No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MARY E. JACOBI,
Petitioner, v.

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK and COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari
to the State of New York Appellate Division of the
Supreme Court, Third Department

PETITION FOR A WRIT OF CERTIORARI

Anthony M. Bruce, Esq.
Counsel of Record
Andreozzi Bluestein LLP
9145 Main St.
Clarence, NY 14031
P: 716-565-1100
amb@andreozzibluestein.com

Randall P. Andreozzi, Esq.
Andreozzi Bluestein LLP
9145 Main St.
Clarence, NY 14031
P: 716-565-1100
rpa@andreozzibluestein.com

QUESTIONS PRESENTED

The court below properly determined that Petitioner holds a substantial property interest in her driver license sufficient to warrant protection under the Fourteenth Amendment of the United States Constitution. The questions presented in this Petition are as follow:

I. Whether New York Tax Law Section 171-v is, on its face, constitutionally deficient by failing to provide meaningful due process of law and/or a financial hardship provision before taking a taxpayer's substantial property interest in their driver's license for the non-payment of state income tax when the taxpayer does not have the financial ability to enter into a payment arrangement acceptable to the Commissioner?

II. Whether New York State's implementation of New York Tax Law Section 171-v violates the 14th Amendment to the United States Constitution by failing to provide meaningful due process of law and/or a financial hardship provision before taking a taxpayer's substantial property interest in their driver's license for the non-payment of state income tax when the taxpayer does not have the financial ability to enter into a payment arrangement acceptable to the Commissioner?

III. Whether New York State can take a citizen's substantial property interest in a driver's license for conduct that is wholly unrelated to the appropriate administration and enforcement of driving privileges in the State.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mary E. Jacobi respectfully petitions for a writ of certiorari to review the decision of the State of New York Appellate Division of the Supreme Court, Third Department in *Jacobi v. Tax Appeals Tribunal of the State of New York and Commissioner of Taxation and Finance of the State of New York*

OPINIONS BELOW

The decision of the Court of Appeals is reported at 2018 N.Y. LEXIS 1099 (N.Y., May 3, 2018) and is found at Appendix, (App.) herein at page 1A. The Court of Appeals order denying leave to appeal was entered on May 3, 2018. The memorandum and judgment of the Third Department is reported at 156 A.D.3d 1154 (3d Dep't 2017) and is found at App. at page 3A. The judgment affirming the Tax Appeals Tribunal's decision was entered on December 21, 2017. The decision of the State of New York Tax Appeals Tribunal is reported at and is found at App. at page 14A. The decision of the Tax Appeals Tribunal sustaining the Division of Taxation's notice of proposed driver license suspension referral issued to Petitioner pursuant to Tax Law § 171-v was entered on May 12, 2016.

JURISDICTION

The State of New York Court of Appeals issued its final decision on May 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y.C.L., Tax Law § 171-v:

(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 drivers' 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.

(2) The agreement shall include the following provisions:

(a) the procedures by which the department shall notify the commissioner of motor vehicles of taxpayers with past-due tax liabilities, including the procedures by which the department and the department of motor vehicles shall share the information necessary to identify individuals with past-due tax liabilities, which shall include a taxpayer's name, social security number, and any other information necessary to ensure the proper identification of the taxpayer;

(b) the procedures by which the commissioner shall notify the department of motor vehicles that a taxpayer has satisfied his or her past-due tax liabilities, or has entered into an installment payment agreement or has otherwise made payment arrangements satisfactory to the commissioner, so that the suspension of the taxpayer's driver's license may be lifted; and

(c) any other matter the department and the department of motor vehicles shall deem necessary to carry out the provisions of this section.

(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. However, no such notice shall be issued to a taxpayer whose wages are being garnished by the department for the payment of past-due tax liabilities or past-due child support or combined child and spousal support arrears. 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 tax liabilities are fully paid or the taxpayer makes payment arrangements satisfactory to the commissioner; and

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

(4) After the expiration of the sixty day period, if the taxpayer has not challenged the notice pursuant to subdivision five of this section and the taxpayer has failed to satisfy the past-due tax liabilities or make payment arrangements satisfactory to the commissioner, the department shall notify the department of motor vehicles, in the manner agreed upon by the two agencies, that the taxpayer's driver's license shall be suspended pursuant to subdivision four-f of section five hundred ten of the vehicle and traffic law ; provided, however, in any case where a taxpayer fails to comply with the terms of a current payment arrangement more than once within a twelve month period, the commissioner shall immediately notify the department of motor vehicles that the taxpayer's driver's license shall be suspended.

(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 the purposes of subdivision three of this section.

However, nothing in this subdivision is intended to limit a taxpayer from seeking relief from joint and several liability pursuant to section six hundred fifty-four of this chapter, to the extent that he or she is eligible pursuant to that subdivision, or establishing to the department that the enforcement of the underlying tax liabilities has been stayed by the filing of a petition pursuant to the Bankruptcy Code of 1978 (Title Eleven of the United States Code).

(6) Notwithstanding any provision of this chapter to the contrary, the department may disclose to the

department of motor vehicles the information described in this section that, in the discretion of the commissioner, is necessary for the proper identification of a taxpayer referred to the department of motor vehicles for the purpose of suspending the taxpayer's driver's license pursuant to this section and subdivision four-f of section five hundred ten of the vehicle and traffic law . The department of motor vehicles may not redisclose this information to any other entity or person, other than for the purpose of informing the taxpayer that his or her driver's license has been suspended.

(7) Except as otherwise provided in this section, the activities to collect past-due tax liabilities undertaken by the department pursuant to this section shall not in any way limit, restrict or impair the department from exercising any other authority to collect or enforce tax liabilities under any other applicable provision of law.

N.Y.C.L., Veh. & Tr. § 530:

A person whose driving license or privilege of operating a motor vehicle in this state has been heretofore suspended or revoked pursuant to the provisions of section five hundred ten of this chapter or whose driver's license or privilege has been revoked pursuant to section three hundred eighteen of this chapter and for whom the holding of a valid license is a necessary incident to his employment, business, trade, occupation or profession, or to his travel to and from a class or course at an accredited school, college or university or at a state approved institution of

vocational or technical training or enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner may thereafter apply for and may be issued a restricted use license or if the holder of a license issued by another jurisdiction valid for operation in this state, a restricted use privilege of operating a motor vehicle in this state as provided herein.

(1) The issuance of a restricted use license or privilege shall be in the discretion of the commissioner of motor vehicles or his duly authorized agent, who may require the applicant to attend a driver rehabilitation program specified by the commissioner, and shall be issued only after it is established to the reasonable satisfaction of the issuing officer that a driving license or privilege is a necessary incident to the applicant's employment, business, trade, occupation or profession, or to his travel to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training or enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner and that a denial of such license or privilege would deprive the person of his usual means of livelihood and thereby constitute an unwarranted and substantial financial hardship on the applicant and his immediate

family or would seriously impair such person's ability to meet the requirements of his education.

(2) Such license or privilege shall not be issued to a person who, within the four year period immediately preceding the date of application, has been convicted within or without the state of homicide or assault arising out of the operation of a motor vehicle, of criminally negligent homicide or criminal negligence in the operation of a motor vehicle resulting in death, or has been convicted within the state of a violation of subdivision two of section six hundred of this chapter or of reckless driving. Such license or privilege shall not be issued to a person whose license or privilege, at the time of application, is revoked pursuant to the provisions of subparagraph (x) or (xi) of paragraph a of subdivision two of section five hundred ten of this chapter. Such license or privilege shall not be issued to a person whose license or privilege is suspended or revoked because of a conviction of a violation of subdivision one, two, two-a, three, four or four-a of section eleven hundred ninety-two of this chapter or a similar offense in another jurisdiction, or whose license or privilege is revoked by the commissioner for refusal to submit to a chemical test pursuant to subdivision two of section eleven hundred ninety-four of this chapter. Such license or privilege shall not be issued to a person who within the five year period immediately preceding the date of application for such license or privilege has been convicted of a violation of subdivision one, two, two-a, three, four or four-a of section eleven hundred ninety-two of this chapter or a similar alcohol-related offense in another jurisdiction, or whose license or privilege has been revoked by the

commissioner for refusal to submit to a chemical test pursuant to subdivision two of section eleven hundred ninety-four of this chapter, except that such a license or privilege may be issued to such a person if, after such conviction or revocation, such person successfully completed an alcohol and drug rehabilitation program established pursuant to article thirty-one of this chapter in conjunction with such conviction or revocation. Provided, however, that nothing herein shall be construed as prohibiting an operator from being issued a limited or conditional license or privilege pursuant to any alcohol rehabilitation program established pursuant to this chapter.

(3) Such license or privilege and renewal thereof shall be issued for a period not exceeding the period during which such person's regular driver's license or privilege has been suspended or revoked, shall be marked and identified as a restricted use license or privilege and shall be valid only: (a) during the time the holder is actually engaged in pursuing or commuting to or from his business, trade, occupation or profession, (b) en route to and from a driver rehabilitation program or related activity specified by the commissioner at which his attendance is required, (c) to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training, (d) enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner, or (e) enroute to and

from a place, including a school, at which the child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training and shall contain the terms and conditions under which it is issued and is valid. In the event the holder of a restricted use license or privilege is convicted of: any violation (other than parking, stopping or standing) or of operating a motor vehicle for other than his employment, business, trade, occupational or professional or other purposes for which the license or privilege was issued, or does not comply with other requirements established by the commissioner, such license or privilege may be revoked and the holder shall not be eligible to receive a license or privilege pursuant to this section for a period of five years from the date of such revocation.

(4) The fee for a restricted use license or privilege shall be seventy-five dollars to be paid upon the issuance thereof, and such fee shall not be refundable.

(4-a) Fees assessed for a restricted use license or privilege shall be paid to the commissioner for deposit in the general fund.

(5) [Eff until Aug 31, 2019] A restricted use license or privilege shall be valid for the operation of any motor vehicle, except a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck as defined in this chapter subject to the

conditions set forth herein, which the holder would otherwise be entitled to operate had his drivers license or privilege not been suspended or revoked. Notwithstanding anything to the contrary in a certificate of relief from disabilities or a certificate of good conduct issued pursuant to article twenty-three of the correction law, a restricted use license shall not be valid for the operation of a commercial motor vehicle. A restricted use license shall not be valid for the operation of a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck where the holder thereof had his or her drivers license suspended or revoked and (i) such suspension or revocation is mandatory pursuant to the provisions of subdivision two or two-a of section five hundred ten of this title; or (ii) any such suspension is permissive for habitual or persistent violations of this chapter or any local law relating to traffic as set forth in paragraph d or i of subdivision three of section five hundred ten of this title; or (iii) any such suspension is permissive and has been imposed by a magistrate, justice or judge of any city, town or village, any supreme court justice, any county judge, or judge of a district court. Except for a commercial motor vehicle as defined in subdivision four of section five hundred one-a of this title, the restrictions on types of vehicles which may be operated with a restricted license contained in this subdivision shall not be applicable to a restricted license issued to a person whose license has been suspended pursuant to paragraph three of subdivision four-e of section five hundred ten of this title.

(5) [Eff Aug 31, 2019] A restricted use license or privilege shall be valid for the operation of any motor vehicle, except a commercial motor vehicle or a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck as defined in this chapter subject to the conditions set forth herein, which the holder would otherwise be entitled to operate had his drivers license or privilege not been suspended or revoked. A restricted use license shall not be valid for the operation of a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck where the holder thereof had his or her drivers license suspended or revoked and (i) such suspension or revocation is mandatory pursuant to the provisions of subdivision two or two-a of section five hundred ten of this chapter or (ii) any such suspension is permissive for habitual or persistent violations of this chapter or any local law relating to traffic as set forth in paragraph (d) or (i) of subdivision three of section five hundred ten of this chapter; or (iii) any such suspension is permissive and has been imposed by a magistrate, justice or judge of any city, town or village, any supreme court justice, any county judge, or judge of a district court.

(5-a) [Expires and repealed Aug 31, 2019] Issuance of a restricted license shall not be denied to any person whose license is suspended pursuant to paragraph three of subdivision four-e of section five hundred ten of this chapter for any reason other than such person's failure to otherwise have a valid or renewable driver's license. The issuance of a restricted license issued as a result of a suspension under subdivision four-e of section five hundred ten of this chapter shall not in

any way affect a person's possible eligibility for a restricted license at some future time.

(5-b) Issuance of a restricted license shall not be denied to any person whose license is suspended pursuant to subdivision four-f of section five hundred ten of this title for any reason other than such person's failure to otherwise have a valid or renewable driver's license. The restrictions on the types of vehicles which may be operated with a restricted license contained in such subdivision five of this section shall not be applicable to a restricted license issued to a person pursuant to subdivision four-f of section five hundred ten of this title. The issuance of a restricted license issued as a result of a suspension under subdivision four-f of section five hundred ten of this title shall not in any way affect a person's eligibility for a restricted license at some future time.

(6) It shall be a traffic infraction for the holder of a restricted use license or privilege to operate a motor vehicle upon a public highway for any use other than those authorized pursuant to subdivision three of this section.

(7) Subject to the limitation prescribed in subdivision four of this section, a restricted use license or privilege shall be valid until the expiration date of any unrestricted driver's license which was held by such person prior to the suspension or revocation upon which the restricted use license or privilege has been issued. Upon such expiration, the restricted use license or privilege may be renewed for the same fee

for which such unrestricted license could have been renewed and such renewal fee shall be applied to the renewal, if issued by this state, or reissuance of his unrestricted driver's license when such license is eligible for issuance.

(8) The commissioner shall establish a schedule of fees to be paid by or on behalf of each person who is required to attend a driver rehabilitation program as a condition to the issuance of a restricted use license or privilege, and he may, from time to time, modify the same. Such fees shall defray the ongoing expenses of the program. In no event shall such fee be refundable. A driver improvement program established pursuant to section five hundred twenty-three-a of this chapter may be designated by the commissioner as a driver rehabilitation program under this section if the curriculum and other requirements both for the purposes of this section and section five hundred twenty-three-a of this chapter are satisfied by such program. Where the commissioner has approved any driver improvement program conducted by local authorities as a driver rehabilitation program under this section, any fee required for attendance at such program shall be paid to the agency conducting such program.

(9) In order to effectuate the purpose of this section the commissioner shall establish and publish rules and regulations as may be necessary for the administration hereof.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

New York State Tax Law Article 8 § 171-v, which became effective on March 28, 2013, authorizes the Department of Taxation and Finance (DTF) to refer taxpayers with delinquent tax liabilities of over $10,000 to the New York State Department of Motor Vehicles (DMV) for suspension of their driver license. Pursuant to section 171-v, a taxpayer can avoid suspension of his or her license by fully satisfying the past-due tax liabilities or by making payment arrangements satisfactory to the commissioner. The notice to taxpayers of the proposed suspension must include, *inter alia*, information on how they can pay any past-due tax liabilities and how to enter into a payment arrangement.

According to Tax Law § 171-v(5), a taxpayer has no right to commence a court action or proceeding or any other legal recourse regarding a notice issued under Tax Law § 171-v unless it is to challenge the suspension on limited grounds, including that (i) the individual to whom the notice was provided is not the taxpayer at issue; (ii) the past-due tax labilities 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 []; (v) the taxpayer's driver's license is a commercial driver's license []; 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 [].

B. Facts

The DTF issued a Notice of Proposed Driver License Suspension Referral dated August 2, 2013 to Petitioner. The Notice included a Consolidated Statement of Tax Liabilities with a current balance of tax, interest and penalties due of $73,262.06. The Notice, under the heading "How to avoid suspension of your license," expressly instructs taxpayers to "pay the amount due or set up a payment plan to avoid suspension of your license." The Notice further notified Ms. Jacobi that the Driver License Suspension Referral will be provided to the DMV for the purpose of suspending her license unless she, *inter alia,* sets up a payment plan, protests the proposed suspension of the license by either filing a Request for Conciliation Conference with the Tax Department, or files a petition with the Division of Tax Appeals. Petitioner did not have the financial ability to full pay the liability. To avoid suspension of her driver license, and pursuant to the instructions in the Notice, she requested a Conciliation Conference before the Bureau of Conciliation and Mediation Services. The conciliation conference occurred on January 16, 2014. The Conferee sustained the August 2, 2013 Notice of Proposed Driver License Suspension Referral in a Conciliation Order dated March 14, 2014.

Petitioner also prepared an Offer in Compromise Form DTF 4.1 ("OIC") and Statement of

Financial Condition and Other Information Form DTF-5 and filed these with the Commissioner on June 3, 2014. Petitioner also made monthly installment payments of $750.00 towards her unpaid liabilities based upon her current income and necessary basic living expenses, including her required payments for her current income tax liabilities.

Petitioner's Financial Statement showed that her liabilities substantially exceeded her assets. The family residence is encumbered by a mortgage, an outstanding judgment recorded in 2010 and a Federal Tax Lien. As a consequence, there was no equity available to the DTF in the residence. Petitioner's husband is unemployed and receives only his Social Security benefits, which is statutorily exempt from New York collection. Petitioner is unemployed, but at the time of her OIC had a minority interest in flow-through real estate business entities from which she received periodic distributions. Currently she is unemployed and receives installment sales proceeds from the sale of those entities. Petitioner is timely filing and paying taxes on all her current income. Petitioner suffers from arthritis and was diagnosed with stage III Large Cell Lymphoma while the proceedings below were pending. She has undergone treatment and remains under monthly medical supervision.

On June 4, 2014, the very day after Petitioner filed her OIC, the DMV issued a Form MV-110C (Order of Suspension or Revocation) advising Petitioner that her New York State Driver License would be suspended effective June 18, 2014 because of her delinquent unpaid tax debt with the Department of Taxation and Finance. Petitioner timely filed her

petition on June 10, 2014, and later amended petition, with the New York State Division of Tax Appeals (DTA) challenging the Commissioner's determination that her Driver License be suspended under Tax Law §§ 171-v and Vehicle and Traffic Law §§ 510(4-f), 511(7) and 530(5-b) for unpaid New York State income tax liabilities. On June 14, 2014, after she filed both her OIC and her petition, the DMV informed Petitioner that New York State rescinded the proposed suspension of her Driver License as of June 11, 2014.

On December 22, 2014, the Division filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination. Thereafter, the Administrative Law Judge issued its determination on April 16, 2015 granting the Division's motion for summary determination, denying the petition and sustaining the Division's notice of proposed driver license suspension. On May 15, 2015, Petitioner filed her timely Exception to the April 16, 2015 determination. After briefing and oral argument, the Tax Appeals Tribunal rendered its decision on May 12, 2016, affirming the April 16, 2015 determination of the Administrative Law Judge. The Tribunal declined to address the Constitutional concerns Petitioner raised, advising that it did not have the jurisdiction to do so.

C. Proceedings Below

Petitioner appealed to the State of New York Appellate Division, Third Department by filing a timely verified petition on September 2, 2016. The verified petition questions presented included whether

the Commissioner's implementation and interpretation of Tax Law § 171 in this case causes the statute to violate the United States Constitution by failing to provide due process of law and/or failing to include an economic hardship provision.

The court, in its judgment and memorandum concedes that once a driver's license is issued, the holder has obtained a property interest therein that the state may not take away without providing procedural due process. App. at 8A. However, it determined that "[t]o the extent that petitioner is making a facial challenge to Tax Law § 171-v, she has failed to establish that no set of circumstances exist under which the law would be valid." *Id.*

The court then addressed Petitioner's argument that the statute as implemented fails to take into account a taxpayer's ability to pay, and due process is violated when a person is deprived of a right based on financial circumstances. The court stated that Tax Law § 171-v does not entirely deprive a taxpayer of the ability to drive because if their license is suspended, they can apply for a restricted use license which permits driving as necessary for employment, school and medical treatment.

Further addressing Petitioner's argument under the Due Process Clause, the court determined that because the notice of proposed driver license suspension included provisions on how to avoid suspension of her license by, *inter alia*, setting up a payment plan, filing a request for a conciliation conference with BCMS or filing a petition with the Division of Tax Appeals, and because Petitioner took advantage of the processes, that she obtained the required due process. App. at 10A. The court further

determined that even though a person has applied for a payment arrangement by OIC, "[n]othing in the law requires DTF to act on [offers in compromise] within a specific time frame, and the Commissioner has broad discretion in deciding whether to accept an offer in compromise. [] While it would be improper for DTF to purposefully delay or withhold review of an offer in compromise until after the taxpayer's license was suspended (for example, in an effort to gain leverage in negotiating a compromise), it would likewise be improper for courts to impose a time frame upon DTF for it to consider such offers where the relevant statue and regulation do not contain any time requirements. [] Hence, a taxpayer is not deprived of due process simply because DTF has not reached a determination on the taxpayer's offer in compromise before a license suspension takes effect." App. at 12A.

On February 7, 2018, Petitioner filed her notice of Appeal to appeal the December 21, 2017 judgment of the Supreme Court, Appellate Division, Third Department to the Court of Appeals of the State of New York. After briefing, the Court of Appeals, on its own motion, dismissed Petitioner's motion for leave to appeal on the ground that no substantial constitutional question is directly involved.

REASONS FOR GRANTING THE PETITION

This important federal question has not been decided by the Supreme Court. A state statute must minimally have a rational basis supporting its passage and implementation of a statute (i.e. it must be rationally related to legitimate government interest).

As more states implement statutes that suspend or revoke licenses as a means to compel payment for income tax liabilities that are wholly unrelated to the license subject to suspension or revocation, such statutes must be reviewed to ensure their constitutionality. This is especially true when implementation of such statutes provide no financial hardship provisions and allow deprivation of the license even when that person objectively cannot afford to pay the amounts due or a make a monthly payment toward the same.

The Supreme Court has considered license suspensions or revocations and found such state action to be constitutional when public safety was substantially served by the suspension of licenses or when public interest in driver's license administration were sufficiently related to the purpose of the government action. The Court has not yet addressed whether a State's action to take a citizen's property interest in their driver license for conduct wholly unrelated to the privileges of the driving license. Nor has the Court yet addressed whether a State can take a substantial property interest from a citizen for non-payment of income tax, specifically when the citizen does not have the assets to pay the income tax.

A State cannot punish its citizens for their poverty. *See, Bearden v. Georgia*, 461 U.S. 660, 671 (1983). In a recent *amicus* brief, the United States opined that the "practice of automatically suspending the driver's license of any person who fails to pay outstanding court debt – without inquiring into ability to pay – violates that constitutional principle." Statement of Interest of the United States filed in *Stinnie v. Holcomb*, case no. 3:16-cv-00044 (W.D. Va.

Nov. 7, 2016). Tax Law § 171-v is intended to promote voluntary compliance with the tax laws. Here, there is no rational basis to support the statutory provisions that require suspension of a taxpayer's driver's license regardless of their ability to pay.

Generally, New York State, like other taxing jurisdictions, may employ three types of collection strategies. First, it may use any of the various methods at its disposal to *directly* collect delinquent tax liabilities (for example, collection suits, wage and income garnishments, tax warrants, or seizure of property). Second, a legislature may impose a penalty for failure to pay a tax. *Bankers Trust Co. v. Blodgett,* 260 U.S. 647, 651, 43 S. Ct. 233 (1923). Third, the State may, through legislation, adopt a collection strategy designed to coerce payment by suspending a taxpayer's right or privilege.[1] Tax Law § 171-v implements the third strategy by suspending taxpayers' driver's licenses – a strategy that by itself generates no income – in order to coerce taxpayers to work with the State to enter into a payment arrangement. A coercive statute, however, is premised upon the presumption that the individuals coerced *can* accomplish the action sought but choose not to. However, the State cannot coerce individuals to do something they objectively *cannot* do.

Tax Law § 171-v must, constitutionally, establish a rational basis between the government taking of the property interest and the statutory purpose of coercing taxpayers who can make payments

[1] New York State has all three methods at its disposal and has already implemented the first two against Petitioner, imposing penalties upon her for failure to pay tax due, and seizing money from her bank accounts.

on their past-due tax liabilities to do so. To this end, the statute may be interpreted to be premised on the presumption that New York State has in place protocol to ensure that taxpayers are afforded due process of law in establishing payment arrangements so that their circumstances are properly considered in a meaningful manner in any determination of their ability to make any arranged payments. Indeed, as a practical matter, to interpret Tax Law § 171-v to mean that New York State need *not* provide due process of law and may arbitrarily and capriciously abuse its discretion in allowing taxpayers to make payment arrangements would render the statute's "payment arrangement" requirement meaningless. To allow New York State to deprive its taxpayers of their property interest in their driver's licenses arbitrarily, capriciously, and *even when they objectively cannot pay* the tax owed, would erase any rational basis to this law, the purpose of which is to coerce recalcitrant taxpayers who can make payments to in fact make payments.

New York State argued at the beginning of the case below both that due process is *not* required for the taking of a citizen's driver's license, but later, before appellate court, it changed its argument to concede that due process *is* required. New York State argued that the Commissioner's mere issuance of a notice required by the statute satisfied the due process requirement. It is Petitioner's position that more than a mere formalistic issuance of a notice without any substantive application of the protocol under that notice, is required for the State to meet its due process obligations. The State's actions in this case fail to satisfy that requirement.

a. Petitioner Has a Legitimate Property Interest in her Driver's License.

It is established that the Due Process Clause of the Fourteenth Amendment applies to the deprivation of a driver's license by a state: "Suspension of issued licenses ... involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Dixon v. Love*, 431 U.S. 105, 112 (1977). This protection requires that citizens be afforded a reasonable opportunity to be heard at a meaningful time or in a meaningful manner "at a time when the deprivation can still be prevented." *Berjikian v. Franchise Tax Bd.*, 93 F. Supp. 3d 1151 (C.D. Cal. 2015)(citing *Duentes v. Shevin*, 407 U.S. 67, 81 (1972)).

b. New York Tax Law § 171-v, As Written and As Applied, Fails to Provide a Meaningful Review of Proposed Driver License Suspension Notices Prior to Suspension.

Tax Law § 171-v, and the State's implementation of that provision in this case, fails to provide a mechanism to ensure that the Commissioner respects a taxpayer's rights and dignity through consideration of facts and financial circumstances so as to formulate a meaningful

determination with respect to a taxpayer's ability to enter into a payment arrangement prior to suspending his or her license.

An Offer in Compromise, Installment Agreement, Income Execution, or any other payment arrangement provides an avenue to avoid license suspension. As the goal of the statute is to generate tax payments from recalcitrant tax debtors, the statute recognizes this avenue as a means of avoiding suspension and refers to payment arrangements throughout. Yet the Commissioner may refuse to consider or summarily reject without cause a taxpayer's proposed payment arrangement arbitrarily and capriciously, without any meaningful consideration or explanation; and without any appellate rights. Tax Law § 171-v essentially requires a taxpayer, not covered by one of the very limited exceptions, to either full pay their liability or have their license suspended. Any attempt to enter into a payment arrangement, which is the only means to avoid suspension of a driver license pursuant to Tax Law § 171-v, is wholly in the discretion of the Commissioner.[2] The Commissioner claims that it is

[2] The State's statute stands in stark contrast to an analogous Federal provision. 26 U.S.C. § 7345 allows the Commissioner of Internal Revenue to certify a taxpayer with "seriously delinquent tax debt" to the Secretary of State for revocation of that taxpayer's passport. However, the statute expressly provides that, before a taxpayer can be certified for passport revocation, the tax debt must have been subject to either a notice of federal tax lien or a levy, both of which carry collection due process ("CDP") rights. New York State does not afford CDP rights to taxpayers. Furthermore, 26 U.S.C. § 7345 "provides the IRS discretion to exclude categories of tax debt from certification,

not subject to any appeal or review, such that for any reason whatsoever or no reason at all, a taxpayer can be denied a payment arrangement. If a taxpayer does not have the means to full pay their tax liability, they are punished by losing their property interest, and because the statute contains no provision to appeal the suspension decision based on inability to full pay the tax liability and the statute contains no financial hardship provision, such statute is repugnant to the Fourteenth Amendment of the Constitution.

The manner in which the Commissioner is implementing Tax Law § 171-v in this case affords no procedural protections to "ensure against an erroneous or arbitrary deprivation of a taxpayer's license when the taxpayer claims [in good faith] that he or she qualifies for a financial-hardship exemption." *Berjikian v. Franchise Tax Bd.*, No. BC514589 (L.A. County Super. Ct. 2015). The "financial-hardship exemption" referenced in *Berjikian* is entirely lacking from statutory text and

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even if the debt meets the criteria [for certification]." IRM 5.1.12.27.4 (12-20-2017). Those categories include, *inter alia*, debt that is currently not collectible, debt of a taxpayer in bankruptcy, or debt that is included in a pending installment agreement request or request for an Offer in Compromise. *Id.* Finally, the Federal Taxpayer's Bill of Rights provides that "Taxpayers have the right to expect that any IRS enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing." https://www.irs.gov/newsroom/the-right-to-privacy-taxpayer-bill-of-rights-7. Again, the State's statute fails to afford similar protections.

the Commissioner's implementation of Tax Law § 171-v. That California statutory provision allows an exemption when:

> The applicant or licensee is unable to pay the outstanding tax obligation due to a current financial hardship. "Financial hardship" means financial hardship as determined by the State Board of Equalization or the Franchise Tax Board, whichever is applicable, where the applicant or licensee is unable to pay any part of the outstanding liability and the applicant or licensee is unable to qualify for an installment payment arrangement as provided for by Section 6832 or Section 19008 of the Revenue and Taxation Code. In order to establish the existence of a financial hardship, the applicant or licensee shall submit any information, including information related to reasonable business and personal expenses, requested by the State Board of Equalization or the Franchise Tax Board, whichever is applicable, for purposes of making that determination. Cal. Bus. And Prof. Code Section 494.5

Indeed, it only makes sense that a statute whose purpose is to coerce taxpayers to make arrangements to pay their tax bill and punish those who do not by taking their property rights should protect against the possibility that the statute might

inadvertently punish those who objectively cannot pay by imposing upon them a payment obligation that exceeds their means.

The New York State legislature mentions payment arrangements in the statute's notice requirements and therefore appears to acknowledge the need for such financial hardship provisions. But the Commissioner argues that the statute provides no allowance for administrative or judicial review of his consideration of or discretion over such payment arrangements. He argues that the statute mandates no financial hardship consideration and that New York State can use Tax Law § 171-v to coerce from its taxpayers any payment arrangement it likes, even arrangements that compel taxpayers to use income or assets, like Social Security, that the State has already identified as exempt from the reach of its collection statutes or that would render the taxpayer impoverished. The consequences of such an interpretation are draconian and, as far as Petitioner's research has determined, nowhere contemplated in the legislative history of Tax Law § 171-v. Such consequences are aptly illustrated in this case as the financial hardships created here certainly deprive her of life, liberty or property without due process in violation of the Fourteenth Amendment of the U.S. Constitution.

c. Post-Deprivation Rights Do Not Cure the Due Process Deficit.

The Commissioner does not deny that Petitioner lacks the income and assets to fully satisfy

her tax liability or that the Commissioner's actions will harm the Petitioner's ability to financially support for herself and her family. Instead, the Commissioner simply claims that any due process violation is moot because the Petitioner can apply for a restricted driver's license which, if granted, would permit her to drive in certain necessary situations. That argument is a red herring, as an opportunity to *apply* for a restricted license post-suspension cannot rectify due process violations in the suspension process. *See Berjikian* at 11 (holding that the Commissioner's failure to include a financial hardship exception or otherwise provide due process to taxpayers in Petitioner's position *prior* to the suspension of his driver license deprives him of a meaningful opportunity to be heard "at a time when the deprivation can still be prevented." (citing *Duentes v. Shevin*, 407 U.S. 67, 81)). Furthermore, NY Vehicle and Traffic Law § 530, which permits limited travel on a restricted license, does not provide any allowance for driving to a store to purchase food or clothing.

d. The government's interest in tax collection is not rationally related to suspension of a driver license, as the taking of a driver license from someone who has no ability to pay their tax liability defeats the stated purpose of Tax Law 171-v.

Tax Law § 171-v was enacted to "improve tax collection" by providing a method to coerce recalcitrant taxpayers who successfully avoided

collection efforts to voluntarily come forward to pay – or enter into an arrangement to pay – their outstanding tax liabilities. However, the law – as written – exceeds its intended bounds, as it provides no financial hardship exception for taxpayers who cannot pay their delinquent liabilities and/or whose remaining assets or income are specifically exempted from collection action by the Commissioner pursuant to New York Law.

There is no dispute that Petitioner does not possess sufficient funds to repay her past-due tax liability in full. However, to resolve her outstanding liabilities, she submitted a good faith Offer in Compromise based on the formula and guidance by New York State's DTF 4.1 and DTF 5. The Commissioner proposed the suspension of Petitioner's license before even considering her Offer and eventually arbitrarily and capriciously rejected the Offer and posits that (1) it cannot be forced to compromise a tax debt; and (2) since Petitioner did not enter into a payment arrangement "satisfactory" to the Commissioner, her driver's license must be suspended.

When a statute intended to punish those who consciously and affirmatively avoid paying their past-due tax punishes those who undisputedly cannot do so, there must be another path for those taxpayers to avoid the license suspension regime. So, when the Commissioner provides taxpayers with an opportunity to avoid license suspension by entering into a payment arrangement, that procedure becomes tied to potential deprivation of a taxpayer's property interest – a procedure that is afforded due process rights under the U.S. Constitution. Here, ultimately,

during the pendency of these proceedings, the Commissioner rejected Petitioner's Offer in Compromise arbitrarily, capriciously, and on a whim for unstated and undocumented "policy reasons" without disputing a single asset, income or expense item listed. Such abuse of discretion cannot be the basis for deprivation of a Constitutionally-protected property interest.

CONCLUSION

For all these reasons, this Court should grant the petition.

Dated: August 1, 2018

Respectfully submitted,

/s/ Anthony M. Bruce
Anthony M. Bruce, Esq.
Andreozzi Bluestein LLP
9145 Main St.
Clarence, NY 14031
P: 716-565-1100
F: 716-565-1920

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

Decided and Entered on the third day of May, 2018

Present, Hon. Janet DiFiore, Chief Judge, presiding.

Mo. No. 2018-231
In the Matter of Mary E. Jacobi,
Appellant,
v.
Tax Appeals Tribunal of the State of New York et al.,
Respondents.

Appellant having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is further

ORDERED, that the motion for leave to appeal is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ John P. Asiello
John P. Asiello
Clerk of the Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 21, 2017 523650

In the Matter of MARY E. JACOBI,

Petitioner,

v MEMORANDUM AND JUDGMENT

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK et al.,

Respondents.

Calendar Date: November 20, 2017

Before: McCarthy, J.P., Rose, Devine, Mulvey and Rumsey, JJ.

Andreozzi Bluestein LLP, Clarence (Randall P. Andreozzi of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Robert M. Goldfarb of counsel), for Commissioner of Taxation and Finance, respondent.

McCarthy, J.P.

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal sustaining the notice of proposed driver's license suspension referral imposed under Tax Law article 8.

The Division of Taxation issued petitioner a notice of proposed driver's license suspension referral, indicating that her license would be suspended by the Department of Motor Vehicles (hereinafter DMV) in 60 days unless she resolved her outstanding tax liabilities. (see Tax Law § 171-v). Her income tax liabilities were well in excess of the $10,000 statutory requirement for license suspension (see Tax Law § 171-v [1]). Petitioner requested and received a conference before the Bureau of Conciliation and Mediation Services (hereinafter BCMS) of the

Department of Taxation and Finance (hereinafter DTF), but the suspension notice was sustained.

Petitioner submitted an offer in compromise to make 48 monthly payments of $750, for a total of $36,000, to settle her outstanding tax liability, which had grown at that point to more than $430,000. According to the required financial information form, petitioner's liabilities (including $3.1 million in federal tax liability) far exceeded her assets. Petitioner began making the $750 monthly payments while her offer in compromise was pending.

The next month, petitioner filed an administrative challenge to the suspension notice. The Division moved for a summary determination asserting that petitioner relied on the provision preventing suspension when a person has made satisfactory payment arrangements with respondent Commissioner of Taxation and Finance, but her offer in compromise had not yet been accepted. An Administrative Law Judge (hereinafter ALJ) granted the Division's motion, finding that petitioner did not establish any statutory ground for challenging the suspension (see Tax Law § 171-v [5]). Respondent Tax Appeals Tribunal affirmed the ALJ's determination. Petitioner commenced this CPLR article 78 proceeding seeking to annul the Tribunal's determination (see Tax Law § 2016).

Initially, to the extent that petitioner seeks to have this Court decide whether the Commissioner

erred in rejecting her offer in compromise, that issue it not before the Court. The letter containing that denial was not in front of the ALJ, and the Tribunal appropriately held that it could not consider documents outside the record. Likewise, we will not consider documents – or determinations contained therein – that were not part of the administrative record or considered by the agency (see Matter of Lippman v Public Empl. Relations Bd., 296 AD2d 199, 203 [2002], lv denied 99 NY2d 503 [2002]). This proceeding challenging the Tribunal's ruling on a license suspension notice is not the proper vehicle for petitioner to challenge the denial of her offer in compromise.

The issue before us is the determination sustaining the notice to suspend petitioner's license. Tax Law § 171-v was enacted to require DTF and DMV to "cooperate in a program to improve tax collection through the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of [$10,000]" (Tax Law § 171-v [1]). The statute requires notice to the taxpayer at least 60 days prior to inclusion in the suspension program, with the notice containing clear statements of the past-due tax liabilities, that the taxpayer may avoid suspension "by fully satisfying the past-due tax liabilities or by making payment arrangements satisfactory to the [C]ommissioner" and how that can be accomplished, and that the right to protest the suspension notice is limited to certain issues (Tax Law § 171-v [3]). Pursuant to the statute, a taxpayer has no right to commence a proceeding or any other legal recourse

against DTF or DMV regarding a suspension notice except on that grounds that (i) the notice was issued to the wrong person, (ii) the past-due liabilities have been satisfied, (iii) and (iv) the taxpayer's wages are being garnished by DTF or through an income execution to satisfy either the liabilities at issue or arrears in child or spousal support, (v) the taxpayer's license is a commercial driver's license, or (vi) DTF incorrectly found that the taxpayer failed twice within the previous 12 months to comply with a payment arrangement with the Commissioner (see Tax Law §171-v [5]).

The Division issued a timely suspension notice, and petitioner did not assert that its contents failed to comply with the statute. Nor did petitioner raise any of the enumerated grounds set forth in Tax Law § 171-v (5), despite that subdivision plainly stating that those are the only grounds upon which a suspension or referral may be challenged. Thus, according to the plain language of the statute, the Tribunal was required to uphold the suspension notice.

Petitioner contends that the statute and the Division's implementation of it deprived her of due process because there was no consideration of her financial ability to make any arranged payments. Once a driver's license is issued, the holder has obtained a property interest therein that the state may not take away without providing procedural due process (see Dixon v Love, 431 US 105, 112 [1977]; Bell v Burson, 402 US 535, 539 [1971]; Pringle v

Wolfe, 88 NY2d 426, 431 [1996]; see also Matter of Daxor Corp. v State of N.Y. Dept. of Health, 90 NY2d 89, 98 [1997]). As a legislative enactment, Tax Law § 171-v enjoys a presumption of constitutionality, which petitioner had to rebut by demonstrating that the statute is invalid beyond a reasonable doubt (see LaValle v Hayden, 98 NY2d 155, 161 [2002]; Pringle v Wolfe, 88 NY2d at 431). To the extent that petitioner is making a facial challenge to Tax Law § 171-v, she has failed to establish that no set of circumstances exist under which the law would be valid (see Matter of Moran Towing Corp. v Urbach, 99 NY2d 443, 448 [2003]; Berry v New York State Dept. of Taxation & Fin., 2017 NY Slip Op 31345[U], *4 [Sup Ct, NY County 2017]).

Petitioner contends that DTF's application of the statute in this matter deprived her of due process. Specifically, she argues that the statute, as implemented, fails to take into account a taxpayer's inability to pay, and due process is violated when a person is deprived of a right based on financial circumstances. Her argument is too broad. Petitioner relies on Bearden v Georgia (461 US 660 [1983]), where, in a different context, the Supreme Court of the United States concluded that a state may revoke probation for failure to pay a fine if "the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay" (id. at 672). However, "[o]nly if alternate measures are not adequate to meet the [s]tate's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona

fide efforts to pay. To do otherwise would deprive the probationer of his [or her] conditional freedom simply because, through no fault of his [or her] own, he [or she] cannot pay the fine," which "would be contrary to the fundamental fairness required by the Fourteenth Amendment" (id. at 672-673). We disagree with petitioner's argument that the present situation is analogous to that in Bearden. Deprivation of freedom is not directly comparable to deprivation of a driver's license.

Indeed, suspension of a driver's license pursuant to Tax Law § 171-v does not entirely deprive a taxpayer of the ability to drive. Petitioner asserts that the statute and its implementation lead to deprivation of rights for those who cannot afford to pay their tax liabilities and could lead to hardships such as the inability to work. Specifically, she alleges that she needs her license to travel to medical appointments and get prescriptions. We agree with the Commissioner that this type of hardship has been ameliorated by the Legislature, which provided that any person whose driver's license is suspended pursuant to Tax Law § 171-v may apply to DMV for a restricted use license and DMV may not deny a restricted use license to such person as long as he or she otherwise had a valid license (see Vehicle and Traffic Law §§ 510 [4-f] [5]; 530 [5-b]; see also Berry v New York State Dept. of Taxation and Fin., 2017 Slip Op 31345[U] at *7). A restricted use license permits the person to drive as necessary for employment, school and medical treatment for himself or herself and any member of the household (see Vehicle and

Traffic Law § 530). Therefore, petitioner is entitled, upon application after the suspension of her license that she is presently challenging to issuance of a restricted use license that would permit her to drive for medical treatment.

Returning to petitioner's argument, under the Due Process Clause, the process afforded must be "appropriate to the nature of the case," and provide notice and an opportunity to be heard at a meaningful time and in a meaningful manner, generally before the termination or suspension becomes effective (Bell v Burson, 402 US at 541-542 [internal quotation marks and citation omitted]). As required by Tax Law § 171-v, the Division's notice to petitioner set forth the basis for the suspension, was issued 60 days prior to the proposed referral to DMV for suspension and informed her of ways to avoid suspension (resolving the tax debt, setting up a payment plan, notifying DTF of eligibility for an exemption or protesting the proposed suspension by filing a request for a conciliation conference with BCMS of filing a petition with the Division of Tax Appeals).

Petitioner took advantage of the processes that were available. She requested and received a conference with BCMS, but was unsuccessful. She also filed a petition with the Division of Tax Appeals, which led to the ALJ's determination and an appeal to the Tribunal, resulting in the determination that is at issue in this proceeding. The suspension notice was placed on hold until those administrative processes

were completed (and apparently has been kept in abeyance while this legal proceeding has been pending). Petitioner does not challenge the actual administrative process that has been established to contest a notice of license suspension, but instead hinges her argument on the program for offers in compromise.

Petitioner filed an offer in compromise, which would allow her to resolve her tax debt or "make payment arrangements satisfactory to the [C]ommisioner" so as to avoid license suspension (Tax Law § 171-v [4]; see Vehicle and Traffic Law § 510 [4-f] [2]). The Commissioner is statutorily authorized to compromise any taxes or liabilities upon proof that, among other things, the taxpayer is insolvent or would suffer an undue economic hardship, although there are certain restrictions placed upon the Commissioner in that regard (see Tax Law § 171 [15]; see also 20 NYCRR 5005.1). As noted above, DTF's denial of petitioner's offer in compromise is not before us, as it was not properly before the ALJ or Tribunal.

Petitioner argues that she was deprived of due process because, although the law provides an avenue to avoid suspension by making payment arrangements satisfactory to the Commissioner, DTF failed to review or consider her offer in compromise before the suspension was proposed to take effect. Nothing in the law requires DTF to act on such an offer within a specific time frame, and the Commissioner has broad discretion in deciding

whether to accept an offer in compromise (see 20 NYCRR 5005.1 [d]; [e] [2], [3]). While it would be improper for DTF to purposefully delay or withhold review of an offer in compromise until after the taxpayer's license was suspended (for example, in an effort to gain leverage in negotiating a compromise), it would likewise be improper for courts to impose a time frame upon DTF for it to consider such offers where the relevant statute and regulation do not contain any time requirements. Any time frame imposed by a court might not be administratively feasible and would intrude on the Commissioner's authority. Additionally, requiring an answer from DTF regarding an offer in compromise before permitting license suspension could lead to gamesmanship by taxpayers and the filing of offers shortly before the suspension deadline merely for purposes of delay. Hence, a taxpayer is not deprived of due process simply because DTF has not reached a determination on the taxpayer's offer in compromise before a license suspension takes effect. Considering the processes afforded to petitioner before her license suspension would become effective, we decline to disturb the Tribunal's determination.

Rose, Devine, Mulvey and Rumsey, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

s/ Robert D. Mayberger

Robert D. Mayberger
Clerk of the Court

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARY E. JACOBI	:	DECISION DTA NO. 826332
for Review of a Notice of Proposed Driver License Suspension Referral under Tax Law § 171-v.	:	

Petitioner, Mary E. Jacobi, filed an exception to the determination of the Administrative Law Judge issued on April 16, 2015. Petitioner appeared by Andreozzi, Bluestein, Weber and Brown, LLP (Randall P. Andreozzi, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq. and Linda Harmonick, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division filed a letter brief in opposition. Petitioner filed a letter reply brief. Oral argument was heard in Albany, New York on

November 19, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

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

We find the facts as determined by the Administrative Law Judge, except that we have modified the Administrative Law Judge's findings of fact 1, 3, 8, 9 and 10 to better reflect the record. We have not included the Administrative Law Judge's findings of fact 7, 11 and 12 in our findings because such findings merely state the parties' legal arguments. We have also renumbered the Administrative Law Judge's findings of fact 8, 9 and 10 as 7, 8 and 9 herein. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) brought a motion seeking an order dismissing the

petition herein or, in the alternative, denying the petition and granting summary determination in its favor. The petition protests a notice of proposed driver license suspension referral, dated August 2, 2013, and issued to petitioner, Mary E. Jacobi, pursuant to Tax Law § 171-v (suspension notice of 60-day notice). The suspension notice informed petitioner that she had outstanding tax liabilities in excess of $10,000.00 owed to the State of New York and that, unless she responded within 60 days of the mailing date of the suspension notice, her driver's license would be suspended. Specifically, petitioner was advised through a consolidated statement of tax liabilities that income tax assessment number L-036560876-4 in the amount of $56,550.00, plus interest in the amount of $10,869.32, and penalty in the amount of $7,226.76, less payments or credits of $1,384.02, for a balance due of $73,262.06 was subject to collection action.[1]

2. Petitioner requested a conference before the Bureau of Conciliation and Mediation Services (BCMS) and on March 14, 2014, BCMS issued to petitioner a conciliation order, CMS number 259102, that sustained the August 2, 2013 suspension notice.

3. On June 11, 2014, the Division of Tax Appeals received a petition challenging the suspension notice. According to the petition, petitioner and her spouse are currently unemployed

[1] The notice also listed two income tax assessments as bills not yet subject to collection action and two other income tax assessments that were under formal or informal review.

and do not receive any unemployment benefits. According to the statement of financial condition and other information (form DTF-5) filed in support of an offer in compromise that she made to the Division, petitioner receives disbursements from certain entities totaling $87,460.00 annually, but Mr. Jacobi does not have any income. The petition asserts that the statement of financial condition shows that she and her husband are insolvent and do not have any excess monthly income to pay their unpaid taxes from prior years. According to the petition, petitioner is paying her current taxes. The petition also maintains that petitioner's tax debt is currently uncollectible. As noted, petitioner has made an offer in compromise to the Division and she has been making voluntary payments of $750.00 per month toward her outstanding tax liability. The petition notes that petitioner's offer in compromise is still pending. According to the petition, petitioner lives in a suburban area that lacks accessible public transportation. The petition also states that there are no food stores or pharmacies within walking distance of petitioner's home. The petition asserts that petitioner suffers from arthritis and needs her car to visit doctors or fill prescriptions. The petition submits that the loss of her driving privileges will have a severe effect on petitioner's life.

4. The Division filed an answer to the petition and thereafter brought its motion with an affidavit by Matthew McNamara, who is employed as an 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 reports based on the Division's internal systems. 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 § 171-v.

5. 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) equal to or greater than $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:

(1) the taxpayer is deceased;

(2) the taxpayer is in bankruptcy;

(3) the age of any assessment included in determining the cumulative amount of liability is more than 20 years from the notice and demand issue date;

(4) a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment would leave the balance of such liability below the $10,000.00 threshold for license suspension; or

(5) the taxpayer is on an active approved payment plan.

b) The "DMV Data Match" involves reviewing information on record with the Department of Motor Vehicles (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) DMclient ID,
(7) gender,
(8) date of birth,

(9) mailing address street, (10) city, (11) state, (12) 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 to confirm that the taxpayer continues to meet the criteria for suspension. 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.[2] 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

[2] Prior to license suspension, the Division performs another 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 what is presented) 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.

taken place. Depending on the event, the status of a suspension may be changed to "on-hold" or "closed."

6. A copy of the 60-day notice at issue in this matter, the consolidated statement of tax liabilities, and a payment document (form DTF-968.4) by which petitioner could remit payment against the liabilities in question, were included with Mr. McNamara's affidavit. 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 on August 2, 2013, the Division issued to petitioner a 60-day notice.

7. Under the heading "How to avoid suspension of your license," the suspension notice instructs the taxpayer to "pay the amount due or set up a payment plan to avoid suspension of your license." The notice also advises the taxpayer that a driver's license suspension referral will be provided to the DMV unless the taxpayer, within 60 days, resolves his or her debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption from suspension;[3] or protests the proposed suspension of the license by filing a request for a conciliation conference or a petition with the Division of Tax Appeals.

[3] The suspension notice identifies a child support exemption and a commercial driver's license exemption, neither of which are relevant here.

8. Petitioner's offer in compromise and accompanying statement of financial condition and other information was filed with the Division on June 3, 2014. The offer in compromise proposed $36,000.00 as a fixed and final liability, payable by 48 monthly payments of $750.00. The offer in compromise reported outstanding tax liabilities totaling $479,990.94, less payments of $49,214.93. Petitioner included an installment payment of $750.00 toward the unpaid income tax liabilities with her submission of the offer in compromise.

9. In support of her position, petitioner's representative filed an affirmation in opposition to the motion for summary determination. According to the affirmation, after her offer in compromise was pending for more than seven months, petitioner was advised that her offer had been assigned a settlement officer for review and evaluation. On June 4, 2014, the day after petitioner filed her offer in compromise, DMV issued an order of suspension or revocation advising her that her driver's license will be suspended effective June 18, 2014 because of the tax debt. On June 14, 2014, petitioner was advised that this suspension of her driver's license had been rescinded as of June 11, 2014. As of the date of the affirmation (January 21, 2015), the Division had not rejected the offer in compromise or returned any payment made under the proposed offer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Preliminarily, the Administrative Law Judge determined that, as the Division of Tax Appeals had subject matter jurisdiction over the petition, the Division's summary determination motion was the proper means by which to consider the Division's arguments in this matter. Consistent with this finding, the Administrative Law Judge also determined that the Division's motion to dismiss was improperly brought.

The Administrative Law Judge explained that Tax Law § 171-v provides for the enforcement of past-due tax liabilities through the suspension of driver's licenses. He noted that 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 DMV for action (Tax Law § 171-v [3]). He noted further that the liability set forth in the consolidated statement of tax liabilities issued to petitioner met the threshold requirement for suspension of a driver's license pursuant to Tax Law § 171-v (1).

The Administrative Law Judge rejected petitioner's contention that the Division should not have proceeded with the suspension of her license while her offer in compromise was pending. The Administrative Law Judge noted that, pursuant to Tax Law § 171-v (3) (b), a taxpayer could avoid a proposed license suspension by either fully satisfying

the liabilities or by making payment arrangements satisfactory to the Commissioner. He reasoned that, as the Commissioner had not acted on petitioner's offer in compromise, there were no payment arrangements in place that were satisfactory to the Commissioner. Hence, Tax Law § 171-v (3) (b) provided no relief to petitioner.

The Administrative Law Judge also explained that petitioner's right to challenge the notice of proposed driver's license suspension was limited to the specific grounds listed in Tax Law § 171-v (5). He determined that petitioner's personal health problems and difficult financial situation did not provide a basis to grant the petition because neither of these circumstances fall within the grounds listed in Tax Law§ 171-v (5).

Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioner contends that, by providing that a taxpayer may avoid a driver's license suspension by making payment arrangements satisfactory to the Commissioner, the statute presumes that taxpayers will be afforded due process of law in establishing such payment arrangements. Petitioner asserts that the absence of any such due process would allow the Division to deprive taxpayers

of the right to a driver's license in its sole discretion and without recourse if the Division arbitrarily or unreasonably declines to enter into a payment arrangement. Petitioner contends that this is precisely what has occurred in the present matter.

Specifically, petitioner contends that she has made a good faith effort to establish a payment arrangement satisfactory to the Commissioner by the filing of her offer in compromise. According to petitioner, however, the Division failed to properly consider her proposed payment arrangement and thus failed to provide her with a meaningful and fair opportunity to enter into such an arrangement. Petitioner asserts that, in considering whether to enter into such a payment arrangement, the Division must examine a taxpayer's assets and also the impact that a license suspension will have on the taxpayer and his or her family. Petitioner contends that, if the statute does not allow for due process as described above, then it is unconstitutional. Petitioner also contends that, by allowing the Division to make a suspension referral without affording a taxpayer a meaningful opportunity to enter into a payment arrangement, the determination effectively permits the Commissioner to enhance his bargaining position in negotiating offers in compromise, and to punish individuals who lack the means to pay their taxes.

Petitioner argues that Tax Law § 171-v (3) (b), which expressly provides that a taxpayer may avoid a license suspension by making payment arrangements

satisfactory to the Commissioner, implies that the Commissioner must provide taxpayers with a meaningful and fair procedure for entering into such arrangements and that all such applications will be considered in a reasonable, fair and just manner. Petitioner asserts that the Division has not shown that petitioner's offer in compromise application was given any such consideration and that petitioner has thus been deprived of due process in the suspension of her driver's license. Petitioner further notes that due process applies to the deprivation of a driver's license by the State. She argues that the proposed application of Tax Law § 171-v in the present matter is constitutionally deficient because it fails to provide petitioner with an opportunity to be heard with respect to the Commissioner's failure to accept her offer in compromise.

Petitioner also argues that the Administrative Law Judge's interpretation of Tax Law § 171-v, i.e., permitting the rejection of her offer in compromise application without any procedural protections to ensure against an erroneous or arbitrary deprivation, renders substantial hardship on petitioner and deprives her of property without due process.

The Division asserts that the Administrative Law Judge correctly determined that there were no payment arrangements in place that were satisfactory to the Commissioner as required under the statute. Further, as petitioner has not asserted any of the specific grounds for relief from suspension set forth in the statute, the Division contends that the

Administrative Law Judge properly granted the motion and denied the petition.

The Division asserts that an application for an offer in compromise without acceptance by the Commissioner does not constitute a payment arrangement satisfactory to the Commissioner. The Division contends that Tax Law § 171-v requires that any payment arrangement must be accepted by the Commissioner.

The Division notes that an offer in compromise seeks a reduction in liability and contends that the acceptance or rejection of such an offer is strictly within the discretion of the Commissioner. The Division asserts that the Division of Tax Appeals lacks jurisdiction to consider whether the rejection of an offer in compromise was reasonable.

The Division also argues that petitioner's claim that her due process rights have been violated should be rejected. To the contrary, the Division asserts that petitioner received notice and an opportunity to be heard with respect to the suspension notice.

OPINION

Procedurally, we agree with the conclusion of the Administrative Law Judge that the Division's motion to dismiss is not the proper vehicle for reaching a resolution of this matter and, accordingly, we decide the Division's alternative motion for

summary determination. Such a motion 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]).

As we previously noted in *Matter of United Water New York*:

> "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]) *(Matter of United Water New York, Inc.,* Tax Appeals Tribunal, April 1, 2004)."

In determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion *(see Rizk v Cohen,* 73 NY2d 98, 103 [1989]); *Museums at Stony Brook v Village of Patchogue Fire Dept.,* 146 AD2d 572 [1989], 573-74 [1989]; *see also Weiss v Garfield,* 21 AD2d 156, 158 [1964]). However, "[u]nsubstantiated allegations or assertions are insufficient to raise an issue of fact" *(Matter of Azzato,* Tax Appeals Tribunal, May 19, 2011, *citing Alvord & Swift v Muller Constr. Co.,* 46 NY2d 276 [1978]).

Tax Law § 171-v (1), which became effective March 28, 2013, authorizes "a program 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 liabilities are defined to include penalties and interest due on any tax amounts (Tax Law § 171-v [1]). The phrase "past-due tax liabilities" is specifically defined 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" (Tax Law § 171-v [1]).

There is no dispute in the present matter that the tax, penalty and interest listed in the consolidated

statement of tax liabilities as subject to collection action were past-due tax liabilities in excess of the $10,000.00 threshold. Petitioner's driver's license was therefore subject to suspension pursuant to Tax Law § 171-v.

Tax Law § 171-v (3) requires the Division to notify a taxpayer that he or she is going to be included in the driver's license suspension program by first class mail to the taxpayer's last known address no later than 60 days prior to the Division informing DMV of the taxpayer's inclusion. Tax Law § 171-v (3) also requires that the notification include: a clear statement of the past due tax liabilities, together with notice that the taxpayer's information will be provided to DMV 60 days after the mailing of the notice; a statement that the taxpayer can avoid license suspension by paying the debt or entering into a payment agreement acceptable to the Division and information as to how the taxpayer can go about this; a statement that a taxpayer can only protest the 60-day notice based upon the issues set forth in Tax Law § 171-v (5); and a statement that the suspension will remain in effect until the fixed and final liabilities are paid or the taxpayer and the Division agree to a payment arrangement (Tax Law § 171-v [3] [a] through [d]).

As evidenced by the suspension notice and the consolidated statement of tax liabilities, the Division has shown that all of the notice requirements of Tax Law § 171-v (3) have been met with respect to the

notice of proposed driver's license referral issued in this matter.

Tax Law § 171-v (5), referenced above, limits the grounds upon which a taxpayer may protest a notice of suspension as follows:

> "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."

Before addressing petitioner's arguments on exception, we note our agreement with the Administrative Law Judge's conclusion that a proposed offer in compromise, without an acceptance by the Division, does not satisfy the statutory requirement of "making payment arrangements satisfactory to the commissioner" to avoid a driver's license suspension (*see* Tax Law § 171-v [3] [b]).

Petitioner's arguments on exception are premised on her contention that the Division unreasonably failed to accept her proposed offer in compromise and that she must be given a meaningful opportunity to be heard with respect to the Division's action. Contrary to this contention, however, Tax Law

§ 171-v does not provide a process by which a taxpayer may challenge a decision by the Commissioner to reject an offer in compromise or a proposed payment arrangement. Tax Law § 171-v (5), quoted above, emphatically provides that a suspension notice may be challenged only upon the specific grounds listed in that subdivision. Plainly, none of the grounds so listed deal with the reasonableness of the Commissioner's decision to reject an offer in compromise. Furthermore, an offer in compromise of a fixed and final liability, such as petitioner's offer, is a collection activity of the Division of Taxation *(see* Tax Law § 171 [Fifteenth]; 20 NYCRR 5005.1). The Division of Tax Appeals generally lacks authority to review such an activity *(see Matter of Pavlak,* Tax Appeals Tribunal, February 12, 1998; *see also Matter of Williams,* Tax Appeals Tribunal, September 1, 1994 [Tax Appeals Tribunal "lacks statutory authority to accept or even consider" an offer in compromise]).

As we recently commented, Tax Law § 171-v is a unique tax collection statute because it involves the suspension of a taxpayer's driver's license *(see Matter of Balkin,* Tax Appeals Tribunal, February 10, 2016). As we noted in *Balkin,* a taxpayer has a property right in his or her license that would normally give rise to the due process protections of notice and a right to be heard if the State attempts to suspend that license *(see Bell v Burson,* 402 US 535, 539 [1971] [driver's licenses are important interests to the licensees because once issued, they may become essential to the "pursuit of a livelihood"). As we also noted in *Balkin,* however, a taxpayer whose license has been

suspended pursuant to Tax Law § 171-v is eligible for a restricted use driver's license *(see* Vehicle and Traffic Law § 510 [4-f] [5] [a person whose license has been suspended for failure to pay past-due tax liabilities may apply for the issuance of a restricted use licence] and Vehicle and Traffic Law § 530 [5-b] [implying that a restricted use license cannot be denied to a person whose license has been suspended for failure to pay past-due tax liabilities]). Pursuant to Vehicle and Traffic Law § 530 (1), a restricted use license may be issued if such a license is necessary for certain employment or education reasons for the person whose driver's license has been suspended, or as required for medical treatment for that person or member of his or her household. As we found in *Balkin,* these Vehicle and Traffic Law provisions preserve petitioner's right to drive for reasons of employment, education or medical treatment, and thereby ameliorate the necessity for petitioner to be provided with notice and an opportunity to be heard with respect to a denial of an offer in compromise in the context of a license suspension pursuant to Tax Law § 171-v.

Accordingly, we reject petitioner's argument that Tax Law § 171-v as applied to her in the present matter violates her right to due process. To the extent that petitioner argues that Tax Law § 171-v is unconstitutional on its face, we decline to address this issue as it is not within our jurisdiction *(Matter of Balkin).*

Finally, we note that documents submitted with petitioner's brief on exception have not been not been included in the record and have not been considered in the rendering of this decision.[4] This Tribunal has consistently held that we will not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge *(see e.g. Matter of Richard Dean,* Tax Appeals Tribunal, April 16, 2013).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mary E. Jacobi is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Mary E. Jacobi is denied; and,

4. The notice of proposed driver license suspension referral, dated August 2, 2013, is sustained.

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[4] One of the documents so submitted by petitioner is a letter dated January 26, 2015 by which the Division denied petitioner's offer in compromise. We note that, even if this document had been included in the record, it would have no impact on our decision.

DATED: Albany, New York
May 12, 2016

s/ Roberta Moseley Nero_____
Roberta Mosely Nero
President

s/ Charles H. Nesbitt_____
Charles H. Nesbitt
Commissioner

s/ James H. Tully, Jr._____
James H. Tully, Jr.
Commissioner