

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARILYN FORMICHELLI : DETERMINATION
for Review of a Notice of Proposed Driver License : DTA NO. 826432
Suspension Referral under Tax Law, Article 8, :
§ 171-v. :

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

On January 29, 2015, 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) and 3000.9(b). Accompanying the motion was the affirmation of Michele W. Milavec, and annexed exhibits. Petitioner, appearing by the Law Offices of Lee David Auerbach, P.C. (Lee David Auerbach, Esq., of counsel), did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., 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'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. 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 conciliation conference, which was held on April 24, 2014. By conciliation order dated July 18, 2014, the BCMS conferee sustained the suspension notice.

3. As of August 2, 2013, the date of the issuance of the suspension notice, petitioner had the following fixed and final unpaid sales tax liabilities:

Notice Number	Tax Period Ending	Amount Outstanding
L-027103074-5	11/30/05	\$8,827.62
L-026695730-8	11/30/04	\$33,606.03
L-026695729-8	2/28/05	\$15,535.50
L-026695728-9	5/31/05	\$24,963.38
L-026695727-1	8/31/05	\$16,696.54

4. In total, as of August 2, 2013, petitioner's outstanding liability for above the periods, including penalty and interest, was \$99,629.07.

5. On August 7, 2014, petitioner filed a petition with the Division of Tax Appeals

challenging the suspension notice. In it, petitioner disputes the underlying merits of the sales tax liabilities. Additionally, petitioner describes that she suffers from financial hardships and requests that her account be placed on “currently not collectible status” or that she be permitted to enter into an installment agreement with the Division. She does not allege that an installment agreement currently exists. The petition fails to state any other grounds for her challenge.

6. In support of its motion, the Division also submitted the affidavit of Matthew McNamara, an Information Technology Specialist 3 with its Civil Enforcement Division (CED) during the relevant time. His responsibilities include maintenance of the CED internal website, which includes creation and modification of pages and tables within the server database. Mr. McNamara is also involved in the creation of reports based off the Division’s internal systems along with the creation and maintenance of programs and reports that are run on a scheduled basis. He also supervises a team and ensures that all procedures are understood and that reports are run in a timely manner. Mr. McNamara bases his affidavit upon his personal knowledge of the facts in this matter and his review of the Division’s official records kept in the ordinary course of business.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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. Additionally, Mr. McNamara states that as of the date of the issuance of the suspension notice, petitioner's unpaid amount of sales tax liability for the periods listed in Finding of Fact 3, including penalty and interest, was \$99,629.07.

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).

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]).

B. Petitioner did not respond to the Division’s motion. Accordingly, she 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 may be deemed admitted (*see Kuehne & Nagel, Inc. v. Baiden; Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

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]). The liability represented by the underlying notices meets the threshold requirement for suspension of petitioner’s drivers 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. In the instant case, petitioner has failed to respond to the Division's motion, thereby failing to raise any of the grounds cited in Tax Law 171-v(5) or dispute the facts as asserted. Moreover, in her petition, petitioner similarly does not raise any of the grounds enumerated in the statute. Accordingly, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination is appropriate.

F. Based on Conclusion of Law E, the Division's motion to dismiss under 20 NYCRR 3000.9(a) is moot.

G. The Division's motion for summary determination is hereby granted, the petition of Marilyn Formichelli is denied, and the Division's notice of proposed driver license suspension is sustained.

DATED: Albany, New York
April 30, 2015

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE