

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARY E. JACOBI : DETERMINATION
for Review of a Notice of Proposed Driver License : DTA NO. 826332
Suspension Referral under Tax Law, Article 8, :
§ 171-v of the Tax Law. :

Petitioner, Mary E. Jacobi, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, Article 8, § 171-v.

On December 22, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, and annexed exhibits. Petitioner, appearing by Andreozzi, Bluestein, Weber and Brown, LLP (Randall P. Andreozzi, Esq., of counsel) submitted an affirmation and a memorandum in opposition to the Division of Taxation's motion to dismiss the petition. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's notice of proposed driver license suspension referral issued to petitioner pursuant to Tax Law § 171-v should be sustained.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the validity of petitioner, Mary E. Jacobi's, protest of a notice of proposed driver license suspension referral, dated August 2, 2013, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). The suspension notice informed petitioner that she had outstanding tax liabilities in excess of \$10,000.00 owed to the State of New York, and that unless she responded within 60 days of the mailing date of the suspension notice, her driver license would be suspended. Specifically, petitioner was advised through a Consolidated Statement of Tax Liabilities that income tax assessment ID# L-036560876-4 in the amount of \$56,550.00, plus interest in the amount of \$10,869.32, and penalty in the amount of \$7,226.76, less payments or credits of \$1,384.02, for a balance due of \$73,262.06 was subject to collection action.¹ According to the suspension 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 suspension 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.

2. Petitioner requested a conference before BCMS and on March 14, 2014, BCMS issued to petitioner a Conciliation Order, CMS number 259102, that sustained the Notice of Proposed Driver License Suspension Referral dated August 2, 2013.

3. On June 11, 2014, the Division of Tax Appeals received a petition challenging the

¹ The notice listed two additional income tax assessments that were not yet subject to collection action, because these two assessments were under formal or informal review.

suspension notice. According to the petition, petitioner and her spouse are currently unemployed and do not receive any unemployment benefits. Petitioner receives disbursements from certain entities but Mr. Jacobi does not have any income. Petitioner avers that the Statement of Financial Condition and Other Information shows that she and her husband are insolvent and do not have any excess monthly income to pay their unpaid taxes from prior years. According to petitioner, she is paying her current taxes. She also maintains that her tax debt is currently uncollectible. However, petitioner has made an Offer in Compromise to New York State and is making voluntary payments of \$750.00 per month toward her outstanding tax liability. Petitioner notes that an accepted Offer in Compromise prevents her driver's license from being suspended and that her Offer in Compromise is still pending. According to the petition, petitioner lives in a suburban area that lacks accessible public transportation. The petition also states that there are no food stores or pharmacies within walking distance of petitioner's home. Petitioner suffers from arthritis and needs her car to visit doctors or fill prescriptions. It is submitted that loss of her driving privileges will have a severe effect on her life.

4. The Division filed an answer to the petition and thereafter brought the subject motion with an affidavit by Matthew McNamara who is employed as an 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 reports based on the Division's internal systems. 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 on criteria given by end users. Mr. McNamara's affidavit details the steps undertaken by the Division in carrying out the license

suspension program authorized by Tax Law Article 8, § 171-v.

5. Mr. McNamara's affidavit addresses four sequential actions or steps, to wit, the "Initial Process," the "DMV Data Match," the "Suspension Process" and the "Post-Suspension Process." 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 under Tax Law § 171-v. This process involves first reviewing internally set selection criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) equal to or greater than \$10,000.00, and then reviewing additional data to determine whether any of such taxpayers are excluded from application of the driver's license suspension provisions of Tax Law § 171-v(5) under the following elimination (or exclusion) criteria:

- the taxpayer is deceased.
- the taxpayer is in bankruptcy.
- the age of any assessment included in determining the cumulative amount of liability is more than 20 years from the Notice and Demand issue date.
- 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 would leave the balance of such liability below the \$10,000.00 threshold for license suspension
- the taxpayer is on an active approved payment plan.

b) The "DMV Data Match" involves reviewing information on record with DMV for a taxpayer not already excluded under the foregoing criteria to determine whether that taxpayer has a qualifying driver's license potentially subject to suspension per Tax Law § 171-v. This review examines the following 14 data points:

- “(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) mailing address street, (10) city, (11) state, (12) zip code
- (13) license class, and
- (14) license expiration date.”

If, upon this review, the Division determines that a taxpayer 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. If the taxpayer remains within the criteria for suspension, then a 60-Day Notice will be issued to the taxpayer. In describing the process of issuance of the 60-Day Notice, Mr. McNamara states:

“The date of the correspondence trigger will be stored on the database as the day that the 60-Day Notice was sent, but an additional 10 days will be added to the date displayed on the page to allow for processing and mailing. Additionally, the status will be set to ‘Approved’ and the clock will be set for seventy-five (75) days from the approval date.

The taxpayer(s) is sent the 60 day notice (Form DTF-454) 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 (i.e., the case is not on hold or closed or otherwise changed), the case will be electronically sent by the Division to DMV for license suspension.² Data is exchanged daily between the Division and DMV. If an issue of data

² 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 what is presented) and the suspension will be stayed. If the status is “on-hold” the 60-Day Notice remains on the Division’s system but the suspension will not proceed until the “on-hold” status is resolved. If the suspension is “closed” then the 60-Day Notice will be canceled. If the taxpayer “passes” this final criteria compliance check, the suspension by DMV will proceed.

transmission arises, an internal group within the Division (DMV-Failed Suspensions) will investigate and resolve the issue. Upon successful data processing and transfer, DMV will send 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."

6. A copy of the 60-Day Notice at issue in this matter, the Consolidated Statement of Tax Liabilities, 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 2, 2013 the Division issued to petitioner a 60-Day Notice.

7. In its answer to the petition, the Division asserts that petitioner has not sought relief from the 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), and thus has raised no basis for administrative or judicial review of the proposed suspension of her 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.

8. In response to the Division's motion, petitioner points out that the Notice of Proposed License Suspension Referral under the heading "How to avoid suspension of your license"

instructs taxpayers to “pay the amount due or set up a payment plan to avoid suspension of your license.” The notice also advises taxpayers that a driver’s license suspension referral will be provided to the DMV unless the taxpayer, among other things, sets up a payment plan, protests the proposed suspension of the license by filing a Request for a Conciliation Conference or a petition with the Division of Tax Appeals.

9. On June 3, 2014, petitioner filed an Offer in Compromise (OIC) with the Division and included a Statement of Financial Condition and Other Information. The OIC included an installment payment of \$750.00 toward the unpaid income tax liabilities while the OIC was pending.³

10. In support of her position, petitioner’s representative, Randall P. Andreozzi, Esq., filed an affirmation in opposition to the motion for summary determination. According to the affirmation, after the OIC was pending for more than seven months, petitioner was advised that her OIC had been assigned a settlement officer for review and evaluation. On June 4, 2014, the day after petitioner filed her OIC, the Department of Motor Vehicles issued an Order of Suspension or Revocation advising her that her driver’s license will be suspended effective June 18, 2014 because of the tax debt.⁴ On June 14, 2014, petitioner was advised that the proposed suspension of her driver’s license had been rescinded as of June 11, 2014. It is Mr. Andreozzi’s understanding that it is the Division’s policy that DMV rescind the suspension of any driver’s license during the pendency of the review of the OIC. According to Mr. Andreozzi, petitioner

³ At the time of petitioner’s response to the motion, the OIC had been pending for more than 7 months.

⁴ Petitioner intends to initiate discovery to determine whether the next-day issuance was an intentional effort to leverage consideration of the OIC with the threat of a driver’s license suspension.

has come forward in good faith with an OIC and with monthly payments supported by her Statement of Financial Position. As of the date of the affirmation, the Division has not rejected the OIC or returned any payment made under the proposed OIC.

11. Petitioner also submitted a memorandum of law wherein she maintained that the Division's claim that petitioner has not raised an acceptable ground for challenging the proposed suspension of the driver's license is not correct because petitioner submitted an OIC and began making voluntary payments. Further, petitioner has consistently been making voluntary payments. The only reason petitioner has been unable to provide proof of an accepted OIC is because the Division has not begun consideration of the OIC.

12. Petitioner's memorandum contends that there are material issues of fact that preclude the granting of summary determination, i.e., petitioner relied upon the notice to avoid suspending her license, she followed DMV's instructions on how to avoid a suspension of her license by requesting a conciliation conference, submitting an OIC and, by filing a petition. Petitioner maintains that the Division's motion fails to consider that petitioner's OIC is still under consideration and that petitioner is making monthly payments in reliance upon the Division's advice in the notice.

CONCLUSIONS OF LAW

A. 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). 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 section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness

of petitioner's request for a conciliation conference. This Order shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

B. A motion for summary determination 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]).

C. Petitioner has timely protested the suspension notice. 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]). The liability represented by the notice of deficiency meets the threshold requirement for suspension of petitioner's driver's license pursuant to Tax Law § 171-v.

D. A taxpayer's right to challenge a 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]).

E. Petitioner argues that the Division should not have proceeded with the suspension of her license while the Offer in Compromise was pending. Tax Law § 171-v(3)(d) states that the notice to a taxpayer shall include:

“a statement that the suspension of the taxpayer's driver's license shall continue until the past-due tax liabilities are fully paid or the taxpayer makes payment arrangements satisfactory to the commissioner. . . .”

F. Here, there is no dispute that the Commissioner has not acted on petitioner's offer in compromise. It follows that this section does not afford petitioner any relief since, at this juncture, there are *no* arrangements that are satisfactory to the Commissioner. An application for an OIC, without acceptance by the Commissioner, does not satisfy this criterion. Moreover, this conclusion is not altered by a suggestion in a notice from the Division that the taxpayer make an OIC.

G. Petitioner argues that she has no assets which can be levied upon and that suspension of her license would greatly hinder her ability to care for herself and her family. Neither of these assertions raise any of the grounds set forth in Tax Law § 171-v(5). Accordingly, it is concluded that there is no dispute as to the facts and no basis in law to grant the petition. As a result, the granting of summary determination is appropriate.

H. The Division's motion for summary determination is hereby granted, the petition of Mary E. Jacobi is denied, and the Division's notice of proposed driver license suspension is sustained.

DATED: Albany, New York
April 16, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE