

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JANNA DOHENY : ORDER
for Review of a Notice of Proposed Driver License : DTA NO. 826365
Suspension Referral Under Tax Law, Article 8, § 171-v. :
:

Petitioner, Janna Doheny, filed a petition for review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v, issued on August 9, 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion on November 6, 2014, 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 affidavit of Michele W. Milavec, Esq., dated November 6, 2014, and annexed exhibits. Petitioner, appearing by Richard Guttman, Esq., filed a response to the Division of Taxation's motion on January 8, 2015, the date from which the 90-day period for the issuance of this order 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 order.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to review the Division of Taxation's denial of petitioner's offer in compromise.

II. Whether the Division of Taxation's Notice of Proposed Driver License Suspension Referral issued to petitioner should be sustained.

FINDINGS OF FACT

1. On June 25, 2014, petitioner, Janna Doheny, filed a petition with the Division of Tax Appeals seeking to challenge the denial of an offer in compromise and a Notice of Proposed Driver License Suspension Referral (60-Day Notice). The petition alleged that the Division of Taxation (Division) improperly denied an offer in compromise petitioner had submitted with regard to a real estate transfer tax liability, contending that the Division's denial thereof was arbitrary and capricious. Petitioner further claims that she never received the 60-Day Notice, and only found out about the impending suspension of her driver's license when she received an order of suspension or revocation of her driver's license (suspension order) from the New York State Department of Motor Vehicles (DMV) on June 14, 2014.

2. Attached to the petition is a copy of the December 19, 2013 offer in compromise filed by petitioner and a copy of the May 1, 2014 letter from the Division denying the same, as well as a copy of a consolidated statement of tax liabilities dated April 29, 2014 showing a real estate transfer tax liability of \$18,037.77 owed by petitioner. Petitioner has not disputed this liability, but claims it arose as a result of attorney malpractice stemming from a purchase of property in 2006. The DMV suspension order, which was also attached to the petition, was sent to petitioner at a Long Beach, New York, address, which is the same address used by petitioner on her petition filed herein and her offer in compromise.

3. The Division filed its answer to the petition on September 10, 2014, and in turn brought the subject motion on November 6, 2014. The Division submitted with its motion an affidavit, sworn to November 6, 2014, made by Matthew McNamara, who is employed as a 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. Mr. McNamara's affidavit addresses four sequential actions or steps, 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 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
- 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) city
- (11) state
- (12) zip code
- (13) license class
- (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 4-a. If the taxpayer remains within the criteria for suspension, then a 60-Day Notice will be issued to the taxpayer. In describing the process of issuance of the 60-Day Notice, Mr. McNamara states:

“The date of the correspondence trigger will be stored on the database as the day that the 60-Day Notice was sent, but an additional 10 days will be added to the date displayed on the page to allow for processing and mailing. Additionally, the status will be set to “Approved” and the clock will be set for seventy-five (75) days from the approval date.

The taxpayer(s) is sent the 60 day notice (Form DTF-454) via regular U.S. mail to the taxpayer’s mailing address.”

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.¹ 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.² 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 “on-hold” status can result from events such as those set forth above (e.g., the filing of a protest, a bankruptcy filing, the creation and approval of an installment payment agreement and the like).

¹ 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.

² The 15-day letter is presumably the Order of Suspension or Revocation referred to in Finding of Fact 1.

Similar to the process described in footnote 1, 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 resuspension until resolution of the “on-hold” status (the 60-Day Notice would remain in the Division’s system). If the subsequent event resulted in “closed” status, the 60-Day Notice would be canceled.

5. A copy of the 60-Day Notice at issue in this matter, a Consolidated Statement of Tax Liabilities and a Payment Document (Form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. McNamara’s affidavit. Each of the aforementioned documents are addressed to petitioner at a Brooklyn, New York, address and not the Long Beach, New York, address used by the DMV.³ Mr. McNamara avers, based upon his knowledge of Division policies and procedures regarding driver’s license suspension referrals, and upon his review of the Division’s records, that the Division issued the 60-Day Notice to petitioner on August 9, 2013. Mr. McNamara states that such 60-Day Notice comports with statutory requirements, that petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v(5), and that therefore the 60-Day Notice has not been and should not be canceled. Mr. McNamara notes in his affidavit that as of the date of his affidavit, petitioner’s outstanding tax liability is less than \$10,000.00. There is no indication of the date on which any payment against petitioner’s outstanding tax liability was made.

6. Petitioner’s response to the Division’s motion consists of: (i) the affirmation of Richard Guttman sworn to January 8, 2015, (ii) the affidavit of petitioner sworn to on January 5, 2015;

³ It should be noted that petitioner’s offer in compromise lists petitioner as owning realty in Brooklyn, New York, with the same address as that used by the Division to send the 60-Day Notice.

and (iii) a memorandum of law in opposition to the Division's motion. Petitioner specifically denies receiving the 60-Day Notice, and states that the Division utilized an incorrect address. She also contends that the Division improperly denied her offer in compromise, and claims the Division of Tax Appeals has jurisdiction to review such action. Finally, petitioner contends that since her outstanding tax liability is less than \$10,000.00, her driver's license cannot be suspended.

CONCLUSIONS OF LAW

A. The petition filed in this matter challenges the denial of petitioner's offer in compromise and also challenges the Notice of Driver License Suspension. The Division of Taxation has made a motion to dismiss, or alternatively, a motion for summary determination seeking dismissal of the petition or judgement as a matter of law. First, the Division avers that the Division of Tax Appeals lacks jurisdiction to review the denial of an offer in compromise. With respect to the petitioner's challenge to the driver license suspension, the Division alleges that petitioner's pleadings fail to state a cause for relief since she has not raised any of the exceptions set forth in Tax Law § 171-v, which are the only grounds for challenging the proposed suspension of her driver's license.

B. First addressing petitioner's claim that the Division arbitrarily denied her offer in compromise, the Division correctly notes that the Division of Tax Appeals does not have subject matter jurisdiction to hear such claim. Notwithstanding petitioner's claim that the Division's denial of the offer in compromise was based on arbitrary grounds, that claim cannot be addressed in this forum. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; ***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Department of Taxation and Fin. v. Tax Appeals Tribunal***, 151 Misc

2d 326 [1991]). Its power to adjudicate disputes is exclusively statutory (*id*). Tax Law § 2008 provides, in relevant part, that a taxpayer may commence a proceeding in the Division of Tax Appeals to protest a notice “which gives a person the right to a hearing in the division of tax appeals. . . .” There is no statutory right to a hearing in the Division of Tax Appeals provided to a taxpayer who seeks to challenge the rejection of an offer in compromise (*see Matter of Williams*, Tax Appeals Tribunal, September 1, 1994). Accordingly, that part of the motion seeking dismissal of petitioner’s challenge to the Division’s denial of her offer in compromise is granted.

C. Treated next is that part of the Division’s motion addressing the Notice of Proposed Driver License Suspension Referral. Since the Division has not contested the timeliness of the petition, the Division of Tax Appeals has jurisdiction over the petition (Tax Law § 171-v[3]). Accordingly, a motion for summary determination under 20 NYCRR 3000.9(b) is the proper vehicle to consider the merits of petitioner’s protest thereof and the Division’s arguments in support of the motion. The remainder of this order shall address the instant motion as such.

D. 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]).

E. Tax Law § 171-v provides, in relevant part, as follows:

(1) The commissioner shall enter into a written agreement with the commissioner of motor vehicles, which shall set forth the procedures for the two departments to cooperate in a program to improve tax collection through the suspension of driver’s licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars. For the purposes of this section, the term “tax liabilities” shall mean any tax, surcharge, or fee administered by the commissioner, or any penalty or interest due on these amounts owed by an individual with a New York driver’s license, the term “driver’s license” means any license issued by the department of motor vehicles, except for a commercial driver’s license as defined in section five hundred one-a of the vehicle and traffic law, and the term “past due tax liabilities” means 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.

* * *

(3) The department shall provide notice to the taxpayer of his or her inclusion in the license suspension program no later than sixty days prior to the date the department intends to inform the commissioner of motor vehicles of the taxpayer’s inclusion. . . . Notice shall be provided by first class mail to the taxpayer’s last known address as such address appears in the electronic systems or records of the department. Such notice shall include:

(a) a clear statement of the past-due tax liabilities along with a statement that the department shall provide to the department of motor vehicles the taxpayer’s name, social security number and any other identifying information necessary for the purpose of suspending his or her driver’s license pursuant to this section and subdivision four-f of section five hundred ten of the vehicle and traffic law sixty days after the mailing or sending of such notice to the taxpayer;

(b) a statement that the taxpayer may avoid suspension of his or her license by fully satisfying the past-due tax liabilities or by making payment arrangements satisfactory to the commissioner, and information as to how the taxpayer can pay the past-due tax liabilities to the department, enter into a payment arrangement or request additional information;

(c) a statement that the taxpayer's right to protest the notice is limited to raising issues set forth in subdivision five of this section;

(d) a statement that the suspension of the taxpayer's driver's license shall continue until the past-due liabilities are fully paid or the taxpayer makes payment arrangements satisfactory to the commissioner; and

(e) any other information that the commissioner deems necessary.

* * *

(5) Notwithstanding any other provision of law, and except as specifically provided herein, the taxpayer shall have no right to commence a court action or proceeding or to any other legal recourse against the department or the department of motor vehicles regarding a notice issued by the department pursuant to this section and the referral by the department of any taxpayer with past-due tax liabilities to the department of motor vehicles pursuant to this section for the purpose of suspending the taxpayer's driver's license. A taxpayer may only challenge such suspension or referral on the grounds that (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 purposes of subdivision three of this section.

F. Pursuant to Tax Law § 171-v(5), petitioner may only challenge the suspension of her license on specific grounds. Petitioner has not raised any challenge based on any of such grounds enumerated in the statute. However, petitioner correctly notes that as a condition precedent to making a valid license suspension referral, the Tax Law specifically requires that: (i) petitioner's outstanding past due tax liabilities must exceed \$10,000.00; and (ii) the Commissioner must

provide at least 60 days notice of the proposed suspension referral prior to making such referral to the DMV, with such notice given to petitioner at “[petitioner’s] last known address as such address appears in the electronic systems or records of the department” (Tax Law § 171-v [c][3]).

The record herein does not indicate whether the 60-Day Notice was sent to petitioner’s last known address as such address appears in the electronic systems or records of the department.

The Division’s affiant speaks solely of petitioner’s mailing address. This address, however, differs from that used by the DMV and from that used by petitioner in her offer in compromise and in the petition filed herein. In fact, petitioner specifically denies receipt of the 60-Day Notice. The record does not indicate whether mailing address is synonymous with last known address. While it may be argued that exact compliance with the 60-Day Notice requirement is not necessary as petitioner had actual notice of the license suspension referral and is protesting the same herein, the record does not indicate if petitioner’s outstanding liability was greater than \$10,000.00 when she received such actual notice. The record here reveals that while petitioner’s outstanding liability was over \$10,000.00 on the date the 60-Day Notice was issued and on the date when her offer in compromise was denied, it also reveals that petitioner’s outstanding liability was less than \$10,000.00 as of the date of the Division’s motion. The record does not indicate when payments were made. Thus, it is unclear as to whether petitioner owed in excess of \$10,000.00 when she became aware of the proposed suspension of her license. Stated simply, there are unresolved issues of fact that preclude the granting of a determination in the Division’s favor.

G. The Division's motion seeking dismissal of petitioner's petition is granted insofar as it seeks review of the Division's denial of her offer in compromise in accordance with Conclusion of Law B but, in all other respects, is denied, and a hearing on the merits will be scheduled in due course.

DATED: Albany, New York
April 2, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE