eligible pursuant to that subdivision, or establishing to the department that the enforcement of the underlying tax liabilities has been stayed by the filing of a petition pursuant to the Bankruptcy Code of 1978 (Title Eleven of the United States Code).”

B. The Division has made a motion to dismiss the petition or, in the alternative, a motion for summary determination, on the grounds that petitioner’s pleadings fail to state a cause for relief because he has not raised any of the exceptions set forth in Tax Law § 171-v, which are the only grounds for challenging the proposed suspension of his driver’s license, and there are no material issues of fact, which should result, as a matter of law, in the granting of the Division’s motion for summary determination.

Petitioner received a Notice of Proposed Driver License Suspension Referral, dated August 9, 2013, advising of the possible suspension of his driver’s license because two personal income tax assessments, totaling in excess of \$10,000.00, issued to him remained unpaid. Petitioner initially challenged the proposed suspension of his license by filing a request for conciliation conference with BCMS. Subsequently, BCMS issued a Conciliation Order, dated March 7, 2014, sustaining the Notice of Proposed Driver License Referral. Thereafter, petitioner challenged the Conciliation Order by filing a petition with the Division of Tax Appeals. There is no dispute that the petition was filed on May 27, 2014, a date that falls 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 and, accordingly, a motion for

summary determination under 20 NYCRR 3000.9(b) is a proper vehicle to consider the merits of petitioner's protest of the 60-Day Notice and the Division's arguments in support of the motion. This determination shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under 20 NYCRR 3000.9(a) is improperly brought.

C. A motion for summary determination "shall be granted if, upon all 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 of Practice and Procedure of the Tax Appeals Tribunal 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]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, 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).

E. Here, petitioner did not respond to the Division's motion. Since petitioner did not appear on this motion and presented no evidence to contest the facts alleged in the McNamara affidavit submitted by the Division, those facts are deemed admitted (*see Kuehne & Nagel, Inc., v. Baiden*, 36 NY2d 539, 544 [1975]; *Whelan* at 449).

F. Petitioner received a Notice of Proposed Driver License Suspension Referral, dated August 9, 2013, advising of the possible suspension of his driver's license because two personal income tax assessments issued to him remained unpaid, with a total amount due on both of \$16,730.65. Subsequently, petitioner filed a petition in protest of the Notice of Proposed Driver License Suspension Referral and the Conciliation Order sustaining the same. In his petition, petitioner seeks relief from the tax assessed for the year 2009 because it was imposed as a result of an emergency withdrawal he made from his 401-K retirement account during that tax year. Petitioner, in his petition, also claims to have filed for bankruptcy. The only document submitted in support of his alleged bankruptcy filing was a Certificate of Counseling that stated an individual briefing was conducted by internet and telephone, and a debt repayment plan was not prepared.

Petitioner has raised no challenge that the liabilities in question are not fixed and final. These two tax liabilities were listed on the Consolidated Statement of Tax Liabilities attached to the Notice of Proposed Driver License Suspension Referral issued by the Division on that date. Petitioner did not challenge the suspension of his driver's license on any of the six grounds set forth in Tax Law § 171-v(5). Rather, he claimed to have filed for bankruptcy. Although petitioner submitted the Certificate of Counseling, he failed to submit a copy of the petition for bankruptcy that was required to be filed with the Bankruptcy Court within 180 days of such

individual briefing (*see* 11 USC § 109[h][1]). As such, there is no evidence that petitioner filed a bankruptcy petition listing the two outstanding tax liabilities, i.e., Assessment ID Nos. L-035871322-6 and L-033898734-9, and the Division of Taxation as the creditor of the same. Since petitioner failed to prove that the enforcement of these two fixed and final tax liabilities has been stayed by the filing of a bankruptcy petition, his challenge to the Notice of Proposed Driver License Suspension Referral must fail (*see* Tax Law § 171-v[5]).

G. The Division of Taxation's motion for summary determination is granted, the petition of Tak K. Liu is hereby denied, and the Notice of Proposed Driver License Suspension Referral is sustained.

DATED: Albany, New York
April 9, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE