

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOEL S. HOFFMAN** : ORDER  
 : DTA NO. 826868  
for Review of a Notice of Proposed Driver License :  
Suspension Referral under Tax Law, Article 8, :  
§ 171-v.<sup>1</sup> :

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Petitioner, Joel S. Hoffman, filed a petition for review of a notice of proposed driver license suspension referral under Tax Law, Article 8, § 171-v.<sup>2</sup>

On August 13, 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 3000.9(b). Accompanying the motion was the affirmation of Hannelore F. Smith, and annexed exhibits, and the affidavit of Ronald Catalano. Petitioner, appearing pro se, did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation’s notice of proposed driver license suspension referral

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<sup>1</sup>As petitioner challenged both the proposed suspension notice and the listed notices of determination, the matter has been severed into two petitions. This matter (DTA number 826868) deals solely with the notice of proposed suspension pursuant to Article 8, and petitioner’s challenge to the substance of the underlying sales tax notices will be handled as a separate petition with DTA number 827273.

<sup>2</sup> 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.”

issued to petitioner pursuant to Tax Law § 171-v should be sustained by summary determination.

***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 20, 2014, 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 August 20, 2014 (consolidated statement). The consolidated statement referenced two categories of liabilities. The first category was labeled "Bills subject to collection action" and included the following:

Tax Type	Assessment ID	Tax Period Ended	Balance Due
Sales	L-036786185-6	5/31/10	\$127,096.50
Sales	L-036786182-9	5/31/10	\$35,529.88
Sales	L-033917623-5	11/30/08	\$559,210.25
Sales	L-029755922-6	8/31/05	\$675,706.75

As of August 20, 2014, the date of the issuance of the suspension notice, the unpaid amount on the above assessments, including penalty and interest, was \$1,397,543.38.

3. The consolidated statement also separately listed four notices with assessment numbers L-033789352 through L-033789355, inclusive. These additional four notices were identified as “Estimated amounts due because of returns not yet filed,” and totaled \$504,733.70 as of August 20, 2014. These notices were not included by the Division for purposes of calculating the \$10,000.00 liability threshold.

4. Petitioner requested a conciliation conference before BCMS and the matter was assigned CMS number 263228. By order of January 16, 2015, BCMS issued its order in matter number 263228 sustaining the suspension notice.

5. On March 30, 2015, petitioner filed a petition with the Division of Tax Appeals and attached the consolidated statement listing all eight assessments. On the cover of the petition, petitioner stated that he was challenging “CMS No. 263228,” the suspension notice, and all eight of the sales tax notices referenced in the consolidated statement. The petition also stated that the amount of tax contested is “\$1,934,252.39.” As grounds for the challenge, petitioner only wrote “[t]he audits were performed incorrectly.”

6. 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.

7. 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.

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. 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 numbers L-036786185-6, L-036786182-9, L-033917623-5, and L-029755922-6, he states that the cumulative balance of tax, penalty, and interest owed by petitioner on August 20, 2014 was greater than \$10,000.00, and that petitioner met all other compliance checks referenced in Finding of Fact 7 for proper issuance of the suspension notice.

10. The Division did not submit any proof of mailing or other method of issuance of the sales tax notices referenced in the petition and underlying the suspension notice.

#### ***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 as to the timeliness of the petition with regard to its challenge of the January 16, 2015 BCMS order and, therefore, this motion is properly treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, 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]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [2d Dept 1960]). A review of the pleadings and the record as a whole demonstrates that there exist material and triable issues of fact, and the Division is not entitled to summary determination in its favor.

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” (emphasis added). The stated aim of section 171-v is “to improve tax collection through the suspension of drivers’ licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars” (Tax Law § 171-v[1]). 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 (emphasis added).

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*” (emphasis added). The record in this matter, as developed at this point in time, does not allow for the inarguable conclusion 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 specifies four assessments as comprising the past-due tax liabilities giving rise to the basis for license suspension (*see* Finding of Fact 2) and petitioner has directly challenged those assessments in his petition. However, the Division has offered insufficient evidence, and absolutely no mail proof, in the face of petitioner’s challenge, to establish either 1) the proper issuance of any of these four assessments and the exhaustion or prohibition of petitioner’s administrative or judicial review, or 2) that the assessments were of a type with respect to which there is no right to a prepayment hearing, or where the right to such a hearing is specifically modified or denied.

E. It is true that petitioner did not specifically raise any of the six enumerated bases for relief from an apparently otherwise facially valid proposed license suspension (*see* Finding of

Fact 5; Tax Law § 171-v[5][I]-[vi]). He did, however, clearly dispute the validity of the four specified assessments underlying the proposed suspension, issues now being resolved in a separate matter before the Division of Tax Appeals (*see* Footnote 1). Thus, there remains a question as to whether petitioner has “past-due tax liabilities,” as defined, that are, in the aggregate, equal to or greater than \$10,000.00, a foundational requirement for a valid referral and, ultimately, license suspension. Accordingly, and at this stage of the proceedings, the foundational predicate supporting the sanction of license suspension, i.e., the existence of “past-due tax liabilities,” as defined in Tax Law § 171-v(1), has not been met sufficiently to warrant summary determination.

F. The Division of Taxation’s motion is denied, without prejudice to the filing of any future motion, and the petition of Joel S. Hoffman shall proceed in due course.

DATED: Albany, New York  
November 25, 2015

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