

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSE A. MUNIZ	:	DETERMINATION
For Review of a Notice of Proposed Driver License	:	DTA NO. 826347
Suspension Referral Under Tax Law, Article 8, § 171-v.	:	

Petitioner, Jose A. Muniz, filed a petition for review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion on December 22, 2014, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Michele W. Milavec, Esq., sworn to December 22, 2014, and annexed exhibits. Petitioner, appearing pro se, did not respond to the motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, 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, Jose A. Muniz, a Notice of Proposed Driver License Suspension Referral (the 60-Day Notice), dated September 27, 2013, which notified petitioner that new legislation allows New York State to suspend the driver's licenses of persons who have delinquent unpaid tax debts. The notice informed petitioner of how to avoid such suspension, how to respond to the notice and what would ensue if he failed to take action. Attached to the notice was a Consolidated Statement of Tax Liabilities listing petitioner's assessments subject to collection, as follows:

Assessment No.	Tax period ended	Tax Amount Assessed	Interest Assessed	Penalty Assessed	Payments and credits	Current Balance Due
L-035411945-2	8/31/09	\$0.00	\$159.33	\$254.08	\$0.00	\$413.41
L-035411944-3	11/30/09	\$0.00	\$0.00	\$28.30	\$0.00	\$28.30
L-033157748-8	8/31/08	\$878.54	\$925.98	\$263.45	\$0.00	\$2,067.97
L-033157747-9	11/30/08	\$758.36	\$745.90	\$227.43	\$0.00	\$1,731.69
L-033157746-1	5/31/09	\$1,020.91	\$865.62	\$306.09	\$0.00	\$2,192.62
L-033157745-2	2/28/09	\$674.36	\$618.88	\$202.23	\$0.00	\$1,495.47
L-032739147-2	12/31/05	\$2,978.00	\$2,718.37	\$1,440.89	\$0.00	\$7,137.26
L-032739146-3	12/31/03	\$254.00	\$318.03	\$193.45	\$0.00	\$765.48
L-032372458-4	3/31/06	\$0.00	\$408.21	\$1,194.25	\$0.00	\$1,602.46
L-032372457-5	6/30/06	\$0.00	\$298.12	\$872.16	\$0.00	\$1,170.28
L-032372456-6	9/30/06	\$0.00	\$538.21	\$1,574.58	\$0.00	\$2,112.79
L-031626648-6	5/31/08	\$570.51	\$396.13	\$171.05	\$704.80	\$432.89
L-028266429-1	9/30/04	\$0.00	\$446.89	\$693.56	\$0.00	\$1,140.45
L-028266428-2	12/31/04	\$0.00	\$655.97	\$1,018.05	\$0.00	\$1,674.02
L-026663149-7	9/30/02	\$0.00	\$303.00	\$373.33	\$0.00	\$676.33
L-026663148-8	12/31/02	\$0.00	\$378.15	\$465.92	\$0.00	\$844.07

L-026663147-9	3/31/03	\$0.00	\$349.04	\$430.08	\$0.00	\$779.12
L-026663146-1	6/30/03	\$0.00	\$290.87	\$358.40	\$0.00	\$649.27
L-026663145-2	6/30/02	\$0.00	\$1,124.60	\$1,385.68	\$0.00	\$2,510.28
L-026663144-3	3/31/04	\$0.00	\$422.02	\$519.98	\$0.00	\$942.00
L-026663143-4	6/30/04	\$0.00	\$395.24	\$486.99	\$0.00	\$882.23
Total						\$31,248.39

2. On June 17, 2014 petitioner filed a petition in response to a Conciliation Default Order dated March 21, 2014 from the Division's Bureau of Conciliation and Mediation Services (BCMS). The Default Order attached to the petition indicated that petitioner had failed to appear at the scheduled conference. The conciliation default order also indicated that notice of the conference was mailed to petitioner on February 6, 2014. The petition claims that petitioner was denied due process in that he never received notice of the scheduled conference. The petition also alleges that it would constitute undue hardship if petitioner's driver's license is suspended.

3. The Division filed its answer to the petition on August 27, 2014, and in turn brought the subject motion on December 22, 2014. The Division submitted with its motion an affidavit, sworn to December 22, 2014, made 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 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 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.

4. 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) in excess of \$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 assessments 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 assessments 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 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
- (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 detailed above in Finding of Fact 4-a. 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.¹ Data is exchanged daily between the Division and DMV. If an issue of data

¹ Prior to license suspension, the Division performs another "criteria for suspension" 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 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." A change to "on-hold" status can result from events such as those set forth above (e.g., the filing of a protest, a bankruptcy filing, the creation and approval of an installment payment agreement and the like). Similar to the process described in footnote 1, 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 (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.

5. A copy of the 60-Day Notice at issue in this matter, a Consolidated Statement of Tax Liabilities, and a Payment Document (Form DTF-968.4), by which petitioner could remit payment against the liability 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 the Division issued the 60-Day Notice to petitioner on September 27, 2013. 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 been and should not be canceled.

6. Petitioner did not file a response to the Division's motion.

CONCLUSIONS OF LAW

A. First addressing petitioner's request to the vacate the BCMS default order, the Division of Tax Appeals is without jurisdiction to grant such relief. The Division's regulations at 20 NYCRR 4000.5(b)(3) provide that upon receipt of a conciliation default order, the requestor may file an application with BCMS to have the default order vacated. There is no indication that petitioner filed such an application. The regulation further provides that the filing of a petition with the Division of Tax Appeals is an alternative remedy in the event of a conciliation conference default (*see* 20 NYCRR 4000.5[b][3]). Inasmuch as petitioner filed a petition with the Division of Tax Appeals, he is in the same position procedurally as if he had never requested a conciliation conference in the first instance (*Matter of Poindexter*, Tax Appeals Tribunal, September 7, 2006).

B. Turning to the merits, the Division of Taxation has made a motion to dismiss, or alternatively, a motion for summary determination seeking dismissal of the petition or judgement as a matter of law. Since the Division has not contested the timeliness of the petition, the Division of Tax Appeals has jurisdiction over the petition (Tax Law § 171-v[3]). Accordingly, a motion for summary determination under 20 NYCRR 3000.9(b) is the proper vehicle to consider the merits of petitioner's protest and the Division's arguments in support of the motion.

C. 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]).

Section 3000.9 of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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 [1980]).

D. Petitioner's right to challenge the 60-Day Notice issued pursuant to Tax Law § 171-v is specifically limited to 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. In his petition, petitioner did not raise a challenge based on any of the above-
enumerated grounds. The Division, through the factual assertions set forth in its motion papers,

has established a prima facie showing that petitioner met the requirements for license suspension; to wit: the giving of notice of the proposed suspension referral and the existence of fixed and final outstanding tax liabilities in excess of \$10,000.00. To rebut this prima facie showing, it was incumbent upon petitioner to produce evidence in admissible form sufficient to raise an issue of fact requiring a hearing (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Petitioner, however, did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc., v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the McNamara affidavit; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc., v. Baiden*, at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992]).

F. The Division's Motion for Summary Determination is granted, the September 27, 2013 Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v is sustained, and the petition of Jose A. Muniz is denied.

DATED: Albany, New York
April 2, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE