

09-1755
MISCELLANEOUS
SIGNED 08-11-09
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER</p> <p>Petitioner,</p> <p>v.</p> <p>TAXPAYER SERVICES DIVISION & PROCESSING DIVISION, OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondents.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-1755</p> <p>Tax Types: Cigarette License, Tobacco License Sales Tax License</p> <p>Judge: Phan</p>
---	---

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Attorney at Law
PEITIONER REP 2, Principal Owner, PETITIONER.
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, Director, Taxpayer Services Division
RESPONDENT REP 3, Director, Processing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on June 23, 2009. Petitioner is appealing the Processing Division's denial to issue a Cigarette Tax License and a Tobacco Tax License. Petitioner is also appealing the Taxpayer Services Division's denial of its Sales Tax License. These matters had originally been opened up as two separate appeals, Appeal Nos. 09-1755 & 09-1867. Upon Motion of the Divisions and with the agreement of the Petitioner, these appeals were consolidated under Appeal No. 09-1755 and will proceed through the administrative hearing process under that number. Appeal No. 09-1867 will be closed.

APPLICABLE LAW

Utah law requires those businesses that are required to collect sales tax to obtain a sales tax license. Utah Code Sec. 59-12-106(2) provides the following pertaining to the sales tax license:

- (a) It is unlawful for any person required to collect a tax under this chapter to engage in business within the state without first having obtained a license to do so.
- (b) The license described in Subsection (2)(a): . . . (iv) is valid until (A) the person described in Subsection (2)(b)(iii)(I) ceases to do business; or (II) changes that person's business address; or (B) the license is revoked by the commission;
- (c) . . .
- (d) The Commission shall review an application and determine whether the applicant: (i) meets the requirements of this section to be issued a license; and (ii) is required to post a bond with the commission in accordance with Subsections (2)(e) and (f) before the applicant may be issued a license.
- (e) (i) An applicant shall post a bond with the commission before the commission may issue the applicant a license if: (A) a license under this section was revoked for a delinquency under this chapter for: (I) the applicant; (II) a fiduciary of the applicant; or (III) a person for which the applicant or the fiduciary of the applicant is required to collect, truthfully account for, and pay over a tax under this chapter. (ii) if the Commission determines it is necessary to ensure compliance with this chapter, the commission may require a licensee to: (A) for a licensee that has not posted a bond under this section with the commission, post a bond with the commission in accordance with Subsection (2)(f); or
- (f) . . .
 - (ii) Except as provided in Subsection (2)(f)(iv), the commission shall calculate the amount of a bond required by Subsection (2)(e) on the basis of: (A) commission estimates of: (I) an applicant's tax liability under this chapter; or (II) a licensee's tax liability under this chapter; and (B) any amount of a delinquency described in Subsection (2)(f)(iii).
 - (iii) . . .
 - (A) For an applicant, the amount of the delinquency is the sum of: (I) the amount of any delinquency that served as a basis for revoking the license under this section . . . (II) the amount of tax that any of the following owe under this chapter: . . . (B) for a licensee, the amount of the delinquency is the sum of : (I) the amount of any delinquency that served as a basis for revoking the license under this section . . . ; or (II) the amount of tax that any of the following owe under this chapter: . . .
 - (iv) Notwithstanding Subsection (2)(f)(ii) or 2(f)(iii), a bond required by Subsection (2)(e) may not: (A) be less than \$25,000; or (B) exceed \$500,000.

The statutes require that businesses obtain a tax license for cigarettes and post a bond at Utah Code Sec. 59-14-201:

- (1) It is unlawful for any person in this state to manufacture, import, distribute, barter, sell exchange or offer cigarettes for sale without first having obtained a license issued by the commission under Sec. 59-14-202.
- (2) . . .
- (3) (a) A license may not be issued until the applicant files a bond with the commission. The commission shall determine the form and the amount of the bond, the minimum amount of which shall be \$500. . .
(b) Applicants are not required to post a bond who: (i) purchase during the license year only products which have the proper state stamp affixed as required by this chapter: and (ii) file an affidavit with their application attesting to this fact.

The statutes also require a license to sell tobacco products. The requirements are at Utah Code Sec. 59-14-301 which provides:

- (1) All manufacturers and distributors of all tobacco products, as defined in Section 59-14-102, who are responsible for the collection of tax on tobacco products under this chapter and all retailers of all tobacco products shall: (a) register with the commission; and (b) be licensed by the commission under Section 59-14-202.
- (2) . . .
- (3) The Commission shall require any manufacturer, wholesaler, retailer, or any other person subject to this section, and who is responsible for the collection of tax on tobacco products under this chapter, to post a bond as a prerequisite to registering. The bond shall be in a form and an amount determined by the commission. If the bond is required under Section 59-14-201, the bond may be a combination, the minimum amount of which shall be \$1,000.

DISCUSSION

The facts relevant to the Commission's decision start with an audit of tobacco products tax for a prior period and a different entity, PETITIONER (the "LLC"). PETITIONER REP 2 was the principal owner of the LLC and that business was audited for the period of October 1, 2000 through September 30, 2004. The Auditing Division issued an audit deficiency of tobacco products tax, as well as negligence and late filing penalties and interest. The LLC appealed the audit and the matter proceeded to a Formal Hearing before the Tax Commission on October 31, 2006. In Findings of Fact, Conclusions of Law, and Final Decision, Appeal 05-0239 the Tax Commission waived the penalties, but sustained the tax and interest against the LLC. The tax had not been collected by the LLC from its customers, under the assumption that the wholesaler had collected and remitted the tax. The result after the appeal was an assessment of tobacco products tax and interest of

approximately \$\$\$\$\$. This tax was never paid and with the continued accrual of interest the liability is approximately \$\$\$\$\$. Collection efforts have been made to no avail. The LLC was dissolved in 2005. At some point, without formal action or personal penalty assessment, the Division began mailing collection notices for the LLC's liability to PETITONER REP 2 personally.

PETITONER REP 2 set up another entity, PETITIONER., which is the Petitioner in this matter. PETITONER REP 2 is the principal owner of Petitioner. Sometime early in 2009, Petitioner submitted a form or forms TC69 to obtain a sales tax license, a cigarette products license and a tobacco products license. It is unclear whether Petitioner filed the same TC69 to apply for all three licenses at one time, or if the Tobacco and Cigarette License were applied for later. However, Petitioner was issued the Sales Tax License in January 2009. There were some assertions about a verbal denial to issue the Tobacco and Cigarette Tax Licenses and of lost applications. It was not until April 8, 2009, that the Processing Division issued a written denial to issue the licenses to Petitioner. The reason given by the Processing Division was that the applicant or a fiduciary of the applicant had failed to satisfactorily resolve the tobacco tax debt. Around that same time, on April 6, 2009, the Taxpayer Services Division issued a letter to Petitioner stating that it could not process its TC-69 application for sales tax license unless Petitioner posted a bond in the amount of \$\$\$\$\$. The letter stated, "Our records show at least one owner, officer or partner has unpaid tax debt." Then later, on May 13, 2009, the Taxpayer Services Division issued its decision to deny the sales and use tax license because Petitioner had failed to post the bond.

Petitioner's representative points out several key factors. First, it was the LLC that incurred the prior tax liability, and there has not been formal personal penalty action or other action to hold PETITONER REP 2 personally responsible for the debts of the LLC. In fact, it was Petitioner's position that the Division would be unable to issue a personal penalty assessment against PETITONER REP 2 because of the Tax Commission's findings in the LLC's prior appeal. In that prior appeal, the Tax Commission found that PETITONER REP 2 was not negligent and that he had been unaware that he needed to collect and remit tobacco products tax for those items he had purchased from out of state distributors. At some point the Division merely started sending collection notices, that had been previously been addressed to the LLC, directly to PETITONER REP 2 personally for the LLC liability. Second, once PETITONER REP 2 was aware of the tobacco products tax, he started purchasing from distributors who collected and remitted the tax so he has not incurred further liability. Third, neither the LLC, nor the Petitioner had outstanding cigarette tax balances or incurred cigarette tax liability. Both Petitioner and the LLC only purchased cigarettes from

wholesalers who stamped the cigarettes and paid the tax. Fourth, the LLC had no outstanding sales tax liability. Fifth, Petitioner had originally applied for a sales tax license in January 2009 and the license had been issued. Petitioner then timely filed and paid its sales tax return for the first quarter of 2009, so Petitioner has no outstanding sales tax liability. Petitioner operated under this license until May 13, 2009, when it was notified by the Taxpayer Services Division that the license was denied. The Taxpayer Services Division denied the license without filing a revocation action, and providing reasonable notice and a hearing.

1: Cigarette Products License

Petitioner argues that under the current statutory framework, the Processing Division could not deny the issuance of the cigarette products and tobacco products licenses. The Division's attorney had argued in its prehearing brief that provisions at Utah Code sec. 59-14-202 barred the issuance of the license. However, those provisions would only bar issuance if there had been a delinquent cigarette tax liability. Petitioner points out that in this case, the only delinquency was the tobacco products tax from the LLC. The Commission agrees with Petitioner that there is no statutory provision that would preclude issuance of the cigarette products license in this matter as long as the bond requirement has been met.

Utah Code Sec. 59-14-201(3)(b) does provide that applicants are not required to post a bond if the applicant purchases only products which have the proper state stamp affixed and file an affidavit with their application attesting to this fact. The information proffered by Petitioner at the hearing was that it only purchased stamped cigarettes. If this is Petitioner's intent going forward and it files the affidavit, it would not be required to post a bond to obtain the cigarette products license. If Petitioner does not file the affidavit, the Division may require a reasonable bond, but the Commission notes that pursuant to 59-14-301, the bond may be combined with the tobacco products bond.

2. Tobacco Products License

The Division points to no statutory provision regarding the Tobacco Products License pursuant to which it can deny to issue the license other than the bond requirement. Utah Code Sec. 59-14-301(1) provides that all manufacturers and distributors of tobacco products who are responsible for collection of the tobacco tax, and all retailers of tobacco products shall be licensed. Petitioner is a retailer and clearly would need to be licensed. The bond requirement is set out at subsection (3) and provides that any manufacturer, wholesaler, retailer or other who is responsible for the collection of tax shall post a bond. If Petitioner purchased products from out of state distributors that were not collecting the tax, Petitioner would be responsible for the collection of the tax. Therefore, the Commission concludes that under this provision

Petitioner is required to post a bond. The statute gives the Commission considerable deference on the amount of the bond, with the only restriction being that the minimum amount is \$\$\$\$\$.

The Commission weighs the factors. Petitioner is not currently incurring tobacco products liability. However, in Petitioner's principal's prior business, the LLC, a substantial tax liability was incurred because the business had started purchasing tobacco products from distributors who did not remit the tax to the state. Further this liability remains unpaid to this date. From these factors the Commission concludes that a bond higher than the minimum amount is warranted. The Commission notes from its prior decision in the LLC case that the deficiency in tax was from an audit that encompassed a period of nearly four years. Keeping in mind that Petitioner currently is not incurring tobacco products liability, but that Petitioner would incur this if Petitioner began to purchase from distributors who were not collecting the tax, the Commission concludes that a reasonable amount for the bond would be an estimate of the liability that could occur during a one-years period. Since there was no discussion in the prior decision in the LLC case of when the liability was incurred during the audit period, the Commission's best estimate of a reasonable bond amount is \$\$\$\$\$.

3. Sales Tax Licenses

Utah Code Sec. 59-12-106(2)(d) states that the commission shall review an application and determine if the applicant is required to post a bond before the license is issued. Subsection (2)(e)(i) specifies when the commission would require an applicant to post a bond, but these provisions specifically involve delinquencies under the Sales and Use Tax act. In this case, no delinquencies of sales and use tax were alleged. Under these provisions the Division may deny an applicant a license if they fail to post the bond. However, the Division is not asserting it is taking action under this provision.

The provision under which the Division argues as authority for requiring a bond is Utah Code Sec. 59-12-106(2)(e)(ii). Unlike (2)(e)(i) above, (2)(e)(ii) applies when the Division has already issued a license. Under this subsection, if the Division has issued a license to a party it may require a "licensee" to post a bond if it is necessary to ensure compliance with the Sales and Use Tax Act. The use by the legislature of the term "licensee" rather than "applicant" which it had used in the prior subsection, infers the intent that the bond could be required after the license had already been issued. However, as specified at Utah Code Sec. 59-12-106(2)(b) once the license has been issued it is valid until it is revoked, or for other factors that are not an issue in this matter. Subsection 2(h) provides that if a licensee violates a provision of this chapter, the Commission shall "upon reasonable notice and after a hearing" revoke the license. Although the Commission disagrees with Petitioner's representation that the license could not be revoked for failure to post a bond, the Commission

Appeal No. 09-1755

does agree with Petitioner's point that if the license has already been issued, as is presumed under (2)(e)(ii), the proper procedure would have been to file a revocation action. The Division did not do so. Therefore, the Commission abates the Division's action in denial of the license for failure to post the bond. As the denial has been abated, the Commission does not consider the issue of whether the bond was necessary to ensure compliance of the Sales and Use Tax Act.

The Commission further notes that even if it was found that the bond was necessary, the Division did not follow the statutory requirement for determining the amount of the bond. Utah Code Sec. 59-12-106(f) provides that the basis for determining the bond is the amount of the applicant's sales and use tax liability or sales tax delinquencies of the applicant or fiduciary of the applicant or other related party, or the minimum amount of \$\$\$\$\$. The Division provided no statutory basis upon which it could set an amount for this bond at the \$100,000 that it has requested.

DECISION AND ORDER

Based on the forgoing, the Commission hereby sustains the Processing Division's decision to deny Petitioner the tobacco products license and the cigarette tax licenses pending the bonding requirement. However, the Processing Division is to issue the licenses to Petitioner, should Petitioner comply with the bonding requirements by posting a \$\$\$\$\$ bond for the tobacco products tax and by filing the affidavit for the cigarette products tax. If the affidavit is not filed, the Division may require a reasonable bond for cigarette products tax. The Taxpayer Service Division's denial of the sales tax license is abated. It is so ordered.

This Decision does not limit a party's right to a Formal Hearing. Any party to this case may file a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2009.

Jane Phan
Administrative Law Judge

Appeal No. 09-1755

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

JKP/09-1755.int