New York State Bar Association
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Tax Section

Report on New York State's Driver's License Suspension Program

Tax #2
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The Tax Section of the New York State Bar Association is pleased to submit this report which comments on New York State Tax Law Section 171-v. This law adds a new enforcement tool to the New York State Department of Taxation and Finance (the "**Department**") for collection of delinquent New York State tax liabilities by authorizing the suspension of a tax debtor's driver's license if arrangements are not made by the tax debtor to pay the delinquent taxes. Any individual whose tax liability is $10,000 or greater is subject to revocation of his or her driver's license, regardless of the financial condition of the taxpayer. There is no hardship exemption.

The Report analyzes whether the law (a) satisfies federal or New York State constitutional provisions, (b) is in conflict with longstanding federal and New York State protections to debtors, and (c) should include a hardship exemption. The Report concludes that the Driver's License Suspension Program has the potential for conflict with (or effectively undermining) longstanding federal and state protections which place limits on collections by the Department against New York tax debtors. This is because the law provides the Department a new and potent tool to force taxpayers into payment arrangements to pay their tax debts from assets and income sources that would not otherwise be available to the Department for levy. Without a hardship exemption, there is no guidance on how the law should be administered by the Department to avoid conflict with longstanding debtor protection laws to avoid overly harsh outcomes, especially as applied to indigent taxpayers. For example, some tax debtors may be earning so little in wages or have so little income or assets that they are not financially able to enter into even a low level installment payment agreement or a low sum Offer in Compromise to pay their tax liabilities without compromising their ability to pay basic living expenses. Nonetheless, the program can be used to force payments of tax debt from such indigent individuals under threat of loss of their drivers licenses even though there are laws in place that would protect them from tax levy on their income and assets.

These cases demonstrate that the license suspension law can be applied in a way that allows the Department to make an end-run around longstanding debtor protection laws. The Report concludes that the driver's license suspension law is in conflict with longstanding debtor protection laws when applied to taxpayers who will experience financial hardship if required to enter into a payment agreement with the Department for the payment of their tax debts.

To avoid conflict with these debtor protection laws, the Report recommends that the Department implement an administrative exemption from Section 171-v to provide hardship relief to tax debtors who would suffer financial hardship if required to enter into an Installment Payment Agreement (or Offer in Compromise) to pay the tax liability. Given the high stakes of losing one's driver's license if arrangements are not made to resolve the New York tax debt, focus needs to be placed on implementing both a hardship exemption in the Driver's License Suspension Program and a "currently non-collectible" status (similar to the one under federal tax law) for taxpayers where even a low level installment payment plan (or small Offer in Compromise) would create a financial hardship. These programs need objective standards to ensure reliable and uniform application at all levels of the Department.

As to legislative action, the Report recommends that the law be amended to include an expressly stated hardship exemption. The Report also concludes that to the extent the law applies to tax debts preceding its enactment, it may not pass constitutional muster if challenged and the reviewing court adopts the reasoning applied in the recent California federal district court case of *Berjikian v. Franchise Tax Board*, 93 F. Supp. 3d 1151 (C.D. Cal. 2015), which rules on California's drivers license suspension law. If the New York State Legislature desires to preemptively amend the law to address the constitutional issues raised in *Berjikian*, the law should be amended either by: (1) making it apply prospectively to tax liabilities that become final after the effective date of the law or (2) adding a hearing right to challenge any pre-enactment tax assessments on which the drivers license suspension is based.

What is notable from this Report is that this 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 is encouraged to 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 more 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.

We welcome the opportunity to serve as a resource for you on these recommended administrative procedures and proposed legislation.

Section Chair: Stephen B. Land, Esq.

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I. INTRODUCTION

This Report reviews New York State Tax Law Section 171-v, which adds a new enforcement tool to the State of New York for collection of delinquent New York State tax liabilities.[1] The law authorizes the suspension of a tax debtor's driver's license if arrangements are not made by the tax debtor to pay the delinquent taxes. The Report analyzes whether the law (a) satisfies federal or New York State constitutional provisions, (b) is consistent with longstanding federal and New York State protections to debtors, and (c) should include a hardship exemption.

The Report makes the following recommendations:

1. The New York State Department of Taxation and Finance (the "**Department**") should develop procedures to identify those tax debtors who would experience financial hardship if required to make payment on their New York State tax debts, refrain from referring these debtors for suspension of their driver's licenses, and permit debtors to challenge a license suspension on the basis of financial hardship.

2. If the Department believes that current law does not authorize it to provide this relief, then Section 171-v should be amended to add a hardship exception, which would exempt tax debtors who would experience a financial hardship if required to make payment on their New York State tax debts.

[1] The principal drafters of this Report were Sherry Kraus, Josh Gewolb, Jack Trachtenberg, William Funk, Maria Jones, Stephen Land, Yvonne Cort, Arthur Rosen and Paul Comeau, with substantial contributions from Vincent Valente, Irwin Slomka, Arnold Kapiloff. Helpful comments were received from Michael Schler, Peter Faber, Eric Sloan, Michael Farber, David Schizer, Andrew Solomon, Andrew Walker, Elizabeth Kessenides, Richard Reinhold, William Alexander, David Miller, Eliot Pisem, Robert Cassanos, Bryan Skarlatos, Peter Connors, Deborah Paul, David Sicular, Andrew Braiterman, Megan Brackney, Prof. Richard Briffault and Prof. Thomas Merrill. This report reflects solely the views of the Tax Section of the New York State Bar Association and not those of the NYSBA Executive Committee or the House of Delegates.

3. To avoid litigation over the constitutionality of the retroactive application of the suspension law, consideration should be given to (1) amending the effective date of Section 171-v so that it applies prospectively to tax liabilities that become final after the effective date of the law or (2) granting a hearing right to challenge any pre-enactment tax assessments on which the drivers license suspension is based.

II. SUMMARY OF LAW

Effective March 28, 2013, New York State Tax Law Section 171-v requires the Department and the Department of Motor Vehicles ("**DMV**") to cooperate to develop procedures to enforce the collection of delinquent New York State tax liabilities through the suspension of a taxpayer's driver's license (the "**Driver's License Suspension Program**"). To identify taxpayers who may be subject to the Driver's License Suspension Program, the Department internally sets the following selection criteria: the taxpayer must have an outstanding cumulative balance of tax, penalty and interest of $10,000 or more; the age of the assessment used to determine the cumulative total must be less than 20 years from the notice and demand issue date; all cases in formal or informal protest and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are excluded; and any taxpayer with a "taxpayer deceased" record on his or her collection case is excluded.[2] Once the Department determines that the taxpayer meets these criteria and has a qualifying driver's license, that taxpayer is put into the license suspension process.

A. Pre-Suspension Procedures

Once the taxpayer is placed in the license suspension process, a 60-day notice of proposed driver license suspension will be issued by the Department to the taxpayer by regular U.S. mail. That notice informs the taxpayer that he can avoid a referral to the DMV for license suspension by paying the debt or by entering into a payment agreement acceptable to the Department. The 60-day notice also informs the taxpayer that he or she can file a protest of the license suspension by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or by filing a petition with the Division of Tax Appeals within 60 days from the date of the notice.[3] The notice in-

[2] *See* Matter of Faupel, NYS Div. of Tax Appeals, DTA No. 826255 (Apr. 16. 2015) for this detailed description of the Departmental internal procedures in implementing the Driver's License Suspension Program.

[3] This is the same appeals process in place for protesting a tax deficiency before final assessment.

forms the taxpayer that any challenge to the suspension is limited to 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 (the "**CPLR**");

(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.[4]

Notably, there is no ground for challenge based on financial hardship.[5] While a number of appeals have been brought in New York against the suspensions pursuant to this process, no taxpayer has yet succeeded in such an appeal and almost all of the appeals have been dismissed because of the restrictions on challenges to the suspension.[6]

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), the case will be electronically referred by the Department to the DMV for license suspension. At that point, the DMV sends a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the

[4] N.Y. TAX LAW § 171-v(5)

[5] *See* Matter of Khan, NYS Div. of Tax Appeals, DTA No. 8270941 (Jan. 14, 2016).

[6] *See* Matter of Juan Kip Lenior, NYS Div. of Tax Appeals, DTA No. 826389 (Mar. 18, 2016); Matter of Balkin, NYS Div. of Tax Appeals, DTA No. 826366 (Feb. 10, 2016); Matter of Faupel, note 2 *supra;* Matter of Rivas, NYS Div. of Tax Appeals, DTA No. 825897 (Nov. 13, 2014); Matter of Callahan, NYS Div. of Tax Appeals, DTA No. 825992 (Apr. 2, 2015); Matter of Muniz, NYS Div. of Tax Appeals, DTA No. 826347 (Apr. 2, 2015); Matter of Dakar, NYS Div. of Tax Appeals, DTA No. 826137 (Apr. 2, 2015); Matter of DeMaio, NYS Div. of Tax Appeals, DTA No. 825913 (Apr. 2, 2015); Matter of Lappner, NYS Div. of Tax Appeals, DTA No. 825836 (Dec. 4, 2014).

taxpayer, and the DMV does not receive a cancellation record from the Department, the taxpayer's license will be marked as suspended on the DMV database. Once the license suspension has occurred, the suspension will remain in effect until the liabilities are paid or a satisfactory payment arrangement with the Commissioner has been reached.

Under DMV rules, any taxpayer who drives while his or her license is suspended may be subject to arrest and penalties. A taxpayer may apply for a restricted license, but such a license permits the individual to travel only to and from work, school, medical appointments, the DMV and childcare related to employment or education.[7] The taxpayer must return directly home.[8]

B. Post-Suspension Procedures

Pursuant to the Department's internal procedures, there are monitoring events after a license suspension that can update the status of the suspension. Depending upon the event, the status of a suspension may be changed to "on-hold" or "closed." A change to "on hold" status can result from events such as the filing of a protest, a bankruptcy filing or the creation and approval of an installment payment agreement. Where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Department for suspension until resolution of the "on-hold" status. However, the 60-day notice of proposed driver license suspension referral would remain in the Department's system. If the status is changed to "closed," the 60-day notice of proposed driver license suspension referral is canceled.

Once the tax debtor has received the notice from DMV regarding the pending suspension of the driver's license or that the driver's license has been suspended, the only remedies available to the tax debtor are applying for a restricted-use license (as described above) or contacting the Department and then negotiating a payment arrangement "satisfactory to the Commissioner." Once either of those two remedies has been completed, the Department will contact the DMV to restore the tax debtor's driver's license.

[7] This is permitted by Section 530 of the Vehicle and Traffic Law. Any individual who has had his or her license suspended pursuant to Section 510 of the Vehicle and Traffic Law may apply for a restricted use license. Section 510 lists several reasons that a license may be suspended, including failure to pay past-due tax liabilities (Vehicle and Traffic Law § 510 [4] [f]).

[8] N.Y. VEHICLE & TRAFFIC LAW § 530; *See also* Press Release, Governor Cuomo Announces Initiative to Suspend Driver Licenses of Tax Delinquents Who Owe More Than $10,000 in Back Taxes (Aug. 5, 2013).

C. Success of Program

New York's Driver's License Suspension Program has been highly successful in raising revenue since it began in July of 2013. The Department has reported that as of December 8, 2015, the revenue collections from the Program have exceeded $288 million.[9] This far exceeds the projections made when the law became effective in March, 2013 of $26 million in the first fiscal year and $6 million in each year thereafter.[10]

The program has proved to be so successful that Governor Cuomo's 2015-2016 New York State Executive Budget proposed two expansions to the Program: (1) that the tax liability threshold for suspension of the tax debtor's driver's license be lowered from $10,000 to $5,000, and (2) that the Program apply to denial or suspension of professional licenses (as well as drivers licenses) whereby applicants for a professional or business license would be required to pay their past-due tax liabilities (or enter into a payment agreement with the Department) before the license is issued or renewed. Neither of these proposals was enacted.[11]

III. BACKGROUND

A. New York State Tax Collections

While the Driver's License Suspension Program adds a new tool to assist the State in tax collections, it does not grant the Department additional collection powers in the form of expanded lien rights to secure its interest against other creditors or expanded levy powers to seize additional property or income to enforce collection of the tax debt. Instead, the Program takes the form of a "non-monetary sanction" to help enforce collection of tax debts. This type of sanction has become increasingly popular in the United States over the last several years and has proven to be an effective method for getting debtors to pay their debts in a wide range of situations.[12]

However, the Driver's License Suspension Program was enacted in 2013 against a backdrop of longstanding federal and New York State laws that protect debtors from certain collections by both public and private creditors. These debtor protection laws are generally based on public policy. They are framed mostly in the form of restrictions upon

[9] Argi O'Leary, Deputy Comm'r, Civ. Enforcement Div., N.Y. St. Dep't of Tax'n and Fin. (Dec. 15, 2015).

[10] *See* Press Release, Governor Cuomo (Aug. 5, 2013), note 8 *supra*.

[11] *See* NY Senate-Assembly Bill S2009, A3009, Part EE and Part JJ.

[12] *See* discussion of non-monetary sanctions used to enforce child support payments in Part III.D.1 below.

collections by creditors against certain assets and income of a debtor. In addition, there are federal and state internal administrative restrictions that have been in place for years to limit collections against certain tax debtors to avoid overly harsh results from a tax lien or tax levy if collection (or payment) of the tax debts would make the taxpayer unable to pay basic living expenses. The next Part reviews these protections in detail in order to give context to our recommendations below regarding the Driver's License Suspension Program.

B. Restraints on Collection

1. Federal

Debtors have long been protected from excessive collection practices by both public and private creditors under a number of federal laws. Federal law limits the amounts that states may allow creditors to collect on debts. While State law may be *more restrictive* in allowing collection of debts, it may *not exceed* that allowed under federal law. The federal "Consumer Protection Act" established national limits for wage garnishments and restricts any garnishment against "earned income" to 25% of disposable earnings.[13] This 25% is an aggregate sum, representing the maximum part of an individual's income which may be subject to garnishment from any and all creditors combined. Notably, this restriction specifically excludes actions to collect federal and state taxes from its limits.[14] Accordingly, both the IRS and the Department are exempt from these restrictions on wage garnishments. However, as more fully discussed in the next Part, the New York State Legislature has chosen to extend these garnishment restrictions to the Department in its tax collections.

In addition, there are federal law restrictions under the provisions of the Employee Retirement Income Security Act of 1974 ("**ERISA**") prohibiting creditor collections against qualified retirement plans, such as profit-sharing plans, money purchase pension plans, 401(k) plans or other similar employer-sponsored plans. In *Patterson v. Shumate*,[15] the United States Supreme Court confirmed that the "anti-alienation" provisions of ERISA represent enforceable restrictions upon the rights of creditors to reach an individual's interest in a qualified retirement plan and that these plans cannot be used by creditors to satisfy judgments. However, individual retirement accounts (IRAs) do not enjoy the same unlimited protection under ERISA.

[13] 15 U.S.C. § 1673.

[14] *Id.*

[15] 504 U.S. 753 (1992).

2. New York State

The CPLR establishes limits on creditor rights of collection in New York. While state law cannot restrict the rights of the IRS to collect federal tax debt (which are governed by federal law only), the CPLR restrictions apply to the Department in its collection of state tax debts in the same manner as applicable to private creditors. Article 52 of the CPLR sets forth the New York State law limitations on creditor enforcement of money judgments. All creditors, including the Department, are limited in income executions (wage garnishments) to the lesser of 10 percent of "earnings" or twenty five percent of "disposable earnings" provided the taxpayer meets a certain income threshold.[16] As under the federal law restrictions, this limitation is an aggregate sum, representing the maximum part of an individual's income which may be subject to garnishment from any and all creditors combined. The CPLR defines "earnings" as "compensation paid or payable for personal services whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program."[17] "Earnings" are interpreted narrowly under the law, and do not include self-employment income. As a result, the Department commonly levies without limitation on the gross earnings or receivables of a self-employed individual even if those earnings are derived from personal services. "Disposable earnings" are defined as that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.[18]

There is also a restriction that protects against garnishment of low wage earners. Under Section 5231 of the CPLR, only weekly earnings in excess of thirty times the federal minimum hourly wage may be garnished. Since the current federal minimum wage is $7.25 per hour, creditors cannot reduce a debtor's disposable earnings to an amount below $217.50 per week.

Section 5205 of the CPLR protects New York debtors from creditor collections against self-created trusts, including IRAs. Section 3212 of New York State Insurance Law protects certain life insurance proceeds and annuity contracts from the claims of creditors.[19]

Under current federal and state debtor protection laws, the Department cannot reach by levy to pay tax debts a tax debtor's social security payments, public assistance

[16] CPLR §§ 5201(b), 5205(d)(2).

[17] CPLR § 5231(c)(i).

[18] *Id.*

[19] Certain personal assets, such as clothing and furniture are also exempt from levy. CPLR § 5205(a)(5). For other exempt assets, see N.Y. DEBTOR CREDITOR LAW § 283.

payments, veteran's benefits, unemployment insurance, child support and workers compensation payments. If the Department levies a bank account containing exempt funds, there is a procedure available for the owner of the account to claim an exemption from levy for the exempt funds.[20]

C. Taxpayer Relief Programs

In addition to the above federal and New York State laws that restrict creditor collections for payment of debt, there are a number of relief provisions—some statutory and some administrative—which are intended to protect tax debtors from overly harsh remedies in the collection of a tax debt. Most of these relief provisions are based on public policy decisions that recognize that taxpayers who have an outstanding tax liability do not always have the means to pay the liability in full. These policies reflect that it is in the interests of both the tax authorities and the taxpayer to provide relief programs under which the taxpayer can reduce the amount due (or the amount paid) to an amount the taxpayer can afford to pay.

1. Federal

At the federal level, taxpayer relief programs include the Offer in Compromise ("**OIC**") program (which allows qualifying taxpayers to resolve their tax liability for something less than full payment)[21] and the Installment Payment Agreement ("**IPA**") program[22] whereby the IRS works with the taxpayer to determine a monthly payment plan that will pay off the tax liability over time. The federal IPA program is administered pursuant to guidelines in the Internal Revenue Manual, which are intended to ensure that the taxpayer's need to pay basic living expenses is factored into the calculation of the expected monthly tax payments. Another important part of the IPA program is the administrative ability of the IRS to place tax debtors in "currently non-collectible" ("**CNC**") status if the taxpayer cannot afford to make any payments toward the tax debt because doing so would result in his or her being unable to pay basic living expenses.[23] This recognizes that some taxpayers are experiencing such severe financial hardship that they cannot carry even a low level IPA. During the period when the taxpayer is in CNC status, he or she is protected from IRS forced collections against assets or income.

[20] *See* CPLR § 5222-a.

[21] I.R.C. § 7122

[22] I.R.C. § 6159

[23] Internal Revenue Manual § 5.16.1.

The federal tax system also provides administrative appeal rights before the IRS can proceed with collection actions.[24] These appeal rights ensure that taxpayers will have an opportunity to contest the appropriateness of an IRS lien, levy or seizure before it occurs. There is also a federal Taxpayer Advocate office to assist taxpayers in resolving problems with the IRS.[25]

2. New York State

New York State faces greater restrictions in its ability to collect against the assets and income of a tax debtor than faced by the IRS in federal tax collections.[26] However, there are also fewer opportunities for taxpayers to obtain relief from overwhelming tax liabilities at the state level than at the federal level. While New York State has offered tax amnesties from time to time and has developed a successful voluntary disclosure and compliance program, the programs available at the state level offer less potential relief to taxpayers than those available at the federal level.

New York State has its own version of an OIC program so that a qualifying taxpayer can compromise his or her state tax debt for less than the total liability. That program differs from the federal program in the calculation of the minimum amount required to compromise the taxes. There have been significant improvements to the New York OIC program over the last several years. Many of the changes were recommended by the Tax Section in earlier reports.[27]

Also, in recent years, the State added a Taxpayer Rights Advocate to the Department to assist in taxpayer disputes. While this was a major step in the right direction, the Advocate is a member of the Department and has less independence and authority than the office of the Taxpayer Advocate at the federal level. Moreover, the authority of the Advocate's office has been limited in recent years compared to when the office was first established.

[24] *See* I.R.C. §§ 6320 and 6330 for Collection Due Process Appeals ("**CDP**") and I.R.C. § 7123(a) for Collection Appeals Program ("**CAP**") rights.

[25] I.R.C. § 7803(c)(2)(a).

[26] *See* discussion of the differences between the assets and income available for State and federal tax collections, *supra* Part III.B.

[27] *See* N.Y. ST. BA. ASS'N TAX SEC., *Report on Proposed Regulations for New York State Offers in Compromise,* Report No. 913 (Oct. 2, 1997); *Report on Conformity of Federal, State and City Offers in Compromise Statutes,* Report No. 983 (Nov. 29, 2000); *Report on Draft Regulations for New York State Offers in Compromise,* Report No. 1251 (Dec. 19, 2011) and *Report on Proposed Changes to New York State Statute of Limitations on Collection of Unpaid Tax Liabilities,* Report No. 1203 (Jan. 29, 2010).

In contrast to the federal provisions, there are no administrative appeal rights prior to lien or levy action by the Department equivalent to the Collection Due Process and Collection Appeals Program available at the IRS.

Most relevant to the current subject of this report are the differences in the federal and New York State IPA programs. In most instances, a taxpayer seeking to set up an IPA with the Department for payment of a New York tax debt over time will be expected to agree to monthly payments that will fully pay the amount due over the shortest period of time possible. While some flexibility is given to Department staff to take into account the taxpayer's ability to pay, there is no law or published Departmental policy that takes into account the taxpayer's basic monthly living expenses in determining the appropriate monthly payment that will be required. As a result, a taxpayer may be required under a New York IPA to pay a monthly amount toward the taxes owed that will leave him or her without adequate means to cover basic living expenses. While we are aware of outcomes where a sympathetic Department collection agent will give a taxpayer a break by holding off on collections for a while, there is nothing that currently guides the Department to allow this leniency (or to identify when this leniency is warranted) on a broad policy basis or based on any objective criteria. Often the best a collection agent can do is to arrange a low level payment IPA in the initial years, followed by very high level payments in later years. Some taxpayers may be told that they must full pay their taxes in three years and other taxpayers may be told that they have five years or longer.[28] The lack of objective criteria and published guidelines in New York contributes to a lack of predictability, uniformity and transparency in the application of the New York IPA program. In fact, the only instances where the Department can by statute and published regulations take into account the taxpayers basic living expenses as a factor is in the Offer in Compromise (OIC) program[29] and under the Taxpayer Bill of Rights in deciding whether to release a levy.[30]

[28] There is the further question of whether the Department has the authority to enter into a "partial payment" installment payment agreement with the taxpayer where the payment plan will not fully pay all taxes owed over the remaining collection statute of limitations. *See* N.Y. ST. BA. ASS'N TAX SEC., *Report on New York State Installment Payment Agreements*, Report No. 1294 (Nov. 26, 2013).

[29] In the 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").

[30] *See* N.Y. TAX LAW § 3022 (a)(1)(E).

Another important difference in the federal and New York State IPA programs is the lack in New York State of any statute or published administrative policy that requires (or allows) the Department to place a tax debtor into CNC status when requiring the tax debtor to make payments under an IPA would result in the taxpayer being unable to pay basic living expenses. As stated above, unlike the federal IPA program, the calculation of the New York IPA monthly payment may not take into account an allowance for the taxpayer's monthly basic living expenses. We are told that the Department has from time to time established internal policies to achieve the outcome of granting CNC status to indigent taxpayers. For example, at one point a few years ago, the Department made a concerted effort to move away from forcing taxpayers who could not meet basic living expenses to nonetheless get on a small (*e.g.*, $5/10/20) payment plan simply to collect revenue or be able to "close" the case on the basis of there being an IPA in place. Even though these small payments would do nothing to meaningfully bring down the debt, this was an attempt by the Department to implement something like the IRS's "currently non-collectible" status to give relief to taxpayers struggling to make ends meet. So, while the Department did not have an official/statutory CNC status, it did conclude that it had the capability, administratively, to move such cases into a "do not collect" inventory. It is our understanding that some version of this program is still in place.

While the Department has from time to time attempted to implement broader relief policies for indigent taxpayers, these policies, when they are in place, are either not known to taxpayers and practitioners or are known only to sophisticated tax practitioners. This is because these internal policies are rarely published in guidelines, included on the Department official website or disseminated through Department public outreach programs to inform taxpayers and practitioners. The lack of published guidelines also contributes to a lack of uniformity in application of these policies among Department staff.

In light of the new law that now requires that tax debtors enter into an agreement "satisfactory to the Commissioner" for payment of the tax debt or risk losing their drivers licenses, there is a need for the New York IPA and OIC programs to operate with fairness, consistency and transparency.

D. Non-Monetary Sanctions to Promote Debt Payments

1. State Law License Suspension Programs

(a) Child Support laws

Non-monetary sanctions, such as suspension of a driver's license or business license, have existed for many years to aid in the collection of child support payments.

Every state has a statutory or administrative provision that restricts, suspends, or revokes licenses for an individual's failure to pay child support. Many states, such as New York, provide temporary or restricted licenses if suspension would result in undue hardship on the obligor, *e.g.*, traveling to and from work. Federal law requires that appropriate notice be given to those about to have their license suspended. Those notice procedures vary among the states.[31]

The child support laws have provided a model in determining the effectiveness of license suspension programs to compel payment of debts. The child support license suspension laws have also demonstrated the complexity and unintended consequences of these sanctions, including whether the laws may be counterproductive when the debtor then has trouble finding and keeping a job without a driver's license. Other adverse consequences to the debtor are increased vehicle insurance costs as a result of the license suspension. Some states, including New York, have determined that there should be a hardship exemption from the child support license suspension laws if a debtor is unemployed or is a low-wage worker and is financially unable to pay the debt, as discussed in the next Part.

(b) New York State Child Support Law

New York State has for years used the threat of driver's license suspension as a tool to compel enforcement of child support obligations. Subsection (a) of Article 13 Section 244-b of New York Domestic Relations Law provides that the court may order the DMV to suspend driving privileges of an individual who is four months in arrears of child support payments. It also provides that upon payment or partial payment of arrears the court may order the DMV to terminate suspension. It includes a calculation for determining whether someone is in arrears for four months.

Subsection (b) of the law provides that the court may order the DMV to suspend driving privileges if, after receiving appropriate notice, the individual fails to comply with a summons, subpoena or warrant relating to a paternity or child support proceeding. The court may subsequently order a termination of the license suspension if it is satisfied the individual has fully complied with any summonses, subpoenas and warrants.

Unlike the recently enacted Tax Law Section 171-v for license suspension in the collection of tax debt, the child support laws include a hardship exemption for low income individuals.[32] The exemption provides that the suspension program *does not apply* to individuals who receive public assistance or supplemental security income, individuals

[31] *See* N.Y. DOM. REL. LAW § 244(b).

[32] *Id.*

whose income falls under 135% of the poverty income guideline for a single person, and individuals whose income falls under 135% of the poverty income guideline after child support payment.

2. Tax Collection Laws

Building on the success of the child support non-monetary sanctions (*e.g.,* driver's license suspension), several states have begun to employ this type of sanction to assist in the collection of unpaid tax debts. New York is not the first state to pass a law requiring the suspension of a driver's license to induce tax debtors to pay their tax debts. Our research has identified at least three other states with similar laws that permit suspension of driver's licenses to help in collections of tax liabilities: California, Louisiana and Massachusetts.

California. California's law is somewhat unique. At least twice per year, the California Franchise Tax Board publishes a list of the 500 largest tax debtors owing tax delinquencies in excess of $100,000.[33] The California Department of Motor Vehicles is required to suspend the driver's license of any individual included on this list.[34] Individuals included on this list may also have other types of business licenses (*e.g.*, pharmacist's license) suspended as well. There are only a few grounds on which the license suspension can be challenged, including one based on financial hardship.[35] There have been constitutional challenges to this law, which are described below.[36]

Louisiana. Louisiana's law is more similar to the New York Program. Under that law, the Louisiana Department of Motor Vehicles must suspend the driver's license of any individual who has a final assessment or judgment for taxes in excess of $1,000.[37] Note, however, that Louisiana (unlike New York) specifically excludes penalty and interest in this calculation.[38] This law has been in effect since 2004. We are not aware of any challenges to the law.

Massachusetts. Massachusetts likewise provides that the Commissioner of Revenue may request that the Department of Motor Vehicles suspend a driver's license due to the licensee's delinquent taxes.[39] Under these regulations, the Commissioner of Revenue

[33] CAL. REV. & TAX CODE §19195.

[34] CAL. BUS. & PROF. CODE § 494.5(a)(2).

[35] *Id.* at § 494.5(h)(3).

[36] *See* Part IV.B.3(b)(i) *infra* at 28.

[37] LA. REV. STAT. § 47:296.2.A.

[38] *Id.*

[39] 830 MASS. CODE REGS. 62C.47A.2.

must provide at least 21 days' notice of the proposed revocation. During this period, the taxpayer may request an informal conference with the Commissioner to discuss the delinquency.[40] The Massachusetts law also specifically provides for a hearing and appeals process.[41] We are not aware of any challenges to the law.

3. Federal Passport Law

Perhaps as a result of the success of the States' non-monetary sanctions, Congress recently enacted new Section 7345 of the Internal Revenue Code, which authorizes the revocation or denial of a passport to a tax debtor who has "seriously delinquent" unpaid federal taxes.[42] Under the new law, which was signed by President Obama on December 4, 2015, the Department of State is required to revoke or deny the passport of any individual who has been certified by the IRS as owing an unpaid. legally enforceable federal tax liability that is greater than $50,000 (inclusive of interest and penalties) and for which a federal tax lien or notice of levy has already been issued. However, there are four exceptions, which protect the passport from revocation or denial if: (1) the taxpayer is timely paying his federal tax debt under an installment payment agreement; (2) the taxpayer is paying his tax debt through an offer in compromise; (3) the tax liability is currently subject to a pending collection due process hearing; and (4) the tax debt is being challenged by an application for innocent spouse relief. Notably missing from the exceptions are taxpayers who have been placed by the IRS in CNC status by reason of their inability to make any form of payment toward the taxes owed without creating severe financial hardship.

While the $50,000 threshold is indexed for inflation, we believe that it is quite low when taking into account that interest and penalties are included in the calculation. The law is retroactive in effect to January 1, 2015. When appropriate, the Department of State may issue a passport under emergency circumstances or for humanitarian reasons.[43] Further, the IRS is required to provide notification to each affected individual, and taxpayers are afforded the right to seek a limited judicial review in the Tax Court or federal District Court to determine "whether the certification was erroneous or whether the Commissioner has failed to reverse the certification."[44]

[40] *Id.* at 62C.47A.2(3).

[41] *Id.* at 62C.47A.2(5).

[42] Fixing America's Surface Transportation Act, P.L. 114-94, § 32101 (2015).

[43] As a consequence of this law, federal tax debtors may find themselves unable to make trips outside of the United States, or there could be many Americans who become, at least temporarily, effectively stranded abroad in foreign countries due to having their passports revoked.

[44] I.R.C. § 7345(e).

The Treasury has not yet issued regulations interpreting this new law.

IV. ANALYSIS AND CONCLUSIONS

A. Financial Hardship

1. Debtor Protection Laws

We are concerned that the Driver's License Suspension Program is in conflict with (or effectively undermines) longstanding collection protections which place limits on collections by the Department against New York tax debtors. Unfortunately, there is nothing in the legislative history of the law to guide us as to whether possible conflicts with these debtor protection laws were considered by the legislature. It is clear, however, that the license suspension law could be potentially administered in a way that conflicts with the policies underlying many of the federal and state debtor protection laws.

The Driver's License Suspension Program could be used by the Department as a new and potent tool to force taxpayers into payment arrangements to pay their tax debts from assets and income sources that would not otherwise be available to the Department for levy. For example, under both federal and New York State law, social security and disability income are exempt from levy, as are the bank accounts into which they are deposited.[45] However, the driver's suspension law makes no mention of these exemptions and, without a hardship exemption, there is no guidance on how the law should operate to avoid conflict with the debtor protection laws to avoid overly harsh outcomes to indigent taxpayers. The license suspension law provides that any individual whose tax liability is $10,000 or greater[46] is subject to revocation of his or her driver's license, regardless of the financial condition of the taxpayer. The program could thus be used to procure payments of tax debt from individuals who otherwise are protected from tax levy on their income and assets.

For the tax debtor who has hundreds of thousands of dollars sitting in a protected pension account beyond the reach of tax levy by New York State, it is hard to make the case that it is inappropriate to require that debtor to enter into a payment agreement to pay off his or her New York tax debt to avoid loss of the debtor's driver's license. How-

[45] 11 U.S.C. § 522(d)(10); CPLR § 5205(l)(2).

[46] The $10,000 threshold is actually very low when considering that it includes interest and penalties and that New York has a very long twenty year statute of limitations for the collection of the tax. During such a long collection period, a small tax liability could easily grow to exceed $10,000 with interest and penalties.

ever, when the Department uses that threat to coerce a tax debtor to enter into a payment agreement when those payments will have to come from otherwise exempt (from levy) assets and income and leave the tax debtor unable to pay basic living expenses, we believe the law undermines the public policies of the debtor protection laws.

Without a hardship exemption in the law, the Department is required to report to the DMV any tax debtors with as little as a $10,000 liability for suspension of their driver's license unless there is an agreement for payment of the liability "acceptable to the Commissioner." There are many instances when a tax debtor is earning so little in wages or has so little income or assets that he or she is not financially able to enter into even a low level installment payment agreement or a low sum Offer in Compromise without compromising his or her ability to pay basic living expenses. Any taxpayer in this situation at the federal level would be placed in "currently non-collectible" status and not be required to begin tax payments under an IPA. However, as pointed out in the earlier discussion, there is no official CNC status recognized by New York in any published law or guidelines to allow a tax debtor to be spared entering into an IPA that he or she cannot financially maintain in order to avoid loss of a driver's license.

> ***Example 1.*** *W*, a widow, 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. Since there is no ground to challenge the license suspension based on financial hardship, she will have to enter into a payment agreement acceptable to the Commissioner if she is to keep her driver's license. 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 alternative other than to enter into a monthly payment arrangement (IPA) with the Department for payment of the tax debt even if those monthly payments will be paid from her exempt social security income and she will not have enough left over each month for food and housing.
>
> ***Example 2.*** *L* is a low-wage earner making less than $217.50/week in disposable wages. Under CPLR Section 5231, *L*'s wages are so low that

his wages are exempt from an income execution by the Department to pay his tax debts. However, since he owes more than $10,000 in tax, interest and penalty and has no arrangement for payment of his tax liability to New York State, *L* will receive a notice threatening suspension of his driver's license. Like the widow in Example 1, *L* will have to enter into a payment agreement with the Department to pay his tax debt if he is to avoid the suspension of his drivers license notwithstanding the fact that he falls within the class of debtors with such low earnings that his wages are protected from garnishment by the Department for the payment of tax debts.

Both of these examples demonstrate that the license suspension laws can be applied in a way that allows the Department to make an end-run around longstanding debtor protection laws. We therefore believe that the driver's license suspension law is in conflict with longstanding debtor protection laws when applied to taxpayers who will experience financial hardship if required to enter into a payment agreement with the Department for the payment of their tax debts. The tax debtors described in the examples above should both be eligible for exemption from application of the license suspension laws. Otherwise, the federal and New York State protections they have from tax levy will be essentially nullified, since the Department now has leverage to force them into a payment agreement to avoid loss of something as essential as a driver's license.

2. Administrative Hardship Exception

There is nothing in the language of Tax Law Section 171-v which explicitly states that the Department must (or can) allow a hardship exemption when determining whether a tax debtor should be referred to the DMV for suspension of his or her driver's license if $10,000 or more in tax is owed and the taxpayer does not have a payment agreement to pay the tax. However, the Department has, on occasion, exercised its discretionary powers granted under a law to mitigate unfair or unintended consequences from the strict wording of a statute.[47] A previous example of the Department's creating such relief is reflected in a Technical Memorandum[48] which addressed to some degree the hardship and injustice resulting from a strict reading of N.Y. Tax Law §1131(1), which imposes absolute 100% liability for unpaid sales taxes owed by an LLC (or limited partnership) on any member (or limited partner) even where the member (or partner) had no involvement or control of the business's affairs. Our prior Report on this subject recommended an

[47] In addition, under the Taxpayer Bill of Rights, the Department has discretion to waive or forgo certain available enforcement mechanisms. (N.Y. TAX LAW § 3000 *et. seq.)*

[48] N.Y. Dep't of Tax'n & Fin. TSB-M-11(17)S (Sept. 19, 2011).

amendment to the law to avoid the harsh and unsupportable consequences of applying strict liability to passive investors, especially since the sales tax law was in conflict with a parallel provision for the collection of unpaid employment taxes from "responsible persons."[49] When it proved difficult to move the corrective tax legislation through the Legislature, the Department issued the TSB pursuant to its discretionary powers granted under the law.

As to the implementation of the driver's license law, it is our understanding that the Department has been trying to limit license suspension referrals to taxpayers who have not contacted the Department after receiving notices of liability. If, upon contact from a taxpayer, the Department learns that the person should be in uncollectible status (such as having only social security income), those taxpayers are not referred to DMV for license suspension. Instead, those cases will either be closed without an IPA or will be referred to the Offer in Compromise unit. Thus, while there is no express statutory authority for the Department to avoid a license suspension referral without an IPA, it seems the Department has concluded that it has the administrative authority to accept a "zero due" IPA to avoid the referral to DMV. It also appears that the Department prefers the approach of centralizing all hardship decisions in the OIC unit.

The Department is to be commended for taking that initiative to carve out a hardship exemption to the law. However, as discussed earlier, the lack of published guidance on the existence of this policy means that taxpayers and tax practitioners do not know to ask for such an exemption. Furthermore, many practitioners continue to report that the Department staff setting up IPAs for taxpayers to avoid license suspension are not making inquiries about financial hardship for the taxpayer, raising the question of how broadly and uniformly this policy is being implemented. It is the experience of many practitioners that Department personnel take the position that a license must be suspended in any case in which the statutory criteria are met without exception.

The Department should therefore implement an administrative exemption from Section 171-v to provide hardship relief to tax debtors who would suffer financial hardship if required to enter into an IPA to pay the tax liability. Given the high stakes of losing one's driver's license if arrangements are not made to resolve the New York tax debt, greater focus needs to be placed on implementing both a hardship exemption in the Driver's License Suspension Program and a "currently non-collectible" status for taxpayers where even a small IPA or small OIC would create a financial hardship. These programs need objective standards to ensure reliable and uniform application at all levels of the Department. The Department should establish a publicized hardship relief program

[49] *See* N.Y. ST. BA. ASS'N TAX SEC., *Report on Trust Fund Liability for Collection of Sales Tax*, Report No. 1035 (July 22, 2003).

applicable both to any taxpayer who has received a notice threatening suspension of his or her driver's license and to any taxpayer seeking an IPA program to resolve his tax debt. This could be applied immediately, for example, to accounts that are now being placed in "currently non-collectible" status by the Department under existing protocols. However, we recommend that those protocols be expanded beyond just taxpayers living on social security to include low-wage taxpayers and any taxpayer who would be unable to pay basic living expenses if required to begin a payment plan with the Department to pay taxes owed.

The hardship exemption program should be implemented with objective criteria easily administered by Department staff and easily understood by taxpayers and practitioners. The Department should develop a form for use by staff who are contacted as a result of a license suspension letter to quickly identify those tax debtors who might be eligible for currently non-collectable status, and therefore whose licenses should not be suspended. A simple initial asset/income inquiry by Department staff could identify those taxpayers who could potentially qualify under the financial hardship exemption. Any referral to DMV would be put on hold to give the taxpayer an opportunity to verify the hardship status (perhaps with the filing of a follow-up Form DTF-5 with supporting documentation) similar to the verifications used in the Offer in Compromise program.[50] In the cases where financial hardship is verified, the Department would either forgo an IPA altogether (thus placing these taxpayers in "currently non-collectible" status) or enter into a low level IPA that would allow the taxpayer to cover basic living expenses. If the Department concludes that some form of IPA must be entered into by the taxpayer to satisfy the requirement of the law that the "payment arrangement must be satisfactory to the Commissioner", it could use its previous policy of requiring only a token IPA payment of $5, $10 or $15 per month as the acceptable "payment arrangement."

Another approach to obtain relief from the harsh application of the Driver's License Suspension Program has been utilizing the New York Taxpayer Rights Advocate office. In one instance reported to us, a practitioner's indigent client sought relief from the Taxpayer Rights Advocate and was directed to the Offer in Compromise program on an expedited basis whereby the debts for taxes were discharged for a nominal sum to end suspension of the taxpayer's driver's license. However, this approach is not formalized and may not have been available to the taxpayer had he not been represented by experi-

[50] Since there is no New York statute or regulation providing for placing an account in "currently non-collectible" status, we recommend that New York adopt procedures for determining when a hardship exemption should be allowed using either the standards applied in the New York OIC program or the guidelines applied by the IRS in determining whether accounts are currently not collectible. *See* Internal Revenue Manual §§ 5.16.1.2.9, 5.15.1.

enced tax counsel. No information encouraging this approach has been provided to the public or consistently furnished by Department representatives.

Furthermore, it should be noted that not all tax debtors will have the resources to avail themselves of the OIC program as an alternative to entering into an IPA with the Department to avoid suspension of his/her drivers license. To have an Offer accepted, the tax debtor must come up with a payment equal to the net value of assets and the "realizable value of future income." While, as stated earlier, "reasonable basic living expenses" are taken into account in determining the "reasonable collection potential" of the file and the "realizable value of future income", a tax debtor who has no assets to liquidate (or borrow upon) and no funds to pay down the value of future income or the value of assets will find the OIC program out of reach. The OIC program is also often out of reach for tax debtors who owe sales taxes since, as a general rule, the Department requires a minimum offer equal to the principal amount of the tax. For those tax debtors, the only other option to avoid license suspension will be to work out an IPA which, if determined without an allowance for basic living expenses, could require a monthly payment so high that it does not leave enough left over for those expenses.

3. Possible Statutory Amendment

As stated earlier, the legislative history does not reveal whether a hardship exemption was considered (and rejected) by the New York State Legislature or whether it was simply not considered at all. One factor that might support that a hardship exemption was simply overlooked in the drafting of the law is the fact that a hardship exemption has long been included in the New York child support license suspension statute. It seems inconsistent that the same type of exemption was not included in the tax collection law. Notably, however, a recent Division of Tax Appeals decision interpreted the law as not including a financial hardship exemption.[51]

As discussed in the previous Part, we believe that the Department should (and can) administer the existing law so as to incorporate an implicit exemption for financial hardship. However, should the Department feel constrained by the absence of an explicit hardship exemption in the statute, then we believe that the law should be amended to include such a hardship exemption.

B. Constitutional Issues

The act of suspending an individual's driver's license can have a devastating effect on the life of an individual, even if exceptions are made for driving to and from the place of work and medical appointments. An array of trips ranging from going to the gro-

[51] *See* Khan, note 5 *supra.*

cery store and everyday activities of life must be taken into consideration. The fact that state action may cause serious harms necessarily raises constitutional issues. Structurally, constitutional issues may apply because of either United States constitutional provisions or New York constitutional provisions.[52] The following discussion is intended as a summary of the constitutional issues that have arisen (or may arise) in connection with driver's license suspension for the collection of tax debt.

1. Fourteenth Amendment

The Fourteenth Amendment reads:

> 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.[53]

The focus on the constitutionality of the various state license suspension laws is primarily based on the Due Process clause and whether such laws result in an impermissible deprivation of property.

While a state or other governing body may come to issue licenses to perform activities that are regulated, the authors of a leading treatise on constitutional law write:

> Whenever the government takes control of an important area of human activity, it must grant a hearing to those who are denied a right to engage in the activity. Because the government has taken control of who may drive automobiles on its highways, when it revokes someone's driver's license, that person is entitled to a hearing to determine the basis for the revocation.[54]

A person's right to a hearing prior to the taking of constitutionally protected property is referred to as "procedural due process." Contrary to a popular misunderstanding, it is not necessary to determine whether the government's actions threaten a "right" or a "privilege," as this analysis was explicitly rejected by the Supreme Court in *Bell v. Burson*.[55] There, the Supreme Court held that the key test is whether an "important interest"

[52] New York constitutional provisions are generally beyond the scope of this report, so the discussion here focuses on U.S. constitutional provisions.

[53] U.S. CONST. amend. XIV, § 1.

[54] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.4(d)(iv) (5th ed. 2012)

[55] 402 U.S. 535, 539 (1971).

of the petitioner is being taken away.[56] If so, procedural due process is required by the Fourteenth Amendment. Indeed, the designation "important interests" covers such things as disqualification for unemployment compensation, discharge from public employment, denial of tax exemption and withdrawal of welfare benefits.[57]

Once it is established that procedural due process is required, it still must be determined what sort of hearing rights satisfy the constitutional test, when the hearing rights should be afforded, and with respect to what issues. The process due is determined by analyzing three factors set forth by the Supreme Court in *Mathews v. Eldridge*.[58] The three factors are: (1) the private interest being affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures, and (3) the government's interest and burdens involved in carrying out the particular procedural requirement.[59]

Based on the *Eldridge* factors, procedural due process concerns may not be material where there has already been an opportunity for a hearing on the substantive facts and determination that lead to the potential deprivation. So when the Supreme Court has considered suspensions of driver's licenses for accumulating a certain number of "points" from moving violations and there has already been an opportunity to contest the finding of such violations, procedural due process has been satisfied in regard to the driver's license suspension.[60] In such cases, although the private interest is significant, the risk of an erroneous deprivation is low and there is no purpose to the additional administrative burden.[61]

However, if there has not been an opportunity for a hearing on the substantive matters, one must be provided before the deprivation. So, for instance, in garnishment actions used to enforce private debts or to terminate disability benefits, the person who may suffer the deprivation must have a meaningful opportunity to contest the facts alleged.[62] As the Supreme Court wrote in *Mathews v. Eldridge*, "The essence of due

[56] *Id.*

[57] *Id.*

[58] 424 U.S. 319 (1976).

[59] *Id.* at 333.

[60] Dixon v. Love, 431 U.S. 105. 112–15 (1977).

[61] *Id.*

[62] Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969); Mathews v. Eldridge, 424 U.S. 319 (1976).

process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it."[63]

The lack of a connection between the offense and the proscribed penalty or punishment also raises substantive due process issues under the Fourteenth Amendment. Federal and state courts have both struck down laws and penalties where the penalties imposed have been deemed excessive or where the lack of a rational relationship between the conduct and the punishment was deemed to be so significant that it was considered tantamount to a denial of due process.

The framework for substantive due process analysis involves first determining whether the interest at stake is considered to be a liberty that is fundamental.[64] If it is, then strict scrutiny will be applied to the issue, but if not, then the rational basis or rational relationship test will be applied.[65] Indeed, the latter standard is the standard that the Supreme Court has applied to professional licenses.[66] The rational relationship test, as set forth by the Supreme Court, provides for a notably permissive standard of review, asking whether, "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker."[67]

Separately, violations of substantive due process have been found when a punitive damages award is so grossly excessive that it enters "the zone of arbitrariness."[68] In *BNW of North America, Inc. v. Gore*, the case concerned a jury award of $4,000 of actual damages and $4 million of punitive damages for suppression of a material fact.[69] The court held that while there is no mathematical test for when a penalty would be found to be grossly excessive, and penalties that significantly exceeded actual damages were permissible, penalties would be tested as to "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred."[70] Based upon the lack of a reasonable rela-

[63] 424 U.S. 319, 348 (1976), *quoting* Joint Anti-Fascist Comm. v McGrath, 341 U.S. 123, 171–72 (1951).

[64] Michael H. v. Gerald D., 491 U.S. 110, 111 (1989).

[65] Washington v. Glucksberg, 521 U.S. 702 (1997); Barry v. Barchi 443 U.S. 55, 67–68 (1979)

[66] Barry, 443. U.S. at 67–68.

[67] Id.

[68] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[69] Id. at 565.

[70] Id. at 581, citing TXO Production Corp. v. Alliance Resources, 509 U.S. 443, 460 (1993).

tionship, the Supreme Court reversed the decision and remanded the case for further proceedings.[71]

2. Eighth Amendment

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted."[72] (emphasis added). There has not been a large body of law analyzing the Eighth Amendment's Excessive Fines clause as applied to license suspensions.

The paucity of Excessive Fines jurisprudence throughout much of American history is attributable primarily to the limited use of civil forfeiture.[73] That changed first with attempts to enforce Prohibition and authorizing civil forfeiture of property connected to crimes, and then expanded significantly starting in 1970 under the Racketeer Influenced and Corrupt Organizations Act and the Continuing Criminal Enterprise Act in reaction to increases in crime in the 1960s.[74]

With the gradual expansion of civil forfeiture as a means of deterring crime, the Supreme Court had occasion to take up the issue of Excessive Fines in 1993.[75] In *Austin*, the Supreme Court considered the case of a civil forfeiture proceeding to seize the mobile home and auto body shop of an individual who had already received a criminal sentence for drug offences.[76] The Supreme Court held that the Excessive Fines clause applied to civil matters, not just criminal matters, and was relevant when the fine in question had a purpose that went beyond remediating the harm to the government by either punitive or deterrent purposes.[77] The Supreme Court also held that, despite the literal meaning of the word "fine," the Excessive Fines clause applies to forfeitures as well.[78] The Supreme Court then remanded the case to the lower court for a determination of the excessiveness question.

[71] Id. at 585-86.

[72] U.S. CONST. amend. VIII.

[73] Scott A. Haueri, Comment, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159, 171–72 (1994–95).

[74] *Id.*

[75] Austin v. United States, 509 U.S. 602 (1993).

[76] *Id.* at 604–06.

[77] *Id.* at 607–11.

[78] *Id.* at 622–23.

The Supreme Court revisited the issue in *United States v. Bajakajian.*[79] There, an individual had been required to forfeit $357,144 to customs for the offence of unlawfully not having declared that cash when boarding a flight from the United States to Cyprus.[80] The Supreme Court held that fines, including forfeitures, are excessive when the principle of proportionality is violated: "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[81] So when the punishment is "grossly disproportional" to the gravity of a defendant's offense, it violates the Excessive Fines clause.[82] The Supreme Court also noted that while there was a long-standing principle of instrumentality, that property used in the crime or offence, could be properly required to be forfeited, a reporting offense with respect to money could not make all of the money "guilty property."[83]

Regarding whether loss of a license can be considered a fine, there is some negative authority, but it is potentially distinguishable as the relevant cases were decided in a significantly different context than that of tax collections. In one case, a petitioner contested a driver's license suspension for repeated traffic offenses.[84] While the court stated that revocation was not a fine, the case falls in the category of cases finding that where the forfeiture involves an instrumentality of the offense, it is permissible under the Excessive Fines clause. A case where an attorney, representing himself *pro se*, contested his disbarment for crimes involving moral turpitude likewise found that disbarment did not violate the Excessive Fines clause.[85] While the court said that the Excessive Fines clause did not apply because loss of a law license was not a fine, at bottom the disbarment was not an additional punishment for crimes but an act of regulation of activities for protection of the public.[86] However, the question remains whether the loss of a license can be considered to be a "fine" when there has been no transfer of property to the government.[87]

There are other significant open questions under federal Excessive Fines jurisprudence, one of which is a currently active controversy: whether the individual needs of the

[79] 524 U.S. 321 (1998)

[80] *Id.* at 324.

[81] *Id.* at 334.

[82] *Id.* at 334-335.

[83] *Id.* at 337-344.

[84] Faulk v. Tiffany, No. CIV.A.99–2354–GTV, 2000 WL 714336, at *4, 2000 U.S. Dist. LEXIS 7882 (D. Kan. May 23, 2000 No. 99-2354-GTV).

[85] *In re* Sharp, 674 A.2d 899, 900 (D.C.1996).

[86] *Id.* at 900.

[87] *See* note 90 *infra* and accompanying text.

defendant for economic survival must be considered in the analysis of whether a fine is considered to be excessive.[88] Most circuits have rejected such a test. Some, like the Second Circuit, have been silent on whether such factors should be considered. So far, only the First Circuit has explicitly incorporated those factors into its analysis.[89]

3. Cases on License Suspension Laws

(a) State Child Support laws

There have been many cases challenging the child support license suspension laws for violations of procedural due process. As a result, it is well settled that driver's licenses are "property" interests protected by procedural due process. Most challenges have failed under the procedural due process theory because the state's program provides an opportunity to be heard at a meaningful time and in a meaningful manner, *i.e.*, the laws provide for a right to a hearing to challenge the suspension, an appellate process, and can obtain release by repaying.

Another reason for the lack of success of petitioners in these cases may be because most of the legal challenges have been brought by petitioners representing themselves in a *pro se* proceeding where the petitioners rarely have the ability to formulate rigorous constitutional arguments.[90] Most of these challenges are treated by the courts as nuisance cases. It is notable that a child support case in which the constitutional arguments were taken seriously enough to be the subject of a dissent was a case in which the petitioner was represented by counsel.[91]

In instances when the license is needed to maintain a livelihood (*e.g.*, a commercial driver's license), programs are also challenged under what is known as "substantive due process." In that analysis, a "rational basis" test is used rather than a more strict standard because a fundamental right is not involved. Under the rational basis test, some

[88] Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 854–56 (2012–13)

[89] United States v. Jose, 499 F.3d 105 (1st Cir. 2007).

[90] Collins v. Saratoga County Support Collection Unit, 528 Fed. Appx. 15 (2d Cir. 2013); Knight v Serpas, 69 Fed. Appx. 830 (9th Cir. 2003); Southerland v. Banks, 2015 WL 9581818, 2015 U.S. Dist. LEXIS 172820 (E.D.N.Y. 2015, No. 15-CV-6088);Little v Texas Atty. Gen., 2015 WL 5613321, 2015 U.S. Dist. LEXIS 53274 (N.D. Tex 2015, No. 3:14-CV-3089-D); Sessler v. Crawford County Child Support Enforcement Agency, 2014 WL 3014513, 2014 U.S. Dist. LEXIS 90922 (N.D. Ohio 2014, No. 1:14-CV-0058); Joseph v. Stewart, 2013 WL3863915, , 2013 U.S. Dist. LEXIS 103589 (E.D.N.Y. 2013, No. 13-CV-1678); Taylor v District of Columbia, 606 F. Supp. 2d 93 (2009)

[91] *See* Amunrud v. Bd. of Appeals, 158 Wash. 2d 208, 143 P.3d 571 (2006).

courts have concluded that it is reasonable for a legislature to believe that the suspension program would provide a powerful incentive for those in arrears to pay their debt. However, there is an interesting dissent by Judge Sanders in *Amunrud v. Board of Appeals and Department of Social Health Services*,[92] arguing that the driver's license suspension does violate substantive due process. The dissenting judge argued that the police power to revoke the licenses must be rationally related to the purpose of requiring the license in the first place. The license is required for traffic safety, and thus, should not be revoked for failure to pay child support. In other words, the dissenting judge concluded that there was no rational basis for revoking a driver's license based on a non-driving offense. It should be noted that even under this standard, some states have determined that offenses such as sexual or drug crimes lack a rational relationship to mandatory driver's license revocation, noting that the standard is deferential, but not toothless.[93] But these cases have not been widely followed and were rejected in *Amunrud*, for instance.

One challenge went as far as challenging the child support license suspension law under the Eighth Amendment's Excessive Fines clause. However, this challenge failed because the temporary revocation of a driver's license was not considered a "fine" for Eight Amendment purposes because the revocation did not constitute a payment in cash or in kind.[94]

Another individual challenged a license suspension program under the equal protection clause. The individual argued the equal protection clause was violated because child support obligors in rural areas were treated differently from obligors living in urban areas. He contended that the rural living obligors had fewer employment opportunities and had a correspondingly greater need for a driver's licenses because they had to travel greater distance for employment opportunities. The court disagreed, stating that the program treated similarly situated persons similarly. Rural obligors had the same options for license reinstatement as an urban obligor, and the obligations of rural obligors are equally important as the obligations of urban obligors. Thus, rural and urban obligors were not treated differently.[95]

A driver's license suspension program was also challenged under free exercise of religion in *Office of Child Support*, ex rel. *Stanzione v. Stanzione*.[96] The Court held that

[92] *Id.*

[93] People v Lindner, 127 Ill.2d 174, 182–85 (1989), *citing* Mathews v. De Castro, 429 U.S. 181, 185 (1976); State v. Gowdy, 64 Ohio Misc.2d 38, 40 (1994).

[94] Sessler v. CCCSEA, 2014 WL 3014513, at *4 (N.D. Ohio, July 3, 2014).

[95] State *ex rel.* Bouta v. Buchmann, 830 N.W.2d 895 (Minn. Ct. App. 2013).

[96] 2006 Vt. 98, 910 A.2d 882 (2006).

the suspension did not impermissibly infringe on the rights of free exercise of religion because she did not need the license to practice her faith.

In *Tolces v. Trask*,[97] the Court found that suspension does not impede on an individual's right to travel because it limits only the mode of transportation.

(b) Tax Collection laws

(i) California

In *Berjikian v. Franchise Tax Bd.*,[98] the Federal District Court for the Central District of California provides the most relevant examination to date of whether a license suspension law used to enforce tax collections violates federal constitutional protections. The taxpayers in *Berjikian* had their driver's licenses and pharmacist's license suspended under the California license suspension law. They challenged the law as unconstitutional not only in the federal court (as to the U.S. Constitution) but also in the state court (as to the U.S. and California Constitutions).[99] Both courts determined that the law violated the taxpayer's procedural due process rights because the law had not provided the plaintiff with an appropriate opportunity to be heard prior to taking away the license.

Federal District court case (Berjikian). In the federal case, the Court had first to determine if the driver's license was a "property right" within the meaning of the Fourteenth Amendment of the U.S. Constitution. In concluding that it was a protected property right, the Court drew a distinction between an existing driver's license and one that had been merely applied for. The Court found that only an existing driver's license was protected since once the license had been given, it cannot be taken away without procedural due process. For licenses that had merely been applied for, no such protected property right had arisen.[100]

The Court then proceeded to the question of whether the Berjikians had been afforded the procedural due process rights required under the Fourteenth Amendment before suspension of their licenses. The Court stated:

[97] 76 Cal. App. 4th 285, 90 Cal. Rptr. 2d 294 (4th Dist. 1999).

[98] 93 F. Supp. 3d 1151 (C.D. Cal. 2015)

[99] Berjikian v. Franchise Tax Bd., 2015 Cal. App. Unpub. LEXIS 213

[100] The same reasoning was applied to the business license already issued, which was found to be a protected property interest under the Fourteenth Amendment since it enables one to pursue a profession or earn a livelihood.

> The Due Process Clause 'require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'
>
> * * *
>
> Notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'
>
> * * *
>
> The opportunity for a hearing must occur 'at a meaningful time and in a meaningful manner.'[101]

The State argued that any procedural due process hearing rights required by the Fourteenth Amendment had been satisfied since the Berjikians had a procedural opportunity to challenge the underlying tax before the assessments became final. That they had chosen not to exercise those protest rights should not be viewed as a denial of procedural due process in the later license suspension hearing. The Court disagreed, noting that at the time the Berjikians had a right to protest the underlying tax liabilities, they were not at risk of losing their driver's licenses or business license as a consequence of having an unpaid tax liability, since the license suspension law did not go in effect until years after the tax assessments became final. The Court stated:

> The essential problem in Plaintiffs' case is that at the time Plaintiffs had the opportunity for a hearing regarding their tax assessments, they did not have notice that they could lose their licenses. Indeed, Plaintiffs' first such notice occurred over a decade after any opportunity for a hearing expired. Thus, although Plaintiffs had notice of the deprivation at one point in time and, arguably, the opportunity for a hearing at another point in time, notice and opportunity for a hearing never existed contemporaneously. Without contemporaneousness of notice and opportunity to be heard, Plaintiffs did not have the opportunity to be heard 'at a meaningful time and in a meaningful manner.[102]

The District Court concluded that the State could not suspend the Berjikians' driver's licenses for non-payment of their tax liabilities since they had not been afforded a hearing that would meet the requirements of procedural due process under the Four-

[101] 93 F. Supp. 3d, at 1157–58, *quoting* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950) and Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[102] 93 F. Supp. 3d, at 1158.

teenth Amendment. The Court distinguished the decision in *Crum v. Vincent*,[103] In *Crum*, the state had suspended a physician's license because he had not filed state income tax returns for the prior three years and had a tax deficiency.[104] The *Crum* court held that the hearing right granted to the plaintiff with regard to his tax delinquency served as an adequate hearing with regard to the suspension of his medical license.[105] The Court stated that the *Crum* court had determined that "a license revocation hearing could add nothing to a tax deficiency hearing in this case, because the outcome of the tax hearing would necessarily determine the outcome of the revocation hearing."[106] The Court observed that "Crum had notice that he could lose his license if he failed to file his returns, and he was thus apprised of the matters that would be at stake in a tax deficiency hearing."[107]

Separately from the procedural due process issue of whether the taxpayer had the opportunity to be heard at a reasonable time, the District Court also ruled on the impermissible retroactive effect of the law as applied to old tax debt that was no longer subject to protest or challenge:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence . . . . Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]" *Landgraf v USI Film Prods*, 511 US 244, 265 (1994). The central issue in a retroactivity analysis is "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270. That question requires an inquiry into "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. *Id.*[108]

The Court found that the connection between the driver's license suspension and the unpaid income taxes was tenuous, and contrasted the situation to the case of *Pickell*,[109] where the suspension of a contractor's license related to tax delinquency was found to help insure that a licensed contractor could satisfy potential liabilities and was of good moral character. In *Pickell*, there was no denial of due process because the plaintiff had notice that tax deficiencies would result in suspension of his contractor's license.

[103] 493 F.3d 988 (8th Cir. 2007).

[104] *Id.* at 992.

[105] *Id.* at 993. *See also* Pickell v. Sands, 2014 WL 546049, 2014 U.S. Dist. LEXIS 15905 (E.D. Cal. 2014), No. 2:12-cv-0373) (applying *Crum*).

[106] 93 F. Supp. 3d, at 1158 (citing *Crum*, 493 F.3d, at 993).

[107] *Id.* at 1158

[108] 93 F. Supp. 3d, at 1159

[109] 2014 WL 546049, at *6.

In the *Berjikian* case, however, the Court observed:

> Defendants have made no attempt to explain the relevance of Plaintiffs' tax delinquencies to their driver's licenses or pharmacy license. Because Section 494.5 imposed new, unconnected license-related consequences upon Plaintiffs, its application to them was impermissibly retroactive.[110]

The California State Court case (Berjikian). The Appellate Court of the State of California reversed the Superior Court of California and found that the California driver's license suspension law violated the Due Process Clause of both the United States and California constitutions. Just as in the federal district court case, the law was found not to have provided the Berjikians with an adequate opportunity to be heard before losing their driver's licenses and business license. Of particular interest in this decision was the observation of the Court that the Berjikians were not seeking to prevent the State from collecting the taxes owed. The Court noted that the plaintiffs were only challenging California's right to suspend their driver's licenses and pharmacy license. The Court noted that even though it was ruling in the Berjikians' favor, that would not impede California from its ability to collect the outstanding taxes owed by the Berjikians by other means. The ruling was limited to whether the State could impose the non-monetary sanction of license suspension to enforce tax debts when there was no contemporaneous right to a hearing to the plaintiffs on both the underlying tax liability and the loss of licenses.

> When the Berjikians did have the opportunity to challenge the grounds supporting respondents' suspension of their licenses, their property interests in those licenses had yet to be implicated…However, once their property interests were implicated…, the Berjikians were no longer able to contest the grounds supporting respondents' suspension of their licenses.[111]

The California Appellate Court also ruled that procedural due process had been further violated because the law did not set forth the criteria that would satisfy the financial hardship exemption in the license suspension law.

> An aggrieved taxpayer who files an unsuccessful hardship-exemption request is left without any meaningful explanation as to why

[110] 93 F. Supp. 3d, at 1160.

[111] 2015 Cal. App. Unpub. LEXIS 213, at *19–20.

his or her request was denied, and he or she has no means of contesting that decision.[112]

The California Appellate Court rejected plaintiff's equal protection and substantive due process claims. On the equal protection claim, the court noted that, because the regulation did not implicate a suspect classification, a fundamental right, or gender, the regulation was subject to a rational basis review. The court then concluded that the suspension of driver's licenses was rationally related to a legitimate state interest.[113] On the substantive due process claim, the plaintiff only challenged the revocation of her pharmacy license. As with the equal protection claim, the court noted that the right to choose one's profession is not a fundamental right and, therefore regulations restricting one's ability to select a profession are subject only to a rational basis test. The court noted that the state has a legitimate interest in the prompt collection of taxes and "rationally could have concluded that a licensed pharmacist's failure to pay taxes…is related to the pharmacist's capacity to maintain financial accountability while engaging in the pharmaceutical profession."[114] Accordingly, the state court rejected the equal protection and substantive due process claims. These claims were not addressed in the federal decision.

Both the federal and the state constitutional challenges in the *Berjikian* cases were decided in 2015. If the State of California appeals, it will probably be years before the various constitutional issues relating to license suspension laws in collection of taxes will be settled. These include issues related to procedural due process and retroactivity, as well as substantive due process and the Eighth Amendment's prohibition on excessive fines.

(ii) New York

Under current Department procedures, the only avenue for appeal of a proposed driver's license suspension is to file a protest within the 60-day notice period under the procedures in place for appealing a tax deficiency assessment. This avenue for appeal means that the taxpayer will travel a long legal road before he or she can get to a court with jurisdiction to decide the constitutionality of the law. A case illustrating the problem is *Matter of Rivas*.[115] In that case, the Petitioner, acting *pro se*, filed a protest within the 60 day period to challenge the proposed license suspension on the sole ground that it was unconstitutional. In accordance with those protest procedures, Mr. Rivas first filed a re-

[112] *Id.* at 16.

[113] *Id.* at 24.

[114] *Id.* at 27.

[115] *See* note 6 *supra*.

quest for appeal to the Bureau of Conciliation and Mediation Services. There he received an adverse determination since he had not demonstrated any of the six grounds required under the law for challenging the license suspension. He then filed an appeal to the Division of Tax Appeals where the Administrative Law Judge dismissed his case for failure to prove any of the six grounds for challenge. In addition, the Administrative Law Judge held that he was unable to rule on Mr. Rivas's claim that the law was unconstitutional since "a facial constitutional challenge to the statute is not within the jurisdiction of the Division of Tax Appeals."[116] Mr. Rivas then appealed to the Tax Appeals Tribunal which affirmed the ALJ Decision and similarly ruled that the Division of Tax Appeals lacked jurisdiction to rule on a facial constitutional issue.

The only way in which Mr. Rivas could have obtained a court review on his claim that the law was unconstitutional under this avenue of appeal would have been to take an appeal from the adverse Tax Appeals Tribunal decision to the Third Department Appellate Division through an Article 78 Proceeding. Only then would he reach a forum where his claim that the law was facially unconstitutional could be heard and ruled upon. Mr. Rivas did not take an Article 78 appeal, and his assertion of unconstitutionality was never ruled upon in his long journey through the appeals process.

A more direct route for any taxpayer where the sole issue for challenge is the constitutionality of the law, and there is no question of fact involved, is to bring a Declaratory Judgment action in a state court of original jurisdiction (*e.g.*, Supreme Court, County Court)[117] or in a federal district court.[118] Had Mr. Rivas gone that route, he would have been spared the many administrative and legal appeals necessary to get to a court that could rule on the constitutional issue. However, for financially challenged taxpayers such as Mr. Rivas, who represented himself *pro s*e, the costs of retaining counsel to file a Declaratory Judgment action may be prohibitive. To date, we are not aware of any state or federal court proceeding challenging the facial constitutionality of the New York driver's license suspension law.

Two recent New York Tax Appeals Tribunal decisions have addressed constitutional challenges to the law.[119] Surprisingly, neither decision cited or discussed the

[116] *See also* Matter of Eisenstein, 2003 N.Y. Tax LEXIS 69 (N.Y. Tax Appeals Tribunal, DTA No. 818439, Mar. 23, 2003).

[117] *See* Matter of Doorley v. DeMarco, 106 A.D.3d 27 (4th Dept 2013); Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 150, *cert denied* 464 U.S. 993 (1983).

[118] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); 28 U.S.C. § 1331**.**

[119] *See* Matter of Juan Kip Lenior and Matter of Balkin, *supra* note 6.

Berjikian cases. This could be attributable to the fact that the Petitioner in each case was acting *pro se* and lacked the expereince and expertise to bring forward to the Tribunal a more comprehensive discussion of constitutional findings on drivers license suspension laws. The Tribunal decisions in these cases suggest that the Tribunal will not adopt the reasoning of the courts in the *Berjikian* cases. For example, in *Matter of Juan Kip Lenior*,[120] the petitioner argued that the law (1) was unconstitutionally retroactive in effect, (2) was an unconstitutional taking of a property right and (3) violated the Equal Protection Clause of the Fourteenth Amendment. The Tribunal rejected these arguments. As to the retroactive application of the law to pre-enactment taxes, the Tribunal cited prior case law to support its finding that there is no unconstitutional retroactivity or lack of due process when a new statutory method for collecting taxes is introduced, so long as the taxpayer has been given prior hearing rights at the time the taxes were assessed.[121] As to the protected property right status of a driver's license, the Tribunal acknowledged that a driver's license is a constitutionally protected property right under the Due Process Clause. However, the Tribunal held that since the Petitioner could apply for a restricted use driver's license, this "ameliorate[d] the necessity for Petitioner to be provided another opportunity for notice and hearing."[122] On Petitioner's "equal protection" challenge that the law discriminated against and disproportionately affected people without the means to pay, the Tribunal found that under the less stringent standard applicable (noting that a drivers license is not a "fundamental right"), New York had demonstrated a rational basis for suspending driver's licenses for those with unpaid past-due tax liabilities in excess of $10,000.[123] The Tribunal also held that the Petitioner's claim of hardship to himself and his family did not constitute a valid ground for challenging the suspension.

While the Tribunal decision in *Lenior* does not discuss its jurisdiction to rule on the constitutional issues raised by the Petitioner, its earlier decision in *Balkin* does discuss those limitations.[124] As noted earlier, the Tribunal does not have jurisdiction to rule on a "facial" constitutional challenge of a statute.[125] A facial constitutional challenge occurs when the Petitioner claims there is *no* application of the statute that would be constitutional.[126] Given this limitation on its jurisdiction, the Tribunal treated Petitioners' claims

[120] *Supra* note 6.

[121] The cited cases were League v. State of Texas, 184 U.S. 156 (1902) and Matter of City of New York, 290 N.Y.2d 236 (1943).

[122] See *Lenoir* at 16, where there is no citation of authority for this conclusion.

[123] *Lenoir* at 16, citing *Wells v. Mallow*, 401 F. Supp. at 860–61.

[124] S*ee* Matter of Balkin, *supra* note 6.

[125] *See, e.g.*, Matter of Rivas, *supra* note 66.

[126] *See* Sabri v. United States, 541 U.S. 600, 609 (2004).

in both cases as an "as-applied" constitutional challenge, *i.e.*, that the statute, even though generally constitutional, operates unconstitutionally as to Petitioner because of his particular circumstances.[127] Accordingly, the rulings of the Tribunal in *Balkin* and *Lenior* regarding the constitutionality of the driver's license suspension law "as-applied" to the Petitioners are narrower in both application and precedential value than had the Tribunal had jurisdiction to rule on "facial" constitutional challenges.[128] This is because an "as applied" ruling governs only the law as applied to someone in Petitioner's situation. In this case, however, both the *Balkin* and the *Lenoir* decisions are implicitly facial rulings, too, since if the law is constitutional as applied to the Petitioners in those cases then it cannot be facially invalid because to be facially invalid would make it unconstitutional in all applications.

While Tribunal decisions have precedential effect, the breadth and importance of its findings on the questions of constitutionality of the driver's license suspension law under a broader "facial" constitutional challenge in other courts are yet to be seen.[129]

4. Conclusions on Constitutional Analysis

Outside of New York City and other select locations in New York State, taking care of basic needs is impossible without access to the roads in a motor vehicle, regardless of the theoretical availability of other means of transportation. As discussed above, it is now generally recognized that a driver's license is a constitutionally protected interest, whether one calls it a right, property, or a privilege. This means that procedural due process is required under the Due Process Clause.

In our view, there is a high likelihood that the application of Tax Law Section 171-v to tax debts preceding its enactment will not pass constitutional muster if challenged and the reviewing court adopts the reasoning applied in the *Berjikian* decisions. Like the California law, the New York law applies to tax liabilities that were assessed prior to the effective date of the law. Therefore, for any license suspensions based on pre-

[127] *See* Tex. Worker's Comp. Comm'r v. Garcia, 894 S.W.2d 504, 518 (Tex. 1995). For a discussion of the distinctions between "facial" and "as-applied" constitutional challenges, *see* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL OF RTS. J. 257 (2010).

[128] While the federal district court in the *Berjikian* case had the power to make a "facial" constitutional ruling, the decision was an "as applied" ruling.

[129] The difference between a court finding that a law is unconstitutional in a "facial" constitutional challenge as opposed to a finding based on an "as-applied" challenge, is the difference between a court striking down a statute in its entirety versus overturning the application of the statute on the case at hand. *See* Richard H. Fallon, Jr., *As Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

enactment tax liabilities, the tax debtor will have had no protest rights to challenge the underlying tax at a time when the loss of his driver's license was a consequence if the tax were not paid. Under the *Berjikian* decision, this would be a violation of procedural due process and present constitutional retroactivity issues. Under that test, the New York license suspension law would only pass muster if (1) applied prospectively to tax liabilities that became final after the effective date of the statute or (2) a procedurally sufficient hearing right is granted to challenge pre-enactment tax assessments on which the drivers license suspension is based.

With respect to the Eighth Amendment Excessive Fines clause of the Constitution, there may be risks to the New York statute that will become clearer only with development by cases brought to court by qualified counsel. While a driver's license is a protected property interest under the Fourteenth Amendment, there has been no determination in a well-developed case as to whether a forfeiture or suspension of a driver's license, or any other license, would be considered a "fine" for purposes of the Eighth Amendment or for its New York State equivalent. If a court concludes that suspension of a driver's license is a fine, then the question of whether the law imposes an impermissibly excessive fine under federal constitutional law can be examined. It is possible that the suspension of driver's licenses to enforce the payment of tax debts may be found to lack a remediating purpose or a purpose of regulating traffic on the roads. If so, its purposes could be arguably punitive or deterrent. And as tax penalties scaled to the deficiencies of the individual taxpayer already exist, the government may be found already to have well-tailored remedies to enforce the law against tax debtors. For the New York law, which has a low threshold ($10,000) for triggering license suspension, there may also be a question as to whether the suspension of a taxpayer's drivers license is a disproportionately harsh punishment for the failure to pay arguably insignificant tax liabilities (particularly as applied to the lower end of the threshold).

The Eighth Amendment risks do not end there. The Second Circuit has been silent on whether the impact on the individual defendant or petitioner must be considered as part of analysis of the Excessive Fines clause. But even if the Second Circuit declines to add that as part of the analysis, New York State courts already have incorporated that as a factor in analyzing New York's constitutional version of the Excessive Fines clause and have interpreted such protections robustly.[130]

There may also be risks to the law if a "substantive due process" challenge is made on the grounds that there is no rational basis for revoking a driver's license based

[130] *See* NY CONST. art. 1, § 5; County of Nassau v. Canavan, 802 N.E.2d 616 (N.Y. 2003).

on a non-driving offense.[131] The argument there would be that it is not clear what, if anything, paying your taxes has to do with knowing the rules governing driving and being able to physically comply with them. The likely defense would be that sufficient nexus may be found in using this remedy as a means for pressuring tax debtors to pay their tax debts. However, it is not certain that argument would prevail. There is also arguably the defense that nonpayment of taxes may suggest that the person is unlikely to comply with the law, including the laws governing driving. While this may seem to be a stretch in establishing nexus between the offense and the punishment, it might be sufficient to sustain the law since the less strict "rational basis" test is used in substantive due process challenges because a fundamental right is not involved.

5. Pre-Emptive Amendment

There are many questions raised by the *Berjikian* decision. The cases are still open to appeal and the constitutionality of these laws will not likely be settled for years.

In the meantime, the States that have passed these laws, including New York State, are enjoying enormous success in boosting their collections of tax debt. Since any taxes collected under the license suspension laws are validly owed to the State, the only consequence to the State if its license suspension law is found to be unconstitutional is that the tax debtor's suspended license must be restored.[132] Given that, it seems unlikely that the States have much incentive to amend preemptively their license suspension laws to address the constitutional issues identified in the *Berjikian* case.

If, however, the New York State Legislature desired to get ahead of this issue and preemptively amend the law to address the constitutional issues raised in the *Berjikian* case before a license is suspended, the law could be amended either by: (1) making it apply prospectively to tax liabilities that become final after the effective date of the law or (2) adding a hearing right to challenge any pre-enactment tax assessments on which the drivers license suspension is based. The first option offers the administratively simpler solution since the hearing rights afforded taxpayers for post-enactment deficiency assessments will likely be found to be adequate to satisfy the procedural due process required for suspension of the taxpayer's driver's license. However, that option eliminates using the law to collect tax liabilities assessed prior to the enactment of the law, which are likely the bulk of the present unpaid tax liabilities. While the second option

[131] *See* Part IV.B.3(a) *supra* (p. 26).

[132] *See* Berjikian v. Franchise Tax Bd., 2015 Cal. App. Unpub. LEXIS 213 at *8–9, where the State California Appellate court held that the constitutional challenge on the license suspensions would have no effect on the underlying tax liability or impede the rights of the State to collect on those liabilities no matter what the outcome.

allows application of the law to pre-enactment tax liabilities, the grant of a hearing right to challenge the underlying tax liability to avoid driver's license suspension will likely present enormous administrative difficulties. Given the long twenty year collection statute in New York State, the Department records for the older tax assessments may not be easily available or even retrievable if a challenge to the underlying tax is made by the tax debtor. While it is not clear how many taxpayers would have sufficient records to launch a successful challenge to these older assessments as part of their later challenge to the driver's license suspension, some taxpayers clearly will be able to do so successfully, thus raising the possibility of conflicting outcomes on the legitimacy of the underlying assessment.[133] For that reason, any amendment adding a separate hearing right at the time of the drivers license suspension challenge should clarify the effect of conflicting determinations. One solution would be to clarify that the determination in the later hearing on the drivers license suspension will have no effect on the State's right to collect the previously assessed underlying tax (by other methods of collection) and is relevant only to the question of whether the drivers license suspension is justified. In summary, should preemptive action be considered to address the potential procedural due process problems in the law, the legislature will need to weight the relative benefits and burdens between the two options outlined above.

It should also be noted that amendment of the law to carve out a hardship exemption (see recommendation at p 20) will not cure the procedural due process issues caused by the retroactive application of the law to pre-enactment tax liabilities. However, such an exemption could have relevance if the law is found to be subject to the Eighth Amendment Excessive Fines clause. In that case, a court would examine whether loss of a tax debtor's drivers license is a disproportionately harsh punishment for the offense of not paying a tax debt. Given the low New York threshold for triggering a drivers license suspension ($10,000), the law may be less vulnerable to an Eighth Amendment challenge if it provided for a hardship exemption. If the statute is amended (or supplemented by Department policy) to create a hardship exemption, care must also be taken to satisfy the due process hearing rights that would arise as a result of carving out the exemption. In *Berjikian*, the Californian Appellate court found that procedural due process was violated because the law did not set forth the criteria that would satisfy the financial hardship exemption in the license suspension law.

[133] For pre-enactment liabilities, the taxpayer will have previously been afforded hearing rights to protest the liability. The taxpayer will have either done so and failed or simply failed to challenge the liability in the first place. This is the legal basis for the tax assessment.

6. Federal Passport Law

It is too soon to know whether the recently enacted federal passport law to promote collection of federal tax liabilities is subject to the same procedural due process defects as the state license suspension laws. This is because the federal passport law includes provisions that may address the problems in the *Berjikian* case. For example, as to *revocation* of previously issued passports, the statute provides that the Department of State "may" revoke the passport when informed of seriously delinquent tax debts. This is in contrast with the mandate that it "s*hall* not issue" passports for new or renewed ones. There may have been a concern (not directly stated in the committee reports) that the law needed to give the Department of State some discretion on whether to revoke already issued passports in order to withstand constitutional scrutiny. Using the reasoning in the *Berjikian* district court decision, the same discretion need not be given to newly issued or renewed passports since those may not rise to the level of protected property interests. Given the discretion to the Department of State not to make a referral for revocation of a passport of a "seriously delinquent" tax debtor, there might be enough flexibility in the statutory language to provide for hearing rights that would satisfy procedural due process, especially since the Department of State discretion seems quite broad and undefined in the statutory language. The outcome will depend on how the regulations interpret the law.

The passport law has a retroactive effective date of January 1, 2015. While the law does not say it applies only to tax liabilities which are still subject to some form of protest rights, the law does provide that there must be "contemporaneous" notification to the taxpayer on lien or levy notices of the possibility of passport revocation or denial. The question arises as to whether the law could be read as being limiting only to taxes on which lien and levy notices are still subject to appeal. As to those assessments, there would still exist CDP and CAP administrative appeal rights to protest the proposed lien or levy action. However, such hearing rights would not include a right to challenge the underlying tax. Query whether this type of open hearing related to collection of the underlying tax would satisfy procedural due process? As noted in the District Court in the *Berjikian* case, "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits." [134]

Until there are Treasury Regulations promulgated on the passport law, it is not clear whether the law will be read as limited only to tax delinquencies with respect to which a lien or levy administrative appeal is still possible. That interpretation seems unlikely since the immediate financial benefits of the law will be substantially reduced

[134] 93 F. Supp. at 1158, *quoting* Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

because the largest tax delinquencies are more likely attributable to older assessed taxes for which there are no collection hearing rights available.

While the law provides for a right to a Tax Court or District Court review prior to the revocation or denial of the passport, that review is limited only to whether the procedures under the law were followed. Such a hearing right may not satisfy procedural due process under the *Berjikian* criteria.

Until more is known on how the law will be interpreted and administered, we cannot predict whether the law will be found to be constitutional. If the passport law is interpreted in Treasury Regulations to be limited only to tax delinquencies with respect to which there are still collection appeal rights, the law may pass muster under the procedural due process test.

C. Policy Considerations

Members of the Tax Section have differing opinions on whether New York's driver's license suspension law is based on good policy or bad policy.

1. Good Policy

Considerations in support of the policy behind the driver's license suspension law have to do with its effectiveness as a tax collections tool.

The law has achieved its objective of improving collections of past due tax liabilities. Of the 56,882 taxpayers that were selected for potential license revocation, 44% of them are now full paid or in the process of making payments and revenue collections from the Program have exceeded $288 million.[135] In addition, this collection mechanism can be operated on a low-cost basis due to its automatic nature, allowing the Department to utilize its limited collection resources more effectively.

The law has provided the Department with a tool that has overcome some of the longstanding challenges in collecting against tax debtors who are "collection-proof" (their assets cannot be reached by levy by the State). For tax debtors who have the means to pay, but have avoided payment by sheltering their assets in a way that defeats collection, the law has improved basic fairness to honest taxpayers who pay their taxes and will no longer have to shoulder such a disproportionate burden because others have found ways to avoid payment.

[135] Argi O'Leary, Deputy Comm'r, Civ. Enforcement Div., N.Y. St. Dep't of Tax'n and Fin. (Dec. 15, 2015).

The law sends a clear message that tax obligations are to be taken seriously. By conditioning a taxpayer's ability to drive on fulfilling his or her obligation to pay the taxes that maintain our public infrastructure, including our roads, there is established a direct link between tax compliance and the exercise of the privileges of being a New York State citizen. This sends the message of the fundamental importance of tax compliance as a matter of societal responsibility.

For the reasons above, some members of the Tax Section support the driver's license suspension law so long as an appropriate hardship exemption is established for indigent taxpayers and procedural protections are put in place consistent with constitutional requirements.

2. Bad Policy

Other members of the Tax Section believe that the law is simply bad policy, even if the hardship and constitutional protections described above are instituted. In this view, as a fundamental matter, taking away a driver's license is an inappropriate and disproportionately harsh punishment for the failure to pay a State tax liability, even if it may be effective in furthering collections. Members of the Tax Section who oppose the driver's license suspension policy note that license suspension may prove to be counterproductive and unnecessarily punitive as tax debtors become overly restricted in travel for their necessary routines of daily life (such as shopping for food, clothes and medicine), in job searches and in countless other aspects of life not permitted under a restricted license.

This is likely to be particularly true for unrepresented or unsophisticated taxpayers who are less capable of effectively navigating the Department's tax collection system, as well as those taxpayers who are more reliant on driving because they live in areas of the State without adequate public transportation. Indeed, the driver's license suspension policy is likely to disproportionately harm those who are not wealthy and do not live in urban areas. Wealthy individuals may not care about losing their driver's license since they can afford to hire drivers or personal assistants (or have food, etc. delivered to their home) and urban residents, whether wealthy or not, may not care about losing their driver's license since they may not own a car and can rely on public transportation to get around. Thus, to those citizens of New York for whom driving is a necessity, the driver's license suspension policy arguably forces them to break the law over what may (as discussed below) be small, questionable or unfair assessments of tax, penalties and interest, as well as inequitable or unreasonable collection efforts that are not subject to any objective review through formal appeal mechanisms.

In this regard, many of our members who believe the law is bad policy are also concerned that the law is being administered in the context of a New York tax collection

process with serious structural deficiencies. The Tax Section has repeatedly expressed concerns regarding troubling aspects of the collection process in New York, including the lack of clarity, transparency and consistency surrounding the procedures for installment payment agreements and offers in compromise, the lack of a formal "currently not collectible status", and the lack of a formal collection due process appeal system to act as an objective check on the largely discretionary decisions the Department is authorized to make in its efforts to collect past-due tax liabilities.

While addressed in prior reports, a few of these concerns deserve particular attention here. Because of the extraordinarily long 20-year length of the New York collection statute, even a small tax liability can easily grow, with penalty and interest, into one triggering the loss of a driver's license. This is particularly true for sales tax debts, which are subject to a penalty rate of interest approaching 15% and which often balloon into debts consisting mostly of penalty and interest that the taxpayer will never be able to satisfy. In addition, there are numerous instances in which a tax may be assessed not because it was really owed, but because the taxpayer has failed to timely challenge the assessment. Given the absence of post-assessment appeal rights, such as are available at the federal level (*e.g*, CDP Appeals, CAP Appeals and federal Offers in Compromise based on Doubt as to Liability), license suspension may occur even for taxpayers who owe nothing but have no procedural avenue for challenging the assessment. Similarly, the shortfalls in the Department's IPA and OIC program (as discussed earlier), when coupled with the lack of a formal appeal mechanism to challenge adverse collection actions, increase the likelihood of harsh and inconsistent application of the license suspension law. While the impacts of the law are particularly acute for indigent taxpayers, its harsh effects also extend to middle class taxpayers who may be financially crippled by having to choose an unaffordable long-term IPA over the loss of a driver's license, which may occur, for example, due to the lack of a formal CNC status or the Department's general policy of refusing OICs for trust fund taxes even if the taxpayer is incapable of ever paying the debt. In this view, the law is of particular concern when administered in the context of a collection system that is viewed by the Tax Section as not working well.

3. Consensus View

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 in-

creasing the threshold that triggers the application of the law.[136] 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 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.

[136] California's driver's license revocation statute, for example, is limited to the 500 largest tax debtors owing tax delinquencies in excess of $100,000. CAL. BUS. & PROF. CODE § 494.5(a)(2).