STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LI HUA GU	:	ORDER DTA NO. 827578
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law, Article 8, § 171-v.	:	
	:	

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

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), brought a motion, on May 5, 2017, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5 and 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Karry L. Culihan, Esq., dated May 5, 2017, and annexed exhibits. Petitioner, appearing by the Law Offices of Stephen K. Seung (Stephen K. Seung, Esq., of counsel), filed a response to the Division of Taxation's motion by its due date of June 5, 2017, which date began the 90-day period for the issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following order.

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 Division of Taxation (Division) issued to petitioner, Li Hua Gu, at her Elmhurst, New York, address, a notice of proposed driver license suspension referral (the suspension

notice), dated August 19, 2015, which notified petitioner that new legislation allows New York State to suspend the drivers' licenses of persons who have delinquent unpaid tax debts. The notice informed petitioner of how to avoid such suspension, how to respond to the notice and what would ensue if she failed to take action. Attached to the notice was a consolidated statement of tax liabilities listing petitioner's assessments subject to collection action, as follows:

Assessment No.	Tax Period Ended	Tax Amount Assessed	Interest Assessed	Penalty Assessed	Payments and Credits	Current Balance Due
L-026495591-6	12/31/98	$19,554.74	$41,332.47	$0.00	$4,383.23	$66,503.98
L-026495587-9	12/31/00	$36,571.25	$85,971.72	0.00	0.00	$102,542.97
L-026495582-5	12/31/99	$6,501.03	$13,237.30	0.00	0.00	$19,738.33
Total						$178,785.28

Specifically, the suspension notice 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 petitioner's driver's license would be suspended. The front page of the suspension notice informed petitioner that unless one of the exemptions on the back page of the suspension notice applied to her, she was required to pay the tax due, or set up a payment plan, in order to avoid suspension of her license.

2. The back page of the suspension notice is entitled, "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 [1] 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, and
> - the Tax Department 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 taxpayer 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 Division, or brings a legal action, he or she may only do so based upon the grounds listed above, and that contacting the Division to ask questions or to resolve any issues does not serve to extend the time to protest.

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:

> "resolve your tax debts or set up a payment plan,
> notify the Tax Department of your eligibility for an exemption, or
> protest the proposed suspension of your license by:
> - filing a *Request for Conciliation Conference* (Form CMS-1-MN, available on our Web site), with the Tax Department; or
> - filing a petition (Form TA-10) with the Division of Tax Appeals, available at *www.dta.ny.gov.*"

3. In protest of the suspension notice, petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). The conferee sustained the statutory notice, i.e., the suspension notice, by the issuance of a Conciliation Order dated January 29, 2016.

4. On April 8, 2016, petitioner filed a petition with the Division of Tax Appeals protesting the suspension of her driver's license, and stating that the tax liabilities had been discharged by a Bankruptcy Court order dated February 11, 2011.

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[1] The suspension notice reference to the "Tax Department" is the same body as the Division of Taxation.

5. The Division filed its answer to the petition dated May 25, 2016. The Division then filed a notice of motion and supporting documentation on May 5, 2017, seeking an order dismissing the petition, or, in the alternative, granting summary determination pursuant to Tax Law § 2006 (6), 20 NYCRR 3000.5 and 3000.9 (a) and (b).

The Division submitted, with its motion, the sworn affidavit of Brandie M. Spohn, a Business Systems Analyst 4 in the Division's Civil Enforcement Division (CED). Ms. Spohn began her employment with the Division in 2004, and has held various positions within the Division, and her current position for approximately 2 years. Ms. Spohn's duties include overseeing the operation of the operations of the CED's Operations Analysis and Support Bureau. Her duties also include working with the Office of Information Technology Services to ensure that the CED's systems support the operational needs of the CED.

6. Ms. Spohn's affidavit details the four sequential steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law § 171-v. They are 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 criteria:

a. the taxpayer is deceased;
b. the taxpayer is in bankruptcy;
c. the age of any assessments included in determining the cumulative amount of liability must be less than 20 years from the Notice and Demand issue date;
d. all assessments involved in a formal or informal protest, which would make the balance of fixed and final liabilities fall below the $10,000.00 threshold for suspension;
e. the taxpayer is on an active approved payment plan; or
f. the taxpayer's wages are being garnished for the payment of past-due tax liabilities, past-due child support, or combined child and spousal support arrears.

(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. The DMV data match systematically performs a match on the candidates and returns the following information to the Division:

(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
(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 6(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 for the issuance of the 60-day notice, Ms. Spohn 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 first class U.S. mail with certificate of mailing 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.

If the taxpayer fails a compliance 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" all compliance checks, the suspension by DMV will proceed.

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 "on-hold" status can result from events such as those set forth in Finding of Fact 6(a). Similar to the process previously described, where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by DMV, the matter would not be referred back to DMV by the Division until resolution of the "on-hold" status, and 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.

7. A copy of the 60-Day Notice at issue in this matter, i.e., the suspension notice, the consolidated statement of tax liabilities described in Finding of Fact 1, and a payment document (Form DTF-968.4) by which petitioner could remit payment against the liabilities in question, were included with Ms. Spohn's affidavit. Ms. Spohn avers, based upon her knowledge of

Division policies and procedures regarding driver's license suspension referrals, and upon her review of the Division's records, that on August 19, 2015, the Division issued to petitioner a suspension notice. Ms. Spohn states that such suspension notice comports with statutory requirements, that as of the date of the affidavit the suspension notice has not been cancelled, that petitioner has failed to allege or establish any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v(5), and that therefore, the suspension should not be canceled.

8. Petitioner filed a petition in bankruptcy for Chapter 7 relief on August 27, 2010, in the United States Bankruptcy Court, Eastern District of New York. In her bankruptcy petition, the Division was listed as a creditor holding unsecured priority claims in the nature of taxes due for 1998, 1999 and 2000.

9. The order of final decree issued by the Bankruptcy Court, dated February 11, 2011, ordered that petitioner be granted a discharge under section 727 of Title 11 the United States Code (bankruptcy code). The explanatory provisions on page 2 of the decree indicate that most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. However, it also provides that some common types of debts, which are not discharged in a chapter 7 bankruptcy case, are debts for most taxes. The decree is not more specific as to which taxes may not be discharged, or which were specifically discharged.

10. According to petitioner, the Division did not object to the discharge, and there is no evidence in the record otherwise.

11. On May 10, 2016, petitioner submitted an "Offer In Compromise For Liabilities Not Fixed and Final and Subject to Administrative Review" (OIC) to the Division. The record of liabilities listed on the OIC included Assessments L-026495591-6, L-026495582-5 and L-026495587-9, for tax periods December 31, 1998, December 31, 1999 and December 31, 2000, respectively, in the same amounts as those listed on the consolidated statement of liabilities attached to the suspension. Additionally, attached to the OIC was a copy of a consolidated

statement of tax liabilities, dated August 19, 2015, listing the same 1998, 1999 and 2000 income tax liabilities previously described.

12. Petitioner did not initially file federal or New York State income tax returns for tax years 1998, 1999 and 2000, since she claimed to have had insufficient income during those years to require her to file returns.[2]

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner's affirmation in opposition to dismissal or for summary determination argues that a defense to suspension exists if the past due liabilities were satisfied. Petitioner asserts that she has been discharged from her tax obligations by a discharge in bankruptcy, which is the equivalent of the satisfaction of the tax liabilities. Thus, petitioner maintains her license should not be subject to suspension.

14. The Division asserts that petitioner has not raised any of the grounds listed in Tax Law § 171-v(5), which are the only grounds for challenging the proposed suspension of petitioner's driver's license, and that petitioner has not established that any grounds exist for a challenge to the proposed suspension. The Division lastly argues that there is no material issue of fact and the facts as presented mandate a determination in favor of the Division.

CONCLUSIONS OF LAW

A. The Division has made a motion to dismiss, or alternatively, a motion for summary determination seeking dismissal of the petition or judgment as a matter of law. Since there is no issue regarding 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 and the Division's arguments in support of the motion.

As the Tax Appeals Tribunal has noted in ***Matter of United Water New York*** (Tax Appeals Tribunal, April 1, 2004):

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[2] Petitioner later filed New York State returns for these years in 2015.

> "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]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see***, ***Gerard v. Inglese***, 11 AD2d 381. . . [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (***Daliendo v. Johnson***, 147 AD2d 312. . . [1989])."

B. Tax Law § 171-v(3) requires the Division to provide a taxpayer with 60 days notice prior to the Division informing DMV of the taxpayer's inclusion in the driver's license suspension program, and such notice must be sent by first class mail to the taxpayer's last known address. The notice must include a clear statement of the taxpayer's past-due liabilities, and a statement of identifying taxpayer information that the Division will provide to the DMV. This subdivision also provides that a suspension notice will not be issued to a taxpayer whose wages are already being garnished by the Division for past-due tax liabilities, child support, or combined child and spousal support. The process as described herein adequately ensures that notices are issued no later than 60 days prior to a taxpayer being included in the Division's driver's license suspension program (***see also Matter of Muniz,*** Tax Appeals Tribunal, February 26, 2016).[3]

Tax Law § 171-v also requires that the notice include a statement that the taxpayer can avoid license suspension by satisfying the debt or entering into a payment agreement acceptable to the Division and information as to how the taxpayer can accomplish this; a statement that a taxpayer can only protest the 60-day notice based upon the issues set forth in subdivision 5; and a statement that the suspension will remain in effect until the past-due liabilities are paid or a the taxpayer makes payment arrangements satisfactory to the Division.

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[3] The Tax Appeals Tribunal identified the following issue with respect to the suspension process in ***Muniz***: "There may be a slight inconsistency between the statute and the Division's process in that it appears there is no provision for ensuring that a taxpayer whose wages are already being garnished by the Division for past-due tax liabilities, child support, or combined child and spousal support is not sent a 60-day notice." However, similar to ***Muniz***, as this provision is not relevant to the current matter, and there are provisions in the 60-day notice for such taxpayers to avoid a license suspension referral by notifying the Division of such garnishments, this issue will not be further addressed.

Subdivision 5 provides that a taxpayer may only challenge a driver's license suspension or referral 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]).

C. The foundational requirements for a valid suspension notice include the requisite 60-day notice to petitioner of the Division's intention to make a referral to DMV for license suspension action against petitioner, and the existence of petitioner's past-due tax liabilities that have become fixed and final such that a taxpayer no longer has any right to administrative or judicial review. In this case, the Division has shown that all of the notice requirements of Tax Law § 171-v have been met in the 60-day Notice of Proposed Driver's License Suspension issued in this matter on August 19, 2015, and petitioner does not deny receipt of the notice. Secondly, included with the suspension notice was a consolidated statement of tax liabilities issued to petitioner subject to collection action, i.e., fixed and final liabilities, in excess of $10,000.00, fulfilling the criteria concerning the purported existence of requisite tax liabilities. Petitioner does not argue that the underlying notices were not issued to her, received by her, or are invalid for some other reason. Instead, petitioner argues that the liabilities have been satisfied, which is one of the enumerated challenges in Tax Law § 171-v(5) available to her, by virtue of being discharged in a Chapter 7 bankruptcy proceeding.

D. It has been established, and is undisputed, that petitioner filed a Chapter 7 petition in bankruptcy on August 27, 2010, and was granted a discharge in bankruptcy under the bankruptcy code on February 11, 2011. The tax assessments in issue herein were listed as unsecured priority

claims in the bankruptcy, and the Division does not assert that the taxes at issue were not discharged in bankruptcy.

11 USC former § 523, entitled *Exceptions to Discharge*, provides that certain taxes cannot be discharged under a Chapter 7 bankruptcy proceeding if certain criteria is met, as follows, in pertinent part:

> "(a) A discharge under section 727. . . of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax . . .--
>
> (A) of the kind and for the periods specified in . . . section 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required--
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . ."

A tax that falls under bankruptcy code former § 507(a)(8) includes the following:

> "allowed unsecured claims of governmental units, only to the extent that such claims are for--
>
> (A) a tax on or measured by income . . . --
>
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
>
> (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
>
> (iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case . . ."

Since § 523(a)(1)(A) of the bankruptcy code does not discharge taxes that are described under § 507(a)(8), it is necessary to analyze whether the tax assessments in issue come within (i), (ii) or (iii) of § 507(a)(8)(A).

The bankruptcy petition was filed on August 27, 2010. The income tax returns for tax years 1998, 1999 and 2000, related to the assessments in issue, were due on October 15, 1999, October 15, 2000 and October 15, 2001, respectively, including extensions. They clearly do not fall within the parameters of § 507(a)(8)(A)(i), since the returns were outside the three year period before the filing date of the bankruptcy petition. Thus, bankruptcy code § 507(a)(8)(A)(i) does not operate to prevent the discharge of the tax assessments in issue.

In order to evaluate whether the assessments fall within the parameter of bankruptcy code § 507(a)(8)(A)(ii), it is necessary to know when the assessments were issued, and the relationship between the dates of the assessments and the filing of the bankruptcy petition. Although it is likely that the assessments were issued more than 240 days before the filing of the bankruptcy petition in 2010, there is no definitive evidence in the record, and therefore, this raises a material question of fact, since it cannot be determined whether the assessments met the exception to bankruptcy discharge under this provision.

For completeness of the analysis, the final provision to consider is bankruptcy code § 507(a)(8)(A)(iii), which requires a determination of whether the tax falls within the kind specified in bankruptcy code § 523(a)(1)(B) or § 523(a)(1)(C). Although the tax returns for the years in issue were not originally filed, those returns were eventually filed in 2015. This date is after the due dates of all the returns, including extensions, but 2015 is not within two years before the date of the filing of the bankruptcy petition, which took place in 2010. Thus, bankruptcy code § 523(a)(1)(B) does not cover the taxes in this matter or operate to prevent the assessments from being discharged. As to the last provision, bankruptcy code § 523(a)(1)(C), there are no allegations or evidence of fraudulent returns or willful attempts to evade or defeat tax, so this

provision is not applied in this matter. Thus, bankruptcy code § 507(a)(8)(A)(iii) does not operate to prevent the discharge of the tax assessments in issue.

Accordingly, since petitioner's protest to the suspension is based upon an enumerated challenge (***see*** Tax Law § 171-v[5][ii]), and there is a material issue of fact in question, which prevents a determination of whether petitioner's bankruptcy discharged the tax assessments in issue, the Division's motion for summary determination must be denied.

E. The Division of Taxation's motion for summary determination is denied and a hearing on the merits of this matter will be scheduled in due course.

DATED: Albany, New York
August 31, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE