STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFFREY S. BALKIN	:	DETERMINATION DTA NO. 826366
For Review of a Notice of Proposed Driver License Suspension Referral Under Tax Law, Article 8, § 171-v.	:	

Petitioner, Jeffrey S. Balkin , 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 January 6, 2015, 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 affirmation of Michele W. Milavec, Esq., sworn to January 5, 2015, and annexed exhibits. Petitioner, appearing pro se, filed a response to the Division of Taxation's motion on February 7, 2015, the date from which the 90-day period for the issuance of this determination began. 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, Jeffrey S. Balkin, a Notice of Proposed Driver License Suspension Referral (the 60-Day Notice), dated August 9, 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 income tax 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-036774402-5	12/31/07	$2,133.00	$1,110.16	$1,003.22	$0.00	$4,246.38
L-036140918-8	12/31/06	$2,450.00	$1,651.51	$1,247.57	$0.00	$5,349.08
L-036140917-9	12/31/05	$3,708.00	$3,073.42	$2,123.41	$118.50	$8,786.33
Total						**$18,381.71**

2. On June 25, 2014, following the issuance of a Conciliation Order, dated March 28, 2014, sustaining the 60-Day Notice, petitioner filed a petition with the Division of Tax Appeals. The petition alleges that petitioner is unable to pay his outstanding tax liabilities and that suspension of his driver's license would impose a severe hardship on him insofar as it would impede his travel to the grocery store and to medical appointments.

3. The Division filed its answer to the petition on September 10, 2014, and in turn brought the subject motion on January 6, 2015. The Division submitted with its motion an affidavit, sworn to January 6, 2015, 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. In his affidavit, Mr. McNamara describes the Division's process for selection of candidates who could be sent notices of proposed driver license suspension pursuant to Tax Law § 171-v. The initial search criteria includes that 1) the taxpayer has an outstanding balance of tax, penalty, and interest in excess of $10,000.00; 2) all assessments currently involved in formal or informal protest, or bankruptcy be eliminated; 3) there must be less than 20 years from the issuance of the particular notice and demand; 4) the outstanding assessments not be the subject of an approved payment arrangement; and 5) the taxpayer is not deceased. The Division searches its electronic database on a weekly basis for those taxpayers that meet the above criteria.

5. Once candidates have been identified by the Division, the necessary information is sent to the Department of Motor Vehicles (DMV) to confirm that the taxpayer has a qualifying driver's license and is eligible for a notice of proposed driver license suspension.

6. After receipt of a match from DMV but prior to issuance of a proposed suspension notice, an additional compliance check is run by the Division to ensure that the case still meets the aforementioned criteria and is still eligible for suspension. If so, the Division issues the proposed suspension notice to the taxpayer.

7. If the taxpayer does not respond to the Division or there has been no change in his or her status, the case is electronically sent to DMV for the license to be suspended.

8. Mr. McNamara avers that based on his review of the Division's records and his knowledge of its policies and procedures, issuance of the suspension notice to petitioner was proper.

9. Petitioner responded to the Division's motion with arguments in opposition.

CONCLUSIONS OF LAW

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9(a), or summary determination under 20 NYCRR 3000.9(b). As the Division of Tax Appeals has subject matter jurisdiction in the instant matter, the Division's motion will be treated as one for summary determination (***see Matter of Ali***, Tax Appeals Tribunal, January 22, 2015).

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]). 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]). 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 v Tri-Pac Export Corp.***, 22 NY2d 439 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572 [1989]).

C. 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]) and the taxpayer must have fixed and final tax liabilities in excess of $10,000.00.

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. 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. Petitioner's responding papers do not raise a challenge based on any of the above- enumerated grounds. Rather, petitioner sets forth two

separate grounds in opposition, to wit: (i) his outstanding tax liabilities are not fixed and final; and (ii) Tax Law § 171-v is impermissibly being applied to him on a retroactive basis.

F. First, Petitioner claims his outstanding liabilities are not fixed and final because his filed personal income tax returns for 2005, 2006 and 2006 self-assessed tax of $8,039.00 (exclusive of penalties and interest) while the Division's Consolidated Statement of Tax Liabilities reflect assessed tax $8,291.00 (exclusive of penalty and interest), i.e., some $252 more than the amount petitioner admittedly self-assessed with the filing of his returns. In addition, petitioner contends the amount the Division has claimed is due and owing does not take into account $91.49 taken by the Division from his bank account. According to petitioner, these discrepancies preclude the outstanding tax liabilities from being considered fixed and final.

G. Petitioner's argument is rejected. It must be stressed that in opposing the motion for summary determination, 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]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Muller Constr. Co.***, 46 NY2d 276 [1978]). Petitioner has failed to shoulder his burden. Petitioner has raised no allegation that he never received any underlying notices of deficiency for the years in issue, nor has he alleged that the assessments are currently being challenged through the administrative hearing process or are the subject of judicial review. Taking petitioner's allegations in a light most favorable to him, petitioner, at a minimum, has admitted to a fixed and final liability of $8,029.00 exclusive of penalty and interest thereon, self-assessed with the filing of his returns (***see*** Tax Law § 682[a]). With the addition of penalties and interest, such admittedly self-assessed liability, the outstanding liability far exceeds the $10,000.00 threshold for license suspension referral. In short, petitioner has not established that

such amount is not in fact fixed and final, much less raised a triable issue of fact requiring a hearing on this issue.

H. Petitioner also responded to the Division's motion by arguing that the sanction of license suspension under Tax Law § 171-v is being applied to him retroactively in violation of his due process rights under the state and federal constitutions. Petitioner's arguments on this score are likewise rejected. While retroactive tax legislation is looked upon with disfavor by the courts (***see Caprio v. New York State Department of Taxation and Finance***, 117 AD3d 168 [1st Dept., 2014]), statutes imposing new remedies are presumed to operate retroactively (***Marino S., Jr. v. Angel Guardian Children and Family Servs., Inc.***, 100 NY2d 361, 370–71, [2003]; McKinney's Book 1 Statutes § 54). The Court of Appeals and the United States Supreme Court have specifically held that a new remedy for the *collection* of delinquent taxes may validly be applied to tax liabilities existing prior to enactment of the statute (***In re 801-815 East New York Avenue, Borough of Brooklyn City of New York***, 290 NY 236 [1943]; ***League v. State of Texas***, 184 US 156 [1902]; ***Phillips v. Commissioner of Internal Revenue***, 283 US 589, 601 [1931]). Accordingly, petitioner's arguments are rejected.

I. The Division's Motion for Summary Determination is granted, the August 9, 2013 Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v is sustained, and the petition of Jeffrey S. Balkin is denied.

DATED: Albany, New York
April 9, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE