

New York State Bar Association

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New York State Bar Association

Tax Section

Report on Recommended Amendments to the New York State

Driver's License Suspension Program

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**Approved by the New York State Bar Association Executive Committee on
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Report on Recommended Amendments to the New York State Driver's License Suspension Program

I. INTRODUCTION

On May 5, 2016, the New York State Bar Association Tax Section published its Report No. 1344 on “New York State’s Driver’s License Suspension Program” (the “**2016 Report**”).¹ That report reviewed New York State Tax Law Section 171-v, which gives the Department of Taxation and Finance (the “**Department**”) the authority to suspend the driver’s licenses of New Yorkers who owe \$10,000 or more in New York State tax liabilities (inclusive of interest and penalties). Among the recommendations made in the 2016 Report were that amendments be made to the law to provide for (1) a hardship exemption, (2) an increase in the tax liability threshold for suspension of the tax debtor’s driver’s license from the existing threshold of \$10,000 owed in tax, interest and penalties, and (3) the grant of more discretion to the Department to allow exemptions in appropriate cases.

As summarized on the final page of the Report, this Committee reached the following conclusion:

What emerges from this back and forth is a consensus that the law is an extraordinarily powerful tool and one that must be utilized with great care. As the body required to administer the law, the Department should consider the equities of each case and utilize appropriate discretion. Likewise, the legislature should consider potential changes to the law that would mitigate the potentially harsh application of the law, such as carving out a hardship exemption and ensuring that procedural protections are put in place consistent with constitutional requirements. We also believe that the legislature should consider increasing the threshold that triggers the application of the law. Such a powerful and harsh sanction should be reserved for high value cases such as taxpayers owing a much higher amount of tax debt (*e.g.*, \$100,000) or who have engaged in egregious conduct (*e.g.*, hiding assets). We also believe that the law will be applied more equitably if the legislature gives discretion to the

¹ The principal drafters of this Report were Sherry Kraus, Josh Gewolb, Maria Jones, Stephen Land, William Funk and Yvonne Cort. Helpful comments were received from Michael Farber, Michael Schler, Deborah Paul, Kimberly Blanchard and Paul Comeau. Appreciation is expressed to Daniel Hsiung and Shervon Small of the Legal Aid Society, Low-Income Taxpayer Clinic, New York City and Prof. Elizabeth Cooper, Prof. Elizabeth Maresca, Joshua Liebman and Jessica Drake of Lincoln Square Legal Services, Inc., Legislative and Policy Advocacy Clinic, Fordham Univ. School of Law for sharing their experiences and recommendations.

Commissioner regarding whether to use license suspension in a particular case. Any law that imposes sanctions that restrict such a fundamental need as an individual's mobility must be crafted and administered with sensitivity to these considerations.²

The purpose of this Report is to provide greater specificity with respect to certain of the recommendations made in our 2016 Report, as well as to provide the statutory language we think is needed to effect the recommended amendments to the law. The background and analysis underlying those recommendations will not be repeated in this report and can be found in the 2016 Report, which is hereby incorporated by reference.

This Report makes the following recommendations:

1. The "hardship exemption" should have two separate provisions:
 - a. An automatic exemption for low-income tax debtors who receive public assistance or supplemental security income or who have income below 135% of the level specified by the Federal Poverty Income Guidelines (currently \$16,281 per year for a household of one).
 - b. A hardship exemption for any tax debtor who can demonstrate that payment of his or her past due tax liabilities will leave insufficient income to cover necessary basic living expenses.
2. The threshold for triggering license suspension should be increased from \$10,000 to \$50,000 and be indexed for inflation.
3. A tax debtor's driver's license should be subject to suspension, regardless of the amount of tax debt owed, if the Department determines that the tax debtor has taken affirmative steps to evade or avoid the collections of tax, such as by hiding assets.
4. The Department should be granted discretionary authority to waive license suspension based on the equities of the case.

II. UPDATES SINCE OUR 2016 REPORT

At the time of our 2016 Report, the New York State Driver's License Suspension Program had been highly successful in raising revenue since it began in July of 2013. The Department has advised us that as of August 1, 2017, the revenue collections from the Program have exceeded \$708 million.³

² 2016 Report at 42-43.

³ Email from Argi O'Leary, Deputy Comm'r, Civ. Enforcement Div., N.Y. St. Dep't of Tax'n and Fin. (August 15, 2017). The projections made when the law became effective in March, 2013 were \$26 million in the first fiscal year and \$6 million in each year thereafter. *See* Press Release, Gov. Cuomo (Aug. 5, 2013).

In our experience, since our 2016 Report was published, the Department has not implemented a hardship exemption administratively, perhaps because it did not believe it had the statutory authority. Rather, the response from Department representatives handling calls from tax debtors or their representatives is that the only way to avoid license suspension is (a) to pay the liability in full, (b) to enter into an installment payment agreement (“**IPA**”) to pay the full liability or (c) to resolve the liability for an amount less than the full liability due by submitting an Offer in Compromise (“**OIC**”) acceptable to the Department.⁴ This lack of an administrative hardship exemption highlights the importance of proceeding with a legislative amendment to the law to provide for a statutory hardship exemption.

III. HARDSHIP EXEMPTION

Under current law and Department procedures, a taxpayer with a \$10,000 deficiency who does not have some form of payment arrangement, such as an IPA or an OIC, can challenge a driver’s license suspension only on the following six grounds:

- (i) the individual to whom the notice was provided is not the taxpayer at issue;
- (ii) the past-due tax liabilities were satisfied;
- (iii) the taxpayer’s wages are being garnished by the Department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears;
- (iv) the taxpayer’s wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to Section 5241 of the Civil Practice Law and Rules;
- (v) the taxpayer’s driver’s license is a commercial driver’s license as defined in Section 501-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.

There is no other ground for challenge based on financial hardship. Furthermore, a tax debtor wishing to assert a challenge to the license suspension must go through the procedural complexity of filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or of filing a petition with the Division of Tax Appeals.

However, there are many instances when a tax debtor has so little income or assets that

⁴ The Commissioner’s authority to compromise a tax liability for less than full payment is granted under New York Tax Law section 171-15th. We have no information on the number of cases that the Taxpayer Rights Advocate Office may have referred to the OIC unit for special consideration as hardship cases, but this would in any event constitute *ad hoc* relief that falls short of the published and uniformly administered administrative hardship exemption that we have recommended.

he or she is not financially able to enter into an IPA or an OIC. An IPA requires full payment of the tax in monthly installments. Under an OIC, the tax debtor is seeking to resolve the liability by paying an amount less than the total amount due. Acceptance of an Offer is discretionary with the Department, and one can be rejected if it would undermine voluntary compliance or would not be in the interest of the State. To be acceptable under current standards, the tax debtor must offer, at a minimum, an amount equal to the total of (a) the net value of the tax debtor's existing assets and (b) the amount of the tax debtor's future projected income in excess of basic living expenses over a period of up to ten years.⁵ While an Offer can be paid in monthly installments not to exceed two years, an OIC can be an insurmountable challenge to many tax debtors because it requires a payment of cash up front for assets that may be illiquid or for income that will not be earned (or available) until future years. Many will find the OIC program out of reach.⁶

There are, in addition, formidable procedural obstacles for a tax debtor, especially an unrepresented one, to obtain an OIC. The OIC program requires the submission of an application (Form DTF-4.1), and a significant amount of information, including a complex financial statement (Form DTF-5), three years of tax returns, a credit report less than thirty days old, twelve months of bank statements, real property tax appraisals, and other information. The application process can be quite complex and can be daunting even for professionals.

At the federal level, a taxpayer without the requisite ability to pay would be placed in "currently-not-collectible" ("CNC") status and would not be required to begin tax payments under an IPA or OIC. However, there is no CNC status recognized by New York that allows a tax debtor to be spared entering into an IPA or an OIC to avoid loss of a driver's license.

Example 1. *W* owes more than \$10,000 to New York in tax, penalty and interest. *W* has not paid her back taxes because she is living on a social security income which barely covers her basic living expenses. She has no assets of value and no ability to borrow. In the past, she has not had to worry about a tax levy by the Department against her income or bank account because her social security income is exempt from levy under federal and New York State laws. However, she receives a notice from the Department (or the DMV) that she will have her driver's license suspended unless she makes arrangements for the payment of her New York State tax debt. *W* does not qualify for any of the six grounds to challenge the proposed license suspension. Because there is no ground to challenge the license suspension based on financial hardship,

⁵ 20 NYCRR Section 5005.1.

⁶ In addition, for tax debtors who owe trust fund taxes, such as sales taxes, the tax regulations generally require a minimum payment equal to the principal amount of the tax. 20 NYCRR Section 5005.1(b)(1).

she will have to enter into a payment agreement acceptable to the Commissioner if she is to keep her driver's license. W is unlikely to be able to resolve the liability with an OIC, either because she has no financial means to fund an OIC or because her minimum offer under the usual formula would be so low that it would be unlikely to be acceptable. Because she lives in an area of the State where she must have her driver's license for her personal needs, she feels she has no meaningful alternative other than to enter into a monthly payment arrangement under an approved IPA with the Department for payment of the full tax debt even if those monthly payments will be paid from her exempt social security income and she will not have enough left each month for food and housing.

Our 2016 Report recommended that "the legislature should consider potential changes to the law that would mitigate the potentially harsh application of the law, such as carving out a hardship exemption." We expressed the view that a hardship exemption should be allowed to tax debtors who, under threat of the loss of something as essential as a driver's license, would be compelled to enter into payment agreements with the Department to pay their tax liabilities, even if the payments would compromise their ability to pay their basic necessary living expenses. Ideally, the hardship exemption should be modeled on the collection criteria applied by the Internal Revenue Service ("IRS") in placing taxpayers in CNC status. This is the status given to federal tax debtors who have no ability to begin even a low-level payment plan or to liquidate assets to pay a federal tax debt without impairing their ability to cover basic living expenses.⁷ During the period when the tax debtor is in CNC status, there will be no IRS forced collection actions to collect the debt (*e.g.*, bank levies, wage garnishments or asset levies). As noted above, there is no requirement that the federal tax debtor first submit an OIC in order to qualify for CNC status.

New York borrowed heavily from the federal CNC standards when the New York State Offer in Compromise law was amended in 2011 to open up the OIC program to tax debtors who could demonstrate that payment in full of the liability would result in "undue economic hardship."⁸ The definition of "undue economic hardship" under the NY OIC law and regulations closely follows the standards in the federal Internal Revenue Manual ("IRM") guidelines for determining a tax debtor's ability to pay toward the tax debt owed.⁹ As a result, the "undue economic hardship" definition under the NY OIC law and regulations is a

⁷ See IRS Policy Statement 5-71, IRM §§ 1.2.14.1.14 and 5.16.1.1.

⁸ N.Y. TAX LAW § 171-15th.

⁹ Under 20 N.Y.C.R.R. Section 5005.1(b)(3), IRS Collection Financial Standards are used to determine allowable basic living expenses in the "undue economic hardship" test. In the NY OIC program, "reasonable basic living expenses" are taken into account, first, in determining whether the tax debtor qualifies for the OIC program (*i.e.*, will full collection of the tax cause the tax debtor "undue economic hardship"?) and, second, whether the offer amount is adequate (*i.e.*, the basic living expenses of the tax debtor are factored into determining the "reasonable collection potential" of the file and the "realizable value of future income").

useful reference in implementing a hardship exemption under the New York driver's license suspension law.

We believe there should be two separate aspects of any statutory hardship exemption to the driver's license suspension law as discussed further below.

A. Automatic Exemption

Under this exemption, a tax debtor would be automatically exempt from the driver's license suspension law if certain low-income criteria are met. The rationale is that people who qualify for the automatic exemption are presumed to have no present ability to pay and should be spared having to go through the administrative process of having to prove that.

We recommend adoption of an automatic exemption from the driver's license suspension law that conforms to the one used in the New York State Child support law. With an automatic exemption built into the law exempting low-income taxpayers from the License Suspension Program, the Department will be able to implement the program more efficiently (and fairly) by not wasting time or resources in trying to collect money from low-income taxpayers with no ability to pay.

Under the New York State Child Support Law,¹⁰ there is an automatic exemption from driver's license suspension for individuals who are in arrears on child support who receive public assistance or supplemental security income or who have income below 135% of the threshold provided by the Federal Poverty Income Guidelines (currently \$16,281 per year for a household of one). The Federal Poverty Income Guidelines are published by the Department of Health and Human Services each year. For 2017, the threshold poverty level income for one person is \$12,060. For a family of four in the household, it is \$24,600. The Federal Poverty Income Guidelines are used by many state and federal programs to define low-income eligibility.

Recommendation: The first prong of the statutory "hardship exemption" should automatically exempt tax debtors who receive public assistance or supplemental security income or who have incomes below 135% of the threshold provided by the Federal Poverty Income Guidelines.

B. No Present Ability to Pay

The hardship exemption should also extend to tax debtors who can demonstrate that payment of the past due New York State tax liabilities will create a financial hardship by leaving them with insufficient income to cover basic living expenses. This is the standard for CNC relief used by the IRS to relieve federal tax debtors from having to begin payment on their federal tax debt.

¹⁰ N.Y. DOM. REL. LAW § 244-b.

As stated earlier, a similar standard is now being applied under New York tax law in determining what constitutes undue economic hardship in its Offer in Compromise program.¹¹ In determining whether a New York tax debtor qualifies for the driver's license suspension hardship exemption, the OIC definition of "undue economic hardship" is a useful reference. However, the tax debtor should not be required to go through the arduous (and sometimes futile) process of submitting an OIC as a condition to being granted the driver's license hardship exemption.¹²

Because few tax debtors qualifying for the hardship exemption will have the financial means to retain professional help, the process of applying for a hardship exemption should be made as simple and streamlined as possible. A taxpayer should not be required to file an appeal under Tax Law Section 171-v (5) in order to obtain the hardship exemption. The law should allow Department representatives to conduct the evaluation and to grant the hardship exemption at the first level of contact with the tax debtor. However, if the taxpayer's request for a hardship exemption is denied, the tax debtor should be given a right to appeal under NY Tax Law § 171-v (5).

Recommendation: The second prong of the hardship exemption should extend relief to tax debtors who can demonstrate that payment of past due New York State tax liabilities will create hardship for in covering necessary living expenses.

IV. HIGHER THRESHOLD

We concluded in the 2016 Report that the New York State legislature should increase the threshold that triggers the application of the license suspension law. We recommended that such a powerful and harsh sanction as loss of one's driver's license should be reserved for high-value cases (*e.g.*, \$100,000 in tax debt) or taxpayers who have engaged in egregious conduct (*e.g.*, by hiding assets). Because the current \$10,000 tax liability threshold includes not only the taxes owed, but also interest and penalties, the present license suspension law potentially applies to very "low-value" cases where the tax debtor may originally have owed only a small amount of tax which can grow over the collection period to an amount in excess of the \$10,000 threshold.¹³

In comparison, California, which was one of the first states to begin using license suspension as an enforcement tool to collect tax debts, suspends the license of only the 500 largest tax debtors who owe tax delinquencies in excess of \$100,000.¹⁴

Another comparison is the 2015 federal tax law that authorizes the revocation or denial

¹¹ See note 9 *supra* and accompanying text.

¹² See note 6 *supra* and accompanying text.

¹³ The collection period in New York is twenty years. N.Y. TAX LAW § 174-b.

¹⁴ CAL. BUS. & PROF. CODE § 494.5(a)(2).

of a passport to a tax debtor who has become “seriously delinquent” in unpaid federal taxes.¹⁵ Under that law, the dollar threshold to trigger this “non-monetary” sanction is a tax liability greater than

\$50,000 (inclusive of interest and penalties) which is indexed for inflation.

Recommendation: We recommend a change in the law to increase the threshold from

\$10,000 to \$50,000 to conform the threshold to that applicable in the federal passport revocation law. Consistent with the provisions of the federal law, this threshold should be indexed for inflation. This increase in the threshold will be a step toward providing the recommended relief from the harsh impact of the law on tax debtors who owe lower levels of tax debt. However, we also recommend that the law be changed to allow for suspension of a tax debtor’s driver’s license, regardless of the amount of tax debt owed, if the Department determines that the tax debtor has taken affirmative steps to evade or avoid the collection of tax, such as by hiding assets.

V. GRANT OF DISCRETIONARY AUTHORITY

The IRS is authorized to enter into an IPA with a tax debtor even if the monthly payments under the IPA will not fully pay the total liability within the remaining collection period.

AUTHORIZATION OF AGREEMENTS. The Secretary is authorized to enter into written agreements with any taxpayer under which such taxpayer is allowed to make payments on any tax in installment payments if the Secretary determines that such agreement will facilitate full *or partial* collection of such liability.¹⁶

The IRS procedures for administering partial payment IPAs are found in IRM Section 5.14.2.1.

In contrast, New York Tax Law Section 3010(a) does not expressly authorize “partial payment” IPAs:

AUTHORIZATION OF AGREEMENTS. The commissioner is authorized to enter into written agreements with any taxpayer under which such taxpayer is allowed to satisfy liability for payment of any tax (including any interest, penalty or addition to tax) in installment payments if the commissioner determines that such agreement will facilitate collection of such liability.

¹⁵ Internal Revenue Code (“Code”) § 7345.

¹⁶ Code section 6159(a) (emphasis added).

Because of this lack of express authorization for “partial payment” IPAs, the Department has long taken the position that it cannot approve an IPA unless it will result in the full payment of the tax over a period not exceeding the remaining collection period under the statute. Moreover, monthly payments are required without regard to whether it will render the tax debtor unable to pay his or her basic living expenses.¹⁷

This raises the question of how to deal with driver’s license suspensions for tax debtors who make too much income to fall within the two hardship exemptions discussed above,¹⁸ but who make too little income to maintain a “full payment” IPA without impairing their ability to pay their basic living expenses. We believe that these tax debtors should be eligible to request relief from license suspension in appropriate cases. This is the reason we concluded in the 2016 Report that:

We also believe that the law will be applied more equitably if the legislature gives discretion to the Commissioner regarding whether to use license suspension in a particular case. Any law that imposes sanctions that restrict such a fundamental need as an individual’s mobility must be crafted and administered with sensitivity to these considerations.¹⁹

Consider this example: T lives and works in upstate New York where there are limited options for public transportation. T has an elderly mother with medical disabilities who lives 30 miles away and who depends upon T to assist her with her personal needs (*e.g.*, grocery shopping, errands) several times a week in order to continue living in her home. T owes more than \$10,000 in NY State tax liabilities and has received a notice of pending driver’s license suspension unless T resolves the liability with a payment arrangement acceptable to the Commissioner. T contacts a Department representative to request a stop to the driver’s license suspension and offers to begin a payment plan of \$200 per month toward payment of the liabilities, which is the maximum amount that T can pay monthly without compromising his ability to pay basic living expenses. The Department representative determines, however, that T would need to pay at least \$800 per month to meet the current standards for approval of an IPA that will full pay the liability. We believe this is a situation where the Department should be permitted to waive T’s driver’s license suspension in exchange for T’s payment of \$200 per month, based on the equities of the case.

In the above example, we believe that the Department currently has the authority to approve T’s \$200 per month payment agreement even though it does not meet the Department’s requirements for a “full payment” plan. This is because the wording of Tax Law

¹⁷ For a fuller discussion of the Installment Payment Program in New York and our recommendations for change, see TAX SECTION, N.Y. ST. BAR. ASS’N, *Report on New York State Installment Payment Agreements*, Rep. No. 1294 (Nov. 26, 2013).

¹⁸ See Parts [III.A](#) and [III.B](#) *supra*.

¹⁹ 2016 Report at 42.

Section 171-v allows the Department to stop the license suspension process if the taxpayer enters into a “payment arrangement acceptable to the Commissioner.”²⁰ This language grants somewhat more flexibility to the Department than the IPA provisions of Tax Law Section 3010(a) and arguably would allow the Department to enter into a “partial payment” agreement to stop a license suspension from proceeding against the tax debtor. However, if the Department is not entering into these “partial payment” agreements to stop license suspensions because it is concerned that it lacks sufficient authority, any reluctance the Department may have in granting this relief would be removed if Section 171-v were amended to give the Department discretionary authority to stop a driver’s license suspension in an appropriate case. This could eliminate the question whether the “payment arrangement” satisfies the “full payment” criterion of Section 3010(a).

It is not clear that such a “payment arrangement” would protect T from other collection enforcement actions by the Department, *e.g.*, a bank levy or a wage garnishment.²¹ In the past, only an approved IPA under Section 3010(a), a voluntary income execution or a wage garnishment would have been considered a payment arrangement sufficient to place a hold on forced collection action. It is not clear that a payment arrangement entered into under Section 171-v (3)(b), which would be sufficient to stop suspension of the tax debtor’s driver’s license, but which does not meet the criteria for approval under Section 3010(a), would result in a hold on future collection action by the Department. While beyond the scope of this Report, it is likely that an amendment to Section 3010(a) is needed expressly to allow the Commissioner to accept “partial payment” IPAs to assure that T’s \$200 per month payment arrangement under section 171-v(3)(b) in the example above will have the effect of placing a hold on other forms of future collection action against T.

Similarly, it is not clear whether a tax debtor’s qualification for the hardship exemption to stop a driver’s license suspension under the recommended changes to the law discussed in Parts [III.A](#) and [B](#) would protect the debtor from other forms of collection action by the Department to enforce the tax debt, including bank account/asset levies or wage garnishments, without an amendment to Tax Law Section 3010(a) to authorize the Commissioner to place tax debtors in CNC status.

While the above statutory changes to Section 3010(a) were recommended in an earlier Tax Section report,²² our recommendations in this report are limited to the statutory amendments needed to provide for relief under the driver’s license suspension law.

Recommendation: We recommend a change in the law to grant discretionary authority to the Department to waive license suspension based on the equities of the case.

²⁰ See N.Y. TAX LAW §§ 171-v(2)(b) and 171-v(3)(b).

²¹ N.Y. TAX LAW § 692.

²² See note 17 *supra*.

