

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANTHONY TAYLOR : ORDER
AND DAIL MOSES-TAYLOR : DTA NO. 827110
: :
for Review of Notices of Proposed Driver License :
Suspension Referral under Article 8, § 171-v of the Tax :
Law. :
:

Petitioners, Anthony Taylor and Dail Moses-Taylor, filed a petition for review of notices of driver license suspension referral under Article 8, § 171-v of the Tax Law.¹

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), brought a motion filed March 3, 2016, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and sections 3000.5, 3000.9(a)(1) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Linda A. Jordan, Esq., dated March 2, 2016, and annexed exhibits. Petitioners, appearing pro se, had until April 4, 2016 to respond to the Division’s motion but did not do so, and the 90-day period for issuance of this order began on April 4, 2016 (20 NYCRR 3000.5[d]).² After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge,

¹ The titles of the subject notices use the phrase “driver license,” while the statute at issue, Tax Law § 171-v, uses the phrase “driver’s license.”

² Since the 30-day period in which to respond expired on Saturday, April 2, 2016, petitioners’ response was due on Monday, April 4, 2016 (*see* General Construction Law §§ 20, 25-a).

renders the following order.

ISSUE

Whether the Division of Taxation's motion to dismiss or, in the alternative, motion for summary determination should be granted.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Anthony Taylor and Dail Moses-Taylor, notices of proposed driver license suspension referral (suspension notices or 60-day notices), dated October 4, 2013 and October 25, 2013, respectively, which notified petitioners that new legislation allows New York State to suspend drivers' licenses of persons who have delinquent unpaid tax debts. Attached to each of the suspension notices was a Consolidated Statement of Tax Liabilities (form DTF-967-E) listing the assessment subject to collection.

The Consolidated Statement of Tax Liabilities, dated October 4, 2013, attached to petitioner Anthony Taylor's suspension notice, advised that income tax assessment number L-038212804-2, for the tax period ended December 31, 2007, in the amount \$7,474.00, plus interest in the amount of \$3,675.59, and penalty in the amount of \$485.81, for a current balance due of \$11,635.40, was subject to collection action. The Consolidated Statement of Tax Liabilities, dated October 25, 2013, attached to petitioner Dail Moses-Taylor's suspension notice, advised that income tax assessment number L-038212804-2, for the tax period ended December 31, 2007, in the amount \$7,474.00, plus interest in the amount of \$3,728.45, and penalty in the amount of \$523.18, for a current balance due of \$11,725.63, was subject to collection action.

2. Each of the suspension notices indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles

(DMV) and the recipient's driver's license would be suspended. The front page of each suspension notice advised that unless one of the exemptions on the back page of the suspension notice applied to him or her, the recipient was required to pay the tax due, or set up a payment plan, in order to avoid suspension of his or her license.

The back page of each suspension notice is titled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that "[i]f any of the following apply," he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim. The first two headings under the title, "How to respond to this notice" are "Child support exemption" and "Commercial driver's license exemption." The third heading, "Other grounds," states that the recipient's driver's license will not be suspended if any of the following apply:

"You are not the taxpayer named in the notice. The tax debts have been paid. The Tax Department [Division] is already garnishing your wages to pay these debts. Your license was previously selected for suspension for unpaid tax debts **and**: you set up a payment plan with the Tax Department [Division], **and** the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period."

Also under "Other grounds" is the statement that the recipient may contact the Division to establish that he or she is eligible for innocent spouse relief under Tax Law § 654, or that enforcement of the underlying tax debts has been stayed by the filing of a bankruptcy petition.

Under the heading, "Protests and legal actions," it is explained that if the recipient protests with the Tax Department (Division), or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, "If you do not respond within 60 days," the recipient is informed that the Division will provide DMV with the information necessary to suspend the recipient's driver's license, unless the recipient does one of

the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or her license by either: filing a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), or filing a petition with the Division of Tax Appeals.

3. On July 13, 2010, the Internal Revenue Service (IRS) issued to petitioners a Notice of Deficiency for the tax year ended December 31, 2007, based upon audit adjustments to income and itemized deductions for such tax year (federal notice of deficiency). The Notice of Deficiency advised that “[i]f you want to contest this determination in court before making any payment, you have 90 days from the date of this letter . . . to file a petition with the United States Tax Court for a redetermination of the deficiency.” It further advised that the “Last Day to File a Petition With the United States Tax Court” was “October 11, 2010.”

4. On an unknown date, the IRS notified the Division of the federal changes to petitioners' 2007 federal income tax return. Based upon their failure to report audit changes made by the IRS to their 2007 federal income tax return within 90 days of such final federal determination, the Division issued to Anthony Taylor and Dail Moses-Taylor, a Notice of Additional Tax Due (Notice No. L-038212804-2), dated June 26, 2012, seeking payment of personal income tax for the tax year 2007, pursuant to Tax Law §§ 659 and 683(c).

5. Petitioners filed a petition with the Division of Tax Appeals³ on July 2, 2015 protesting, three notices of additional tax due, including the Notice of Additional Tax Due, Notice No. L-038212804-2, for tax year 2007 (Petition DTA No. 827103).

³ The Division of Tax Appeals assigned DTA No. 827103 to the matter of Anthony Taylor and Dail Moses-Taylor for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2007 through 2009.

6. By determination of December 10, 2015, the undersigned dismissed Petition DTA No. 827103 based upon the provisions of Tax Law § 173-a (*see Matter of Taylor*, Division of Tax Appeals, December 10, 2015). There is no evidence or assertion that this determination was the subject of an exception to the Tax Appeals Tribunal.

7. On July 2, 2015, petitioners filed a petition with the Division of Tax Appeals challenging the suspension notices at issue here. In their petition, petitioners assert that the Division issued Notice No. L-038212804-2 to them for tax year 2007, based upon erroneous information received from the IRS. They further assert that the Division has garnished their wages and levied their bank accounts to collect the outstanding liabilities due under Notice No. L-038212804-2. Petitioners maintain that the federal changes made for tax year 2007 are incorrect, and were challenged through the IRS's Appeals Office, and the IRS's Office of Taxpayer Advocate in April 2011. They further maintain that the federal changes for the year 2007 are not fixed and final because they have filed a petition with the United States Tax Court (U.S. Tax Court) regarding the federal income tax deficiency for such year.

8. The Division filed its answer to the petition on September 16, 2015. Paragraph 1 of that answer states that the Division denies "all of the allegations, statements and/or positions contained in section (6) of the petition and any and all attachments to section (6) of the petition. . . ."

9. The Division also submitted with its motion an affidavit, dated March 2, 2016, made by Ronald Catalano, who is employed as a Tax Compliance Manager 2 in the Division's Civil Enforcement Division (CED). Mr. Catalano's affidavit details the steps undertaken by the Division in carrying out the license suspension program, as authorized by Tax Law Article 8, § 171-v.

10. Mr. Catalano's affidavit addresses the foregoing steps as four sequential actions, 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 of proposed driver license suspension referral 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 assessment(s) 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 assessment(s) 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; or
- 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) mailing address city, (11) mailing address state, (12) mailing address zip code, (13) license class, and (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 10-a. If the taxpayer remains within the criteria for suspension, then a 60 day notice of proposed driver license suspension referral will be issued to the taxpayer via regular United States mail.

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.⁴ Data is exchanged daily between the Division and DMV. If an issue of data 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

⁴ 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.

“on-hold” status can result from events such as those set forth above in Finding of Fact 10-a (e.g., the filing of a protest, a bankruptcy filing, the creation and approval of an installment payment agreement and the like). 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 re-suspension until resolution of the “on-hold” status (the 60 day notice of proposed driver license suspension referral would remain in the Division’s system). Although not specifically addressed in Mr. Catalano’s affidavit, a change to “closed” status would presumably result from events such as payment of the underlying liabilities, establishing that such liabilities were invalid ab initio, or death of the taxpayer. If the subsequent event resulted in “closed” status, the 60 day notice would be canceled.

11. Mr. Catalano avers that based upon his review of the Division’s records and his knowledge of its policies and procedures, issuance of suspension notices to petitioners was proper. Specifically, Mr. Catalano states that, based upon Notice No. L-038212804-2, the current balance of tax, penalty and interest owed by petitioner Anthony Taylor on October 4, 2013 was greater than \$10,000.00, and Mr. Taylor met all other compliance checks referenced in Finding of Fact 10 for proper issuance of the suspension notice. Likewise, with reference to Ms. Moses-Taylor, Mr. Catalano states that, based upon Notice No. L-038212804-2, the current balance of tax, penalty and interest owed as of October 25, 2013 was greater than \$10,000.00, and that she met all other compliance checks.

12. The Division also attached to its motion the affirmation of its attorney, Linda A. Jordan. In her affirmation, Ms. Jordan states that each of petitioners’ consolidated statements of tax liabilities include outstanding fixed and final tax liabilities attributable to a Notice of Additional Tax Due (Notice No. L-038212804-2). Ms. Jordan further states that petitioners

failed to raise any of the enumerated grounds for cancellation of their suspension notices found in Tax Law § 171-v. Since petitioners have raised no permissible defenses set forth in Tax Law § 171-v(5)(i) - (vi), Ms. Jordan argues that petitioners have no right to administrative or judicial review of the proposed suspension of their licenses, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition for lack of jurisdiction or summary determination in its favor.

13. Attachments to the petition include, among other documents, copies of two warrants issued to petitioners by the Division's Civil Enforcement Division, and a copy of a U.S. Tax Court "NOTIFICATION OF RECEIPT OF PETITION."

14. Warrant (Warrant ID: E-038212804-W001-3) in the total amount of \$11,507.59, referencing Assessment ID number L-038212804-2 (tax period ending December 31, 2007) that asserted tax in the amount of \$7,474.00, penalty of \$448.44, and interest of \$3,585.15, was docketed in the Dutchess County Clerk's Office on August 28, 2013. Warrant (Warrant ID: E-038212804-W005-1) in the total amount of \$46,681.08, referencing personal income tax assessments ID numbers L-042121576-6 (tax period ending December 31, 2009); L-042121575-7 (tax period ending December 31, 2008); and L-038212804-2 (tax period ending December 31, 2007), was docketed on April 16, 2015.⁵

15. The copy of a U.S. Tax Court "NOTIFICATION OF RECEIPT OF PETITION" indicates that the Court received and filed the petition of Anthony Taylor & Dail Moses Taylor on July 13, 2015, and the Court served it on the IRS (respondent) on July 16, 2015. Only the case name, "Anthony Taylor & Dail Moses Taylor v. COMMISSIONER OF INTERNAL

⁵ The Warrant docketed on April 16, 2015 listed unpaid tax in the amount of \$3,213.25, penalty of \$1,008.76, and interest of \$4,903.87 for total amount due of \$9,125.88 for Assessment ID number L-038212804-2.

REVENUE,” and the assigned docket number appear on this notification. The record does not contain any further information regarding the petition filed with the U.S. Tax Court.

CONCLUSIONS OF LAW

A. 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 the DMV for action (Tax Law § 171-v[3]). Here, the Division determined that the liabilities represented by Notice Number L-038212804-2 referenced in petitioners’ respective consolidated statements of tax liabilities met the threshold requirement for suspension of petitioners’ driver’s licenses pursuant to Tax Law § 171-v.

B. A taxpayer’s right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited to a request for a BCMS conciliation conference or a petition with the Division of Tax Appeals, and must be on one of 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]).

C. The Division’s motion to dismiss the petition under section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) may be granted if the petition does not state a cause for relief (20 NYCRR 3000.9[a][vi]). Motions filed pursuant to 20 NYCRR 3000.9, unless otherwise in conflict with the Rules, are “subject to the same provisions as motions filed pursuant to section 3211 of the [Civil Practice Law and Rules] CPLR . . .” (20 NYCRR 3000.9[c]). The regulation at 20 NYCRR 3000.9(a)(1)(vi) is comparable to CPLR 3211(a)(7), which authorizes a party to move to dismiss a cause of action on the ground that “the pleading fails to state a cause of action . . .” (*Matter of Medical Capital Corp.*, Tax Appeals Tribunal, July 25, 2013.)

In *High Tides, LLC v. DeMichele* (88 AD3d 954 [2011]), the Appellate Division reiterated the standard for granting a motion to dismiss under CPLR 3211(a)(7). In particular, the court noted that:

“the pleading is to be afforded a liberal construction (*see* CPLR 3026; *EBCI, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]), and the court must accord the plaintiff ‘the benefit of every possible favorable inference,’ accept the facts alleged in the complaint as true, and ‘determine only whether the facts as alleged fit within any cognizable legal theory’ (*Leon v. Martinez*, 84 NY2d at 87-88). Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (*see Kuzmin v. Nevsky*, 74 AD3d 896, 898 [2010]; *Hartman v. Morganstern*, 28 AD3d 423, 424 [2006])” (*High Tides, LLC* at 956-957).

It is determined that petitioners have established a valid challenge to the Division’s issuance of the suspension notices as dictated by Tax Law § 171-v(5)(iii).

D. Petitioners’ allegation in their petition that their wages are being garnished by the Division for payment of past-due liabilities due under Notice Number L-038212804-2 fits squarely within the statutorily provided ground for relief set out in Tax Law § 171-v(5)(iii),

authorizing a cause of action to challenge the notices of proposed driver license suspension referrals where “the taxpayer’s wages are being garnished by the department for the payment of the past-due tax liabilities at issue. . . .”

In its answer, the Division did not specifically address petitioners’ assertion in the petition regarding garnishment of their wages for payment of the past-due liabilities due under Notice No. L-038212804-2, other than to generally deny it, thereby raising a material issue of fact.

Therefore, the motion to dismiss must fail.

E. With respect to the Division’s motion for summary determination, it is well-established that summary determination is the procedural equivalent of a trial and it should be denied if there is any doubt as to the existence of a triable issue or where a material issue of fact is “arguable” (*Glick & Doleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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, 382 [1960]). Here, petitioners have alleged that the Division is garnishing their wages for payment of the past-due liabilities due for tax year 2007 (Notice No. L-038212804-2), and the Division merely denied it in general terms, raising a material issue of fact, which requires a hearing (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]).

F. The Division of Taxation's motion to dismiss or for summary determination is denied, and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
June 23, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE