STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **BENJAMIN SOLEIMANI** | : | DETERMINATION<br>DTA NO. 826634 |
| for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v. | : | |

Petitioner, Benjamin Soleimani, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, Article 8, § 171-v.[1]

On November 10, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Hannelore F. Smith, 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 (b). Accompanying the motion was the affirmation of Hannelore F. Smith, and annexed exhibits, and the affidavit of Ronald Catalano. Petitioner, appearing by Blank Rome LLP (Joseph T. Gulant, Esq., of counsel), filed an opposition to the motion on December 9, 2015. 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 by summary 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."

## *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 October 11, 2013, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). 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 of the mailing date of the suspension notice, his 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. Attached to the suspension notice was a consolidated statement of tax liabilities for petitioner, also dated October 11, 2013 (consolidated statement). The consolidated statement referenced "[b]ills subject to collection action" and included the following:

| Tax Type | Assessment ID | Tax Period Ended | Balance Due |
|---|---|---|---|
| Income | L-030981058-6 | 12/31/07 [2] | $396,839.84 |

3. Petitioner timely requested a conciliation conference before BCMS. By order of August 29, 2014, BCMS issued its order sustaining the suspension notice.

4. Petitioner was born in Iran and resided in that country until 1960. He subsequently

[2] Petitioner filed both federal and New York state joint returns for 2007 with his wife, Sharyn Soleimani. His wife's involvement with the returns is not relevant to this determination.

moved to the United States and lived here in 2007.

5. Petitioner purchased three parcels of real property in Iran between 1976 and 1978 (Iranian property).

6. On or about April 15, 2007, the Islamic Republic of Iran, citing petitioner's relocation to the Unites States, confiscated the Iranian property.

7. Petitioner did not claim losses from the confiscation of the Iranian property on his New York State resident income tax return filed for the year 2007. Petitioner timely filed the return on October 15, 2008, and indicated a New York State and City income tax liability of $253,259.00, with taxes withheld in the amount of $10,063.00. Petitioner did not remit the remaining taxes due with his return.

8. On November 17, 2008, the Division issued Notice and Demand number L-030981058-6 (notice and demand) for an unpaid balance of $242,966.00, plus penalties and interest for failure to timely pay the tax due as reported.

9. Petitioner filed a petition with the Division of Tax Appeals on April 5, 2011 protesting the notice and demand (2011 petition).

10. By determination of September 29, 2011, the Division of Tax Appeals dismissed the 2011 petition based on the provisions of Tax Law § 173-a (***see Matter of Soleimani***, Division of Tax Appeals, September 29, 2011). There is no evidence or assertion that this determination was the subject of an exception to the Tax Appeals Tribunal.

11. Meanwhile, petitioner also filed a 2007 federal income tax return and 2007 amended federal income tax return claiming losses emanating from the confiscation of the Iranian property. The losses were disallowed in their entirety and petitioner received a notice of

deficiency from the Internal Revenue Service in January 2013 (federal notice).

12. On April 22, 2013, petitioner filed a petition with the United States Tax Court challenging the federal notice. That action remains pending.

13. On November 21, 2014, petitioner filed a petition with the Division of Tax Appeals challenging the suspension notice at issue here. In his petition, petitioner maintains that the suspension notice must be cancelled as it is based upon

> "the erroneous determination that the amount payable by [p]etitioner is 'fixed and final' and a 'past due liabilit[y]' within the meaning of (Tax Law § 171-v) because [p]etitioner is exercising his right to 'judicial review' in U.S. Tax Court by protesting the disallowance of a long-term capital loss in connection with the confiscation of three parcels of real property in Iran that were owned by [p]etitioner."

14. In support of the instant motion, the Division submitted the affidavit of Ronald Catalano, a Tax Compliance Manager 2 with its Civil Enforcement Division (CED). His responsibilities include overseeing the operations of the Training Unit of the CED's Operations Analysis and Support Bureau. His affidavit is based upon his personal knowledge of the facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

15. In his affidavit, Mr. Catalano 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 have 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; and 4) the outstanding assessments not be the

subject of an approved payment arrangement. The Division searches its electronic database on a weekly basis for those taxpayers that meet the above criteria.

16. 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.

17. Mr. Catalano 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. Applying assessment number L-030981058-6, he states that the cumulative balance of tax, penalty, and interest owed by petitioner on October 11, 2013 was greater than $10,000.00, and that petitioner met all other compliance checks referenced in Finding of Fact 15 for proper issuance of the suspension notice.

18. Petitioner maintains that the Division's motion must be denied for several reasons. He asserts, through the affirmation of his representative, Joseph T. Gulant, Esq., that the underlying liability for the suspension notice is not "fixed and final" and remains under judicial review. He adds that the enumerated grounds in Tax Law § 171-v for challenging the suspension notice are insufficient. Moreover, petitioner claims that he was placed in "protective status" with respect to collection by oral agreement with various representatives of the Division. Finally, petitioner states that equity dictates that the suspension notice be canceled.

19. The Division also attached to its motion the affirmation of its attorney, Hannalore F. Smith. In her affirmation, Ms. Smith states that petitioner's New York State tax liability is fixed and final and that he failed to raise any of the enumerated grounds for cancellation of the suspension notice found in Tax Law § 171-v. Hence, the Division argues that summary

determination is appropriate.

***CONCLUSIONS OF LAW***

A. The Division has 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). There is no dispute with regard to the timeliness of the petition with regard to its challenge of the August 29, 2014 BCMS order and, therefore, this motion is properly treated as one for summary determination (***see Matter of Ryan***, September 12, 2013).

B. A motion for summary determination "shall 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" (20 NYCRR 3000.9[b][1]). Section 3000.9(c) of the Rules 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]). 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, 441 [1968]; ***Museums at Stony Brook v. Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]).

C. At issue in the instant matter is the proper issuance to petitioner of the suspension notice. Tax Law § 171-v is titled "Enforcement of delinquent tax liabilities through the suspension of

drivers' licenses." A specific statutory predicate underlying this sanction is the establishment of the existence of "delinquent tax liabilities," specifically the existence of "past-due tax liabilities," owed by the taxpayer in an aggregate amount equal to or greater than $10,000.00.

D. Tax Law § 171-v(1) defines the term "past-due tax liabilities" as "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." Petitioner maintains that he continues to pursue judicial review of his tax liabilities through his action before the United States Tax Court. He emphasizes that his 2007 New York tax liability cannot be determined without a final determination from the Tax Court. Hence, according to petitioner, the Division's motion must be denied as the prerequisite "past-due tax liabilities" are missing.

Petitioner's point is incorrect for several reasons. First, his liability underlying the suspension notice emanates from notice and demand number L-030981058-6 issued on November 17, 2008 for failure to pay the tax shown on his 2007 return. Tax Law § 173-a, applying to notice and demands issued on or after December 1, 2004, amended the Tax Law to specifically state that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to the issuance of a notice and demand, such as the one issued to petitioner (***see*** Tax Law § 173-a(2). Nevertheless, petitioner challenged the notice and demand by a petition that was dismissed by determination of the Division of Tax Appeals on September 29, 2011. Petitioner failed to file an exception to this determination, and therefore, the liability became fixed and final by operation of law (***see*** Tax Law §§ 173-a; 2010[4]).

Additionally, petitioner's action pending before the United States Tax Court seeks review of a separate federal determination of deficiency, albeit for the same tax year. It is not an action

seeking review of petitioner's liability under the Tax Law. It is well settled that New York, as a separate sovereign, is not bound by a federal Tax Court determination (***see Matter of Ross-Viking Merchandise Corp. v. Tax Appeals Tribunal***, 188 AD2d 698 [1992]). Of course, Tax Law § 659 provides that where a taxpayer's federal taxable income is changed or corrected by the Internal Revenue Service, the taxpayer must report such change or correction to the Division within 90 days after the final determination of such change or correction and either concede the accuracy of the federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. Thus, at the completion of the pending federal tax matter, an adjustment to petitioner's New York state liability may be warranted. At present, though, petitioner's argument with regard to the absence of a fixed and final liability based on the pending federal matter is inapt.

E. Petitioner makes an alternative argument that the Division's motion should be denied as it agreed to stay collection pending resolution of the United States Tax Court matter. Generally, with exceptions not relevant here, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (***see*** CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***see Matter of Alvord & Swift v. Stewart M. Muller Constr. Co.,*** 46 NY2d 276 [1978]). Petitioner has offered no evidence to support his bare assertion concerning such an agreement with the Division. Additionally, even if petitioner's allegations are true, they do not give rise to grounds under Tax Law § 171-v(5) for cancellation of the suspension notice. There is no allegation of the existence of a deferred payment agreement, as described in Tax Law § 171-v(5)(vi). Consequently, petitioner's argument on this point must also fail.

F. Furthermore, petitioner maintains that the enumerated grounds in Tax Law § 171-v for challenging the suspension notice at issue are insufficient and nonexhaustive. In particular, petitioner states that Tax Law § 171-v does not adequately account for active federal income tax controversies to serve as a bar to a driver's license suspension. It is well settled that in cases of statutory interpretation, our prerogative is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205 [1976]). The language of the statute is the clearest evidence of such intent (McKinney's Cons Laws of NY, Book 1, Statutes § 51[d]). Petitioner's position ignores the importance of the plain language of the statute, which expressly omits such grounds, thereby creating an irrefutable inference that what is omitted or not included was intended to be omitted or excluded (***see Matter of Helmsley Enterprises, Inc.***, Tax Appeals Tribunal, June 20, 1991). Additionally, while it is true that petitioner's New York income tax liability derives from his federal adjusted gross income, this position overlooks the distinction between federal and state income tax liabilities and the separate procedures for challenging each (***cf. Matter of Ross-Viking Merchandise Corp.***). In sum, petitioner's argument on this point is better directed towards the Legislature and is without merit here.

G. Finally, petitioner maintains that he will suffer undue hardship if his driver's license is suspended. Therefore, he seeks relief based on equitable principles. The law is clear and dispositive of this case, however, and petitioner has alleged no reason or exceptional circumstances for the invocation of equity to prevent a substantial injustice (***see Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003).

H. The record in this matter demonstrates that there exist fixed and final tax liabilities

owed by petitioner with respect to which he no longer has any right to administrative or judicial review. The Division has established in its motion that petitioner's tax liabilities under the cited notice are fixed and final, and that petitioner failed to raise any of the grounds for relief under Tax Law § 171-v(5). Conversely, petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notice is incorrect (***see*** 20 NYCRR 3000.15[d][5]). As a result, the material facts are undisputed and a determination may be entered in favor of the Division as a matter of law (***see Matter of Klein***, Tax Appeals Tribunal, August 28, 2003).

I. The Division's motion for summary determination is granted; the petition of Benjamin Soleimani is denied and the notice of proposed driver license suspension referral dated October 11, 2013 is sustained.

DATED: Albany, New York
February 18, 2016

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