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Report No. 1437

April 6, 2020

The Honorable Michael Schmidt  
Commissioner  
NYS Department of Taxation and Finance  
W. A. Harriman Campus, Building 9  
Albany, New York 12227

Re: *Report on Application for Hardship Exemption under  
NYS Tax Law §171-v(5)*

Dear Commissioner Schmidt:

I am pleased to submit this report of the Tax Section of the New York State Bar Association which urges the Department of Taxation and Finance ("Department") to simplify and clarify its current requirements for applying for the "undue economic hardship" exemption now provided under NY Tax Law Section 171-v. This law requires a suspension of a taxpayer's driver's license if \$10,000 or more in tax debt is owed and arrangements have not been made with the Department to pay the liabilities. As a result of an amendment to the law in April of 2019, an exemption was added to allow the taxpayer to avoid a driver's license suspension if "the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship." Tax Law § 171-v (5)(vii), (viii). On July 31, 2019 the Department published a new webpage explaining what a taxpayer must do to apply for the hardship

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exemption<sup>1</sup>. Now, after several months of experience with this procedure for claiming the hardship exemption, we believe that (1) the current application process is too burdensome to achieve the relief intended by the law and (2) the Department may be too narrowly interpreting the exemption.

The Report analyzes (a) the current application procedures that make the process too burdensome, especially for taxpayers most likely to qualify for relief; (b) how the exemption should be interpreted in order to be better aligned with the purpose of the statute as expressed in the legislative history and (c) whether the current procedures for claiming the exemption could violate the due process clause of the federal constitution.

The Report recommends that the Department (1) simplify and clarify the procedures for claiming the hardship exemption, including creating a call center as an alternative to submitting written documents for making exemption claims, and (2) interpret the exemption provision to apply to taxpayers who are already experiencing undue economic hardship if it will be worsened by suspension of the license and apply a presumption in favor of taxpayers who are already experiencing economic hardship.

These changes are important and urgent since any administrative procedure to implement a law imposing sanctions which restrict such a fundamental need as an individual's mobility must be crafted and administered with sensitivity to these considerations.

In addition to the issues addressed in the Report, we note that during the COVID-19 shutdown it will be close to impossible for taxpayers to submit hardship exemption applications or for the Department to process them. Accordingly, we urge the Department to delay license suspensions during the duration of the shutdown.

We welcome the opportunity to work with you and your staffs on these recommendations.

Respectfully submitted,



Andrew H. Braiterman  
Chair

Enclosure

cc: Liz Krueger, Chair, Senate Finance Committee  
New York State Senate

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<sup>1</sup> <https://www.tax.ny.gov/enforcement/collections/driver-license-susp.htm>

Helene Weinstein, Chair, Ways and Means Committee  
New York State Assembly

Andrew Morris, Executive Deputy Commissioner  
NYS Department of Taxation and Finance

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NYS Department of Taxation and Finance

**Report No. 1437**

**New York State Bar Association**

**Tax Section**

**Report on Application for Hardship Exemption under NYS Tax Law §171-v (5)**

**April 6, 2020**

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## I. Introduction

This report urges the Department of Taxation and Finance ( the “Department”) to simplify and clarify its current requirements for applying for the “undue economic hardship” exemption now provided under NY Tax Law Section 171-v.<sup>1</sup> This law requires a suspension of a taxpayer’s driver’s license if \$10,000 or more in tax debt is owed and arrangements have not been made with the Department to pay the liabilities. The New York State Bar Association (“NYSBA”) played a significant role in the April 1, 2019 amendments to the law to provide for additional exemptions. One new exemption allows the taxpayer to avoid a driver’s license suspension if “the taxpayer demonstrates that suspension of the taxpayer's driver's license will cause the taxpayer undue economic hardship.” Tax Law § 171-v (5)(vii), (viii). Our 2016 and 2017 reports<sup>2</sup> urged the addition of a hardship exemption. The New York State Bar reports are cited in the legislative history of the law.<sup>3</sup>

The Department has responsibility for implementing the law consistent with the statutory language, the legislative history and the spirit and purpose of the law. On July 31, 2019 the Department published a new webpage explaining what a taxpayer must do to apply for the hardship exemption<sup>4</sup>. The taxpayer must (1) submit a written explanation of why he/she is eligible for the exemption on new Form DTF 5.1 and (2) submit a financial disclosure on Form DTF-5 including all required attachments.

After several months of experience with this procedure for claiming the hardship exemption, we believe that (1) the current application process is too burdensome to achieve the relief intended by the law and (2) the Department may be too narrowly interpreting the exemption. As to the overly burdensome application process, it is important to note that the hardship exemption will most likely apply to taxpayers with little financial means or sophistication. This is particularly true for

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1 The principal drafters of this report were Sherry Kraus and Jack Trachtenberg. Substantial contributions were made by Stephen Land, Robert Cassanos, Philip Wagman, Andrew Braiterman, Peter Connors, Kara Mungovan, Josh Gewolb, Michael Lehmann, Michael Schler and Richard Reinhold. Helpful comments were received from Alysse McLoughlin, Deborah Paul, Eric Sloan, Elizabeth Kessenides and Brian Krause. Appreciation is expressed to Daniel Hsiung of the Legal Aid Society, Low-Income Taxpayer Clinic, New York City. This Report reflects solely the views of the Tax Section of the New York State Bar Association (“*NYSBA*”) and not those of the NYSBA Executive Committee or the House of Delegates.

2 NYSBA Tax Section, *Report on New York State’s Driver’s License Suspension Program*, No. 1344, May 5, 2016 (the “2016 Report”) and *Report on Recommended Amendments to the New York State Driver’s License Suspension Program*, No. 1380, August 7, 2017 (the “2017 Report”).

3 The primary Senate sponsor of the amendments – Senator Liz Krueger, Chair of the Finance Committee – adopted the recommendations made by the NYSBA Tax Section. See S.3836 Sponsor’s Memo, citing the 2016 and 2017 Reports., <https://www.nysenate.gov/legislation/bills/2019/s3836>. These recommendations also appear in the legislative “Summary” of the law and the “Justification” for the law.

4 <https://www.tax.ny.gov/enforcement/collections/driver-license-susp.htm>

unrepresented or unsophisticated taxpayers who have limited capability to effectively navigate the Department's tax collection system. The current application procedure requires the filing of the lengthy and complex Form DTF-5 which is the primary document used by the Department in evaluating the financial adequacy of an Offer in the NY Offer in Compromise Program<sup>5</sup>. The new form, DTF-5.1, requires that the taxpayer explain in writing why he/she is eligible for the exemption. This can be daunting to taxpayers who do not have the sophistication or literacy to be able to present their cases in written form. Nor is there any guidance or examples in Form DTF-5.1 as to what constitutes grounds for eligibility. These requirements could have the counterproductive effect of discouraging applications for a hardship exemption by those most in need.

As to the Department's overly narrow interpretation of the exemption, we have become aware of situations where the Department may be denying relief to taxpayers experiencing "undue economic hardship" unless they can show that the hardship is directly attributable to the proposed license suspension. We believe that such an interpretation reads the statutory language of the hardship exemption too narrowly and reaches a result contrary to the purpose and intent of the law.

## **II. Background of "Undue Economic Hardship" Exemption under Section 171-v**

Prior to the 2019 amendment to the law, the only way to avoid license suspension under Section 171-v was (a) to pay the liability in full, (b) to enter into an installment payment agreement ("IPA") to pay the full liability or (c) to resolve the liability for an amount less than the full liability by submitting an Offer in Compromise ("OIC") acceptable to the Department. However, as pointed out in our prior reports, there are many instances when a tax debtor has so little income or assets that there is no financial ability to begin payment of the back taxes under any of the above alternatives.

For example, an OIC can be an insurmountable challenge to tax debtors because it requires a payment of cash up front for the value of assets that may be illiquid or for income that will not be earned (or available) until future years. A tax debtor who has no assets to liquidate (or to 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 generally requires a minimum offer equal to the principal amount of the tax.<sup>6</sup>

An OIC can also be an insurmountable challenge to many tax debtors because of its procedural complexity. The information and attachments required in the ten-page Form DTF-5 are

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5 The Commissioner's authority to compromise a tax liability for less than full payment is granted under New York Tax Law § 171-15th.

6 20 NYCRR Section 5005.1(b)(1).

substantial, exceedingly burdensome and require potentially dozens of attachments, including, among other things, a complete listing of assets and liabilities; federal income tax returns for the preceding three years; balance sheets for the preceding three years for all sole proprietorships and single-member LLCs; credit reports generated within the past 30 days; all bank account and financial statements for the preceding 12 months; recent mortgage or home equity statements within the past 30 days; real property tax appraisals; lease agreements; all loan agreements; and bankruptcy discharge papers. In addition, in completing the Form DTF-5, the taxpayer must understand terms such as accounts receivable, book value, fair market value, grantor, donor, trustee, life interest, remainder interest, schedule K-1, contingent claims, legal actions payable, judgements, receiverships, statement of assets and liabilities, balance sheets, sole proprietorships, LLCs, mortgage indentures and conveyances, security/collateral agreements, rights to sue, subrogation and assignments. The taxpayer must obtain account statements, many going back one year, usually by having to navigate the procedures of various financial institutions. Taxpayers must generate credit reports online when many do not have or cannot afford internet services in their homes. The application process for an OIC can be daunting even for tax professionals.

For tax debtors who could not resolve their liability in the OIC program, the only (pre-amendment) option to avoid license suspension was to enter into an IPA which would provide a monthly payment plan for full payment of the liabilities. Given the relatively short time frames often required by the Department for payment and the fact that the monthly payments make no allowance for payment of the taxpayer's basic living expenses, a taxpayer could end up with an IPA that did not leave him or her enough left over each month to pay basic living expenses.

### **III. Our Prior Report Recommendations**

Both of our reports recommended that “the legislature should consider potential changes to the law that would mitigate the potentially harsh application of the law, such as carving out a hardship exemption.”<sup>7</sup> We recommended an amendment to the driver's license suspension law “to create a hardship exemption for any tax debtor who can demonstrate that payment of his or her past due tax liabilities will leave insufficient income to cover basic living expenses.”<sup>8</sup> We stressed the need for the exemption process to be simple so that taxpayers would not be discouraged (or overwhelmed) to the point that they would fail to claim an exemption for which they qualified. We recommended that the Department model the procedures on those used by the Internal Revenue Service (the “IRS”) in placing taxpayers in currently not collectible (“CNC”) status.<sup>9</sup> In the IRS procedure, the taxpayer calls the Automated Collection

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7 See 2017 Report at 5

8 2017 Report at 2.

9 This is the status given to federal tax debtors who have no financial ability to begin even a low-level payment plan or to liquidate assets to pay a federal tax debt without impairing their ability to cover basic living expenses.



System (“ACS”) at the IRS and a representative takes financial information generally using the 2-page Form 433-F as the questionnaire. Sometimes the representative will ask for follow-up substantiation of some claimed expenses (or income) to be faxed or mailed to the IRS.<sup>10</sup> Unlike the New York Form DTF-5, there is no automatic requirement to provide substantiation for the financial data submitted. The decision to place the taxpayer in CNC status generally is made at the conclusion of that phone call.

New York tax law already borrowed heavily from the federal CNC standards when the New York State Offer in Compromise law was amended in 2011 to open up the OIC program to tax debtors who could demonstrate that payment in full of the liability would result in “undue economic hardship.”<sup>11</sup> The definition of “undue economic hardship” under the amended NY OIC law and regulations closely follows the standards in the federal Internal Revenue Manual guidelines for determining a tax debtor’s ability to pay toward the tax debt owed.<sup>12</sup>

#### **IV. Amendment to the Driver’s License Suspension Law**

The New York Legislature amended Tax Law Section 171-v on April 1, 2019 to include new grounds upon which a taxpayer may challenge the proposed suspension of a driver’s license. Among those grounds is that “suspension of the taxpayer’s license will cause the taxpayer undue economic hardship.”<sup>13</sup> While the amendments do not expressly define “undue economic hardship,” the Department had previously issued regulations defining this term in the context of its OIC Program.<sup>14</sup> Under the OIC regulations, “undue economic hardship” occurs when a taxpayer is

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During the period when the tax debtor is in CNC status, there are no IRS collection actions to collect the debt (*e.g.*, bank levies, wage garnishments or asset levies). There is no requirement that the federal tax debtor first submit an OIC in order to qualify for CNC status.

10 For a Form 433-F submitted in writing, the following is stated at the end of the form: “Please retain a copy of your completed form and supporting documentation. After we review your completed form, we may contact you for additional information. For example, we may ask you to send supporting documentation of your current income or substantiation of your stated expenditures.”

11 N.Y. Tax Law § 171-15th .

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

13 Tax Law § 171-v (5)(vii), (viii).

14 *See* 20 N.Y.C.R.R. 5005.1(b)(3).

unable to pay “reasonable basic living expenses.”<sup>15</sup> Those regulations define “basic living expenses” as:

“[E]xpenses that provide for the health, welfare, production of income of the taxpayer and the taxpayer’s family. The department will look to national and local standard expense amounts used by the Internal Revenue Service as a guideline to provide accuracy and consistency in determining a taxpayer’s basic living expenses.”<sup>16</sup>

We cautioned that it was important to maintain a distinction between the driver’s license suspension law and the Offer in Compromise program even though both programs would likely share a common definition of “undue economic hardship.”

“In determining whether a New York tax debtor qualifies for the driver’s license suspension hardship exemption, the OIC definition of ‘undue economic hardship’ is a useful reference. However, the tax debtor should not be required to go through the arduous (and sometimes futile) process of submitting an OIC as a condition to being granted the driver’s license hardship exemption.

\* \* \*

Because few tax debtors qualifying for the hardship exemption will have the financial means to retain professional help, the process of applying for a hardship exemption should be made as simple and streamlined as possible.

\* \* \*

The law should allow Department representatives to conduct the evaluation and to grant the hardship exemption at the first level of contact with the tax debtor. However, if the taxpayer’s request for a hardship exemption is denied, the tax debtor should be given a right to appeal under NY Tax Law § 171-v (5).”<sup>17</sup>

The amendment to section 171-v did just that. The statutory language added to section 171-v makes it clear that the new “undue economic hardship” challenge to a license suspension is to be considered separately from the OIC Program.<sup>18</sup>

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15 20 N.Y.C.R.R. § 5005.1(b)(3)(i).

16 20 N.Y.C.R.R. § 5005.1(b)(3)(ii)(a).

17 2017 Report at 7 (*emphasis added*).

18 The amendment to Tax Law Section 171-v explicitly state that “nothing in this subdivision is intended to limit a taxpayer from seeking relief pursuant to an offer in compromise . . .,” thereby indicating that the new grounds for challenge are to be considered separately from the OIC Program. Tax Law § 171-v (5).

**V. Why the Current Application Procedure Fails to Achieve the Relief Intended by the Undue Economic Hardship Amendment to the Law.**

**A. Procedure for Applying for Exemption is Too Burdensome.**

While it is perfectly reasonable for the Department to import the definition of “undue economic hardship” from the OIC regulations in evaluating the hardship exemption under the driver’s license suspension law, this does not mean that the procedures for determining relief should be the same in both programs. The OIC program is very different from the relief granted under the exemption to the driver’s license suspension law. In the OIC program, a showing of “undue economic hardship” is one of several alternative threshold requirements for determining whether the applicant qualifies to participate in the OIC program (*i.e.*, will full collection of the tax cause the tax debtor “undue economic hardship”?).<sup>19</sup> The detailed financial disclosures required in the ten-page Form DTF-5 (described above) are arguably necessary since the Department needs to make a close analysis of whether the taxpayer’s offer meets the program criteria (*e.g.*, insolvency). Moreover, a closer scrutiny of the taxpayer’s financials may be warranted in connection with an Offer in Compromise since acceptance of an Offer in Compromise can result in significant tax abatements and lien (warrant) releases.<sup>20</sup>

In contrast, the granting of a hardship exemption from driver’s license suspension does not result in any reduction or abatement of tax liabilities or release of liens. Furthermore, this exemption applies to individuals from whom collection is unlikely in any event. On the other hand, the denial of the exemption will result in the application of a powerful and harsh collection tool which fundamentally restricts an individual’s mobility. This is especially true in areas where there is a lack of good public transportation.

Nor is a “restricted driver’s license” an adequate alternative for many taxpayers who face license suspension.<sup>21</sup> Under DMV rules, any taxpayer who drives while his license is suspended may be subject to arrest and penalties. While a taxpayer whose license is suspended may apply for a restricted license, such a license permits the individual to travel only to and from work, school,

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19 If, for example, the applicant can show insolvency or a recent bankruptcy, there is no requirement that the applicant also show that full payment of the tax would result in “undue economic hardship” to be eligible for OIC relief.

20 The more detailed review is understandable since the OIC program is charged with the dual obligations of, on the one hand, granting taxpayer relief from overwhelming tax debt, while on the other hand, being mindful of protecting the fiscal health of the State and ensuring fairness to other taxpayers who fully pay their tax debts. It is understandable that this evaluation should be a detailed and careful one.

21 See 2016 Report at 4.

medical appointments, the DMV and childcare related to employment or education.<sup>22</sup> The taxpayer must return directly home.<sup>23</sup> The restricted license is inadequate for a multitude of basic driving needs in a taxpayer's everyday life, such as grocery shopping, job hunting, helping with elderly parents or young grandchildren, veterinary care for pets, to name only a few – none of which is allowed under a “restricted license.”

In requiring the submission of a Form DTF-5, the Department has imported the most onerous requirement for processing an Offer in Compromise into the application procedure for claiming the hardship exemption from driver's license suspension. The form requires information only tangentially related to whether the driver's license hardship exemption should be granted. If the procedures for applying for the exemption are too onerous, it will discourage individuals – especially those with limited financial literacy – from pursuing their right to stop the suspension and undermine the relief intended by the statute.

Another reason for the needed simplification of the application process is the short time frame during which the exemption must be submitted and evaluated.<sup>24</sup> It is unrealistic for taxpayers, especially for those with little means to get professional help and little financial sophistication, to gather all of the information and attachments needed for the Form DTF-5 together, mail them in, and hope for a resolution before the expiration of the 60-day period. In the OIC program, it is not uncommon for Department analysts to need months and even, in some cases, over a year to process and evaluate an Offer supported by the extensive information provided in the Form

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22 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. Note, however, that a restricted license will be revoked if the holder is convicted of **any moving traffic violation**. NYCRR§ 135.9(c). 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]).

23 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).

24 Once the taxpayer is placed in the license suspension process, a 60-day notice of proposed driver license suspension is 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.

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 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.

DTF-5. This makes it highly unlikely that a taxpayer’s request for an exemption under the current application procedure will be processed in time to avoid a license suspension.

## **B. Constitutional Questions.**

We believe the procedures now in place at the Department for a taxpayer to exercise the statutory right to claim a hardship exemption are now sufficiently burdensome that they could raise Fourteenth Amendment Due Process issues.<sup>25</sup> When the State seeks to deprive an individual of a protected property interest, such as a driver’s license, that person must receive notice of the deprivation and be given an opportunity to be heard. 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.”<sup>26</sup> Under *Matthews v. Eldridge*, the opportunity to be heard must be made “at a meaningful time and in a meaningful manner.”<sup>27</sup> Determining what process is due generally requires consideration of (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation of the private interest through the existing procedures and the value of any additional procedural safeguards; and (3) the government’s interest, which includes the administrative burdens and societal costs created by any additional procedures.<sup>28</sup>

In *Goldberg v. Kelly*, the United States Supreme Court emphasized that the opportunity to be heard must be appropriately tailored to those affected: “The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”<sup>29</sup> In that case, the Supreme Court concluded that offering individuals losing welfare benefits an opportunity to make

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25 Issues as to the constitutionality of Section 171-v have been raised since the enactment of the provision. A comprehensive analysis of these issues was included in our 2016 Report (pp. 20 to 38) and will not be repeated other than to note that (1) a driver’s license issued by the state represents a “property right” protected by the U.S. Constitution and (2) constitutional issues raised by these laws include whether they satisfy the due process requirements under the Fourteenth Amendment or will withstand Eighth Amendment challenges that they impose an impermissibly excessive fine or that the suspension of driver’s licenses to enforce the payment of tax debts lacks a remediating purpose of regulating traffic on the roads and is thereby punitive. *cf. Timbs v. Indiana*, 586 U.S. \_\_\_ (2019). Recent cases analyzing these issues include: *Arthur Kevin Berry v. NYS Dep’t of Tax. and Fin.*, 162 A.D.3d 606 (1st Dep’t 2018), where a taxpayer who was too poor to satisfy his tax debt argued that Section 171-v was unconstitutional because not supported by a rational state interest in denying him the right to operate an automobile, thereby preventing him from visiting his ailing mother. While this challenge was not successful, the taxpayer’s arguments likely contributed to the success of subsequent efforts to get legislative relief from license suspension in cases involving “undue economic distress”. An extensive analysis of the constitutional issues raised in license suspension cases is contained in *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019), upholding Michigan’s driver’s license suspension program to collect fines for traffic violations over a strong dissent which would have invalidated the statute as involving a Due Process violation because adequate consideration was not given to the person’s ability to pay. *See* opinion of Judge Donald, *dissenting*, 924 F.3d at 19-30.

26 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

27 *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

28 *Id.* at 335, 347.

29 *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

a written submission (rather than an oral presentation) was insufficient, as many of the affected individuals did not have sufficient education to make an effective written submission and were not able to obtain professional assistance with the submission.<sup>30</sup>

As discussed above, to apply for the hardship exemption under section 171-v, the Department now requires that taxpayers explain, in writing, on the Form DTF-5.1, why they are eligible. They must further complete the complicated 10-page Form DTF-5 with potentially dozens of supporting documents to provide information, much of which is not relevant to whether the taxpayer has enough income to pay basic living expenses. As in *Goldberg*, the taxpayers most likely to be eligible for the hardship exemption will often not have the sophistication or literacy to present their case through such a daunting process. The present Department procedure offers no alternative allowing taxpayers to call in and explain their situations to a representative instead of making the above submissions in writing.

There appears to us to be a real possibility that the Department's procedures for claiming the hardship exemption may not satisfy the *Eldridge* three-prong test outlined above. First, the taxpayer's driver's license is a substantial property right, deprivation of which requires due process. Second, the procedures created by the Department could very well result in an erroneous deprivation either because taxpayers simply may be sufficiently confused or overwhelmed by the requirements that they choose not to exercise their right to the exemption or because they do not have the ability to present their case clearly in writing. Finally, it does not appear to be a significant burden on the Department to generate simpler and clearer forms that can be used by applicants seeking the exemption and to set up a call-in number allowing taxpayers to reach a representative to whom they can explain their situation orally.

In light of these constitutional uncertainties, we recommend that the Department simplify and clarify the procedures for requesting the hardship exemption. The specifics of those recommendations are set forth below in Part VII. To continue the complicated and intimidating procedure now in place to claim the hardship exemption will focus attention on potential violations of the taxpayer's due process rights to be heard before the license is suspended.

## **VI. Overly Narrow Interpretation of the Hardship Exemption.**

### **A. Legislative History of the Law.**

The legislative history of the hardship exemption states that the purpose and intent of the law was to give relief from the harsh consequences of suspending a driver's license to a tax debtor who has no financial ability to pay their past due tax liabilities. Unlike most New York legislation, this law has an ample legislative history. The following is an excerpt from the legislative "Justification" for the law:

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<sup>30</sup> *Id.* at 268-269 (1970).

“For example, some tax debtors may have so little income or assets that they are not financially able to enter into an installment payment agreement or an 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 an indigent individual under threat of loss of his or her driver's license even though there are, in many cases, federal and state laws in place that would protect that individual from any direct tax levy on income and assets. The limited financial hardship exemptions make the New York law uniquely punitive when applied to this type of tax debtor. . . .”

The following example was given in our 2017 Report to illustrate a case where the hardship exemption should be granted:

**Example 1.** *W* owes more than \$10,000 to New York in tax, penalty and interest. *W* has not paid her back taxes because she is living on a social security income which barely covers her basic living expenses. She has no assets of value and no ability to borrow. In the past, she has not had to worry about a tax levy by the Department against her income or bank account because her social security income is exempt from levy under federal and New York State laws. However, she receives a notice from the Department (or the DMV) that she will have her driver's license suspended unless she makes arrangements for the payment of her New York State tax debt. *W* does not qualify for any of the six grounds to challenge the proposed license suspension. Because there is no ground to challenge the license suspension based on financial hardship, she will have to enter into a payment agreement acceptable to the Commissioner if she is to keep her driver's license. *W* is unlikely to be able to resolve the liability with an OIC, either because she has no financial means to fund an OIC or because her minimum offer under the usual formula would be so low that it would be unlikely to be acceptable. Because she lives in an area of the State where she must have her driver's license for her personal needs, she feels she has no meaningful alternative other than to enter into a monthly payment arrangement under an approved IPA with the Department for payment of the full tax debt even if those monthly payments will be paid from her exempt social security income and she will not have enough left each month for food and housing.<sup>31</sup>

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31 2017 Report at 4-5

Both the Sponsor’s Memo (Senator Liz Krueger) and the “Summary of Provisions” state that the law was intended to “grant exemptions to taxpayers whose payment of past due tax liabilities would create a hardship to the taxpayer in meeting necessary living expenses.” Both the Senate and Assembly Bills provided that the hardship exemption should be granted where “[p]ayment of past due tax liabilities will create a hardship to the taxpayer in meeting necessary living expenses.”

However, in the final days of the legislative session, the above wording of the hardship exemption was changed and replaced with the phrase “*the taxpayer demonstrates that suspension of the taxpayer’s driver’s license will cause the taxpayer undue economic hardship.*” Applying the definition of “undue economic hardship” contained in the OIC regulations (discussed in Part III *supra*), this translates into “*the taxpayer demonstrates that suspension of the taxpayer’s driver’s license will cause the taxpayer to be unable to pay his reasonable basic living expenses.*”

There is no legislative history revealing why this change in wording was made, but it is possible that the change was at the recommendation of the Department to ensure that the hardship exemption test for determining “necessary living expenses” in the original Bill language tied directly to the “undue economic hardship” definition under the OIC regulations. The New York State Bar Association closely followed the final hectic days of the mark-up of the Bills. No changes were made to the legislative history of the law to suggest that the original purpose and intent of the law had changed. However, there is now some incongruity between the final legislative wording of the exemption and the legislative history describing the purpose and intent of the law.

## **B. Ambiguities of the Law.**

As is now evident in the Department’s reported interpretation of the law, the late session wording change may have introduced interpretive ambiguities that could undermine the relief intended by the hardship exemption. For example:

- **Type of Causal Relationship between the Suspension of the License and the “Undue Economic Hardship.”** The original wording of the legislative test to qualify for the exemption was whether *the payment of past due tax liabilities* would create a hardship to the taxpayer in meeting necessary living expenses. But that was changed to whether *the suspension of the taxpayer’s driver’s license* will cause the taxpayer to be unable to pay his necessary living expenses. At first glance, these may seem like similar tests with similar outcomes. However, the tests for the hardship exemption changed in a significant way: it is no longer a test of whether the taxpayer can show that payment of past due liabilities would result in being unable to pay basic living expenses. The test is whether the *suspension* will “*cause*” the taxpayer to be unable to pay basic living expenses.
  - The question then arises as to whether the license suspension must be the *sole cause* of the taxpayer’s undue economic hardship or merely a



*contributing cause*? For example, what if the taxpayer is already experiencing “undue economic hardship” prior to the suspension notice? Will the exemption be granted if the taxpayer can show that the proposed license suspension will *worsen* the economic hardship? Certainly, the statutory language is not clear on this and could be read to be satisfied if the license suspension is a contributing but not the *sole* factor in the taxpayer’s undue economic hardship.

- **Role of Restricted License Option in Evaluation.** In evaluating the impact of the license suspension on a taxpayer’s ability to pay basic living expenses, will the Department assume that the taxpayer will be able to continue driving in some limited fashion by obtaining a “restricted license” if the license is suspended? This is somewhat implied in Section 2 of Form DTF-5.1, where applicants are asked whether they have “attempted to get a restricted use license”. If the alternative of a restricted license is assumed to be available to the applicant, this should be made clear in the instructions of Form DTF-5.1. Such an assumption means that establishing a causal relationship between the suspension of the license and the taxpayer’s inability to pay basic living expenses gets more complicated. For example, if a taxpayer is employed, he may not be able to show any lessening of income attributable to a license suspension since a restricted license allows the taxpayer to drive to and from the place of employment. So the financial impact of the suspension will have to be shown in increased costs for basic living expenses of activities that require driving not permitted under the restricted license.<sup>32</sup> This could include expenses such as higher food costs since the taxpayer will no longer be able to drive to “big box” stores where prices are cheaper, or having to pay for delivery services, taxis or other alternative forms of transportation to meet basic living needs.

The differing outcomes arising from the ambiguities in the statutory language can be demonstrated in the following examples:

**Example 2.** “T” has a job to which he commutes daily by car. He has received a notice of proposed driver’s license suspension because he owes tax debt in excess of \$10,000. “T” requests a hardship exemption on the grounds that the license suspension will cause him to be unable to pay his basic living expenses. The Form DTF-5 that he submits shows that his

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32 These types of indirect impacts of a license’s suspension should always be taken into account by the Department in determining whether the suspension of the license will negatively affect the taxpayer’s ability to pay basic living expenses. *However, these financial impacts will not be shown on the Form DTF-5 which only lists current expenses (not projected ones).*

income currently exceeds his basic living expenses by \$100/month. However, in his Form DTF-5.1, where he describes how the license suspension will cause him undue economic hardship, he estimates that his basic living expenses will increase by \$150/month because he will have to pay more for food and incur higher transportation costs in taxis, delivery services and other paid transportation to meet his basic living needs which cannot be met by use of a restricted license. Since T can directly attribute the projected additional living expenses (and resulting “undue economic hardship”) *solely* to the suspension of his driver’s license, he should qualify for the exemption under even a strict reading of the statute.

**Example 3.** “S” has a job which does not provide enough income to cover her reasonable basic living expenses. She lives from paycheck to paycheck and has accumulated a large amount of debt to cover a \$100/month shortfall in her income each month. She has just received a notice of proposed driver’s license suspension. She requests an exemption based on the ground that “suspension will cause her ‘undue economic hardship’”. Her Form DTF-5 shows that, even before the license suspension, she is already experiencing “undue economic hardship” since her current income does not cover her allowable basic living expenses. On her Form DTF-5.1, she states that if her license is suspended, she will no longer be able to shop at a “big box” store to which she currently drives to save money on groceries and will therefore have to pay additional food costs of \$50/month to shop at a small nearby grocery store within walking distance of her home.

*Query:* How strictly will the Department interpret the “causal” relationship needed between the license suspension and the “undue economic hardship” language of the statute? Will “S” be denied an exemption because, strictly speaking, the suspension of the license is not the *sole* “cause” of her undue economic hardship (because she is already experiencing undue economic hardship)? Or is it enough for “S” to show that the license suspension will *contribute to or worsen* her already existing undue economic hardship? Certainly, to grant an exemption to “T”, but not to “S” (who is experiencing the greater economic hardship), is an absurd distinction and contrary to the relief intended in the law.

**Example 4.** “W”’s only income is from social security. She lives in an area with poor public transportation. “W” owes over \$10,000 in unpaid tax debt and has just received a notice of proposed driver’s license suspension. She requests a hardship exemption. “W”’s Form DTF-5 shows that her income does not cover all of her reasonable basic living expenses and she has no financial ability to enter into an IPA to begin payment on her tax liabilities.

She (like “S”) is already experiencing “undue economic hardship” prior to the proposed license suspension. However, on the Form DTF-5.1 that she submits to show why she qualifies for the hardship exemption, she describes the hardships resulting from a suspension of her license as: not being able to take her older pet to the vet; not being able to visit her husband’s grave; not being able to help her daughter in babysitting her grandchildren; not being able to go to church; and not being able to visit with friends and relatives. Travel for these activities would not be allowed under a restricted license. She estimates that the additional transportation costs to her if she were to continue these activities without being able to drive her car would add another \$100/month to her monthly expenses, further worsening her financial situation. *Query:* These are real and potentially harsh deprivations in W’s life if her license is suspended. But will these additional transportation costs be considered as meeting the test of being for the “health and welfare or for the production of income” of “W” in order to be allowed as “reasonable basic living expenses”?<sup>33</sup> Such costs are neither expressly allowed nor expressly denied in the IRS (or NYS) examples of “reasonable basic living expenses.” Certainly, a strong case can be made that the activities contribute to the “health and welfare” of “W.” Therefore, any reasonable costs to “W” to engage in the activities should be allowed in determining “undue economic hardship”. A denial of the exemption will leave W no meaningful alternative for continuing the activities other than (a) keeping her license by entering into a monthly payment arrangement under an approved IPA with the Department for payment of the full tax debt even though that will leave her even less money to cover her monthly living expenses and worsen her undue economic hardship or (b) losing her license and incurring the additional costs in alternative transportation, which also will worsen her undue economic hardship. A third outcome of a denial of the exemption would be “W” losing her license and having to forego these activities unless she can get rides from family and friends. In our view, that outcome would result in a *worsening* of her undue economic hardship in much the same way as if she had to cut back on food, medications or other basic living expenses to manage after the license suspension.

The above examples demonstrate the unsupportable and inconsistent outcomes of a narrow interpretation of the statutory language of the hardship exemption. If the exemption is to be granted only to taxpayers who can demonstrate that their “undue economic hardship” is *solely* attributable

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33 The IRS standards for allowable “Transportation” costs are in IRM 5.15.1.10(7-24-2019) (1) (c). Such costs are allowed to the extent they provide for the health and welfare and/or production of income of the taxpayer. These standards, in turn, govern the determination of reasonable basic living expenses under the New York OIC regulations in defining “undue economic hardship.”

to the license suspension, only “T” would be granted the exemption notwithstanding the fact that he is in an economically better position than either “S” or “W”. We believe that the law can (and should) be interpreted to grant the exemption to all of the taxpayers in the above examples. Whether a taxpayer will experience “undue economic hardship” as a direct result of the license suspension, or is already experiencing “undue economic hardship” (even before the license suspension) which will be worsened, should not be a relevant distinction in the question of whether the exemption should be granted. To deny relief to “S” or to “W” because they cannot demonstrate that their “undue economic hardship” is directly attributable to the license suspension would so severely limit the relief available from the hardship exemption as to return the license suspension law to its pre-amendment status as a harsh and punitive collection tool.

### C. Statutory Construction Rules.

The above interpretation of the hardship exemption language to extend to all of the taxpayers in the above examples is supportable under the rules of statutory construction. When the wording of a law displays a plain meaning, the courts construe the legislatively chosen words so as to give effect to that language. This is the “plain language” rule. *Cole v. Mandell Food Stores, Inc.*, 710 N.E.2d 244, 246 (N.Y. 1999).

But when, as here, a statute is unclear, or when interpreting the law in the strictest sense would lead to an absurd conclusion, the courts will look to the legislative history to determine what the legislature intended in a particular statutory provision. *Fumarelli v. Marsam Development, Inc.*, 703 N.E.2d 251 (N.Y. 1998).

In *Mowczan v. Bacon*,<sup>34</sup> the New York Court of Appeals stated:

"In matters of statutory construction, 'legislative intent is 'the great and controlling principle' . . . 'Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.'"<sup>35</sup>

And in *Council of N.Y. v. Giuliani*,<sup>36</sup> it was stated:

In giving effect to these words, "the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted.'"

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34 703 N.E.2d 242 (N.Y. 1998)

35 703 N.E.2d at 244

36 710 N.E.2d 255, 259 (N.Y. 1999) (quoting *People v. Ryan*, 8 N.E.2d 313, 315 (N.Y. 1937)).

And in *In re George L.*<sup>37</sup>, the New York Court of Appeals held that if interpreting the law in the strictest sense would lead to an absurd conclusion, an inquiry must be made into the spirit and purpose of the legislation.

In this case, the purpose of the law, as originally drafted, is set forth in the legislative history. It was intended to provide relief to taxpayers “who can demonstrate that payment of past due tax liabilities will leave insufficient income to cover basic living expenses.” The intent was to make sure that taxpayers were not forced, under threat of loss of their driver’s license, into tax debt payment plans they could not afford which would leave them unable to pay their basic living expenses. Preventing this outcome was one of the primary objectives of the amendments to Section 171-v. There is no legislative record suggesting that this purpose was abandoned in the final revisions to the law. However, the changes in the final wording of the hardship exemption introduced interpretive ambiguities, which, if read strictly, would lead to differing and unsupported outcomes among taxpayers and undermine the relief described in the legislative history.

We believe the statute should be read to accomplish an outcome as close to the purpose and intent stated in the legislative history as can be supported by the statutory language. We believe this is best accomplished by the Department’s extending the exemption to (a) any taxpayer who is experiencing undue economic hardship at the time of making the claim for the exemption that will be worsened as a result of suspension, as well as (b) any taxpayer who will experience undue economic hardship as a direct result of the license suspension.

## **VII. Recommendations.**

### **A. Simpler Application Process.**

- **Stop using Form DTF-5.** We urge the Department to craft a simpler, more streamlined approach for taxpayers to apply for the hardship exemption under Section 171-v. The aim should be to make the application process accessible to all taxpayers who are likely eligible. Continuing to make the taxpayer fill out the lengthy and complex Form DTF-5 to claim the hardship exemption and to require extensive substantiation attachments will discourage applications from many of the taxpayers most likely to be eligible and is overkill in the information that it elicits, much of which is not relevant to the exemption.
- **Develop a simpler financial statement form.** A simpler, less onerous financial statement, modelled on the two-page IRS Form 433-F, should be developed to be used by taxpayers for written submissions and also used by Department representatives in conducting a financial analysis by phone.

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37 648 N.E.2d 475 (N.Y. 1995)

(See recommendation below). Substantiation for all items on the form should not be required. As is done by the IRS, the items required to be substantiated should be limited to those for which there is a legitimate need to do so.

### **B. Clearer Application Process.**

Form DTF-5.1 should be modified to better inform the taxpayer of the grounds for qualifying for the exemption. Section 2 on Form DTF-5.1 should be modified to substitute the following underlined language:

**“2. Justification for exemption.**

Provide the facts and reasons supporting how the suspension would cause (or contribute to) your being unable to pay your reasonable basic living expenses. If you have attempted to obtain a restricted-use license, explain the status of that application.”

The instructions should be amplified to give a more comprehensive explanation of how the claim will be evaluated. For example, if the alternative of a “restricted license” will be assumed to be available to the taxpayer, this should be explained in the instructions, along with a description of what types of driving can and cannot be done under a restricted license.

Examples should be given of situations where the taxpayer will (or will not) qualify for the exemption.

### **C. Call-in Procedure/ Specialized Call Center.**

While the Form DTF-5.1 (as modified pursuant to our recommendations above) could still be used by taxpayers (or their representatives) to submit written applications for the exemption, it is important to have an alternative available that will allow taxpayers who do not have the sophistication or literacy to be able to present their case in written form to speak to a representative by phone and explain their hardship. The Department should put in place a direct line call-in procedure much like that used by the Internal Revenue Service in determining whether a taxpayer should be placed in “currently not-collectible” (“CNC”) status as more fully described above. We believe that this type of procedure for evaluating a hardship exemption to the driver’s license suspension law could easily be added to the training of Department representatives, who are already trained to ask taxpayers about financial data, including income and expenses, when discussing IPAs with taxpayers. Taxpayers could call in, explain their situations on the phone to a Department representative at the call center and allow Department representatives to conduct the evaluation (using a simpler financial statement form, such as the Form 433-F recommended above) to grant the hardship exemption at the first level of contact with the tax debtor. Establishing a specialized call center to process these license suspension exemptions would likely expedite the evaluation of

the exemption requests, thus ensuring that the exemption evaluation can be completed within the 60-day time frame for challenge of the license suspension.

#### **D. Evaluation Process/ Presumption.**

We urge the Department to interpret the hardship exemption to apply not only to situations where the taxpayer would suffer undue economic hardship because of the suspension, but also to situations where suspension would “worsen” or “contribute to” the taxpayer’s already existing undue economic hardship. For any taxpayer who is already suffering undue economic hardship at the time of the exemption request, we recommend that the Department adopt a presumption that further hardship will flow from a license suspension, thus satisfying the requirement for granting the exemption. Such a presumption will save the Department valuable time and resources spent on review of exemption applications from taxpayers who are highly vulnerable and unlikely to be a fruitful source of tax revenue. The presumption should not dictate the outcome (*i.e.*, should be “rebuttable”) in cases where, for example, (a) the applicant has knowingly misrepresented underlying facts or financial data or (b) the Department needs further clarification of the hardship being experienced. The overall objective of the evaluation process should be to ensure that license suspension does not return to its pre-amendment status as a harsh and punitive collection tool used against taxpayers who have no financial ability to pay their tax liabilities.