

11-724  
SALES TAX LICENSE  
SIGNED: 06-28-2011  
COMMISSIONERS: R. JOHNSON, M. JOHNSON, M. CRAGUN  
RECUSED: D. DIXON  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

**INITIAL HEARING ORDER**

Appeal No. 11-724

Tax Types: Sales Tax License

Judge: Phan

**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP. 1, CPA

PETITIONER REP. 2, Managing Member Specialty Carpet Showroom, LLC

For Respondent: RESPONDENT REP. 1, Assistant Attorney General

RESPONDENT REP. 2, Taxpayer Services 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 21, 2011. Petitioner (the Taxpayer) is appealing the Taxpayer Services Division's (the Division's) denial of its Sales Tax License. After issuing a notice to the Taxpayer on November 23, 2010, that a bond in the amount of \$\$\$\$\$ would be required, and after the Taxpayer failed to obtain the bond, the Division denied the tax license by letter dated December 30, 2010. The Taxpayer has appealed this denial and the matter proceeded to the hearing.

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.

...  
(d) The commission shall review an application and determine whether the applicant: . . . (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: . . . (B) there is a delinquency in paying a tax 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;

...  
(f)(ii) Except as provide 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).

(f)(iii) Except as provided in Subsection (2)(f)(iv), for purposes of Subsection (2)(f)(ii)(B): (A) for an applicant, the amount of the delinquency is the sum of: . . . (II) the amount of tax that any of the following owe under this chapter (Aa) the applicant; (Bb) a fiduciary of the applicant; and (Cc) 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; . . .

DISCUSSION

The Taxpayer is a limited liability company and its principal and managing member, as well as the only member, is PETITIONER REP. 2. PETITIONER REP. 2 had been the sole proprietor of the business PETITIONER. The business was audited for the years 1991 through 1993 and assessed additional tax from the audit in the amount of \$\$\$\$ plus interest. Although payments of \$\$\$\$ were made toward this deficiency, with penalties and interest that have continued to accrue since the audit period, the amount owed on this account currently is \$\$\$\$\$. Because this was a sole proprietorship of PETITIONER REP. 2 this entire amount is a liability for which he is personally responsible. PETITIONER REP. 2 explained that he was not able to pay this amount and had never been able to come up with enough money to make an offer in compromise with the

Division based on financial hardship. PETITIONER REP. 2 had continued to operate the business and filed and paid sales tax returns as they became due. The account shows no additional tax deficiency up through the time that it was closed and a new license was obtained by PETITIONER REP. 2 in 1997. In 1997, PETITIONER REP. 2 incorporated PETITIONER. He applied for and obtained a sales tax license for this new business entity. The new corporation filed and paid tax returns from 1997 until September 2010, but in July through September 2010 some of the sales tax was unpaid. At this time there has been no personal penalty assessed against PETITIONER REP. 2 for the tax owed by this corporation.

PETITIONER REP. 2 indicated that because of the economic downturn he ended up having to file for bankruptcy in August 2010 with the business. He states this precipitated his forming a new entity, a limited liability company in October 2010 which is why he applied for a new sales tax license. The new entity, PETITIONER, is the Taxpayer in this matter. PETITIONER REP. 2 is the sole member of the limited liability company. When the Taxpayer applied for a new license, a temporary account number was issued and PETITIONER REP. 2 has been filing returns and paying taxes on this temporary number since October 2010 during the pendency of this proceeding. The Taxpayer's account was mostly current. It was discussed at the hearing that there was some \$\$\$\$ that was unpaid at this time.

It was because of PETITIONER REP. 2's previous accounts and previous deficiencies that the Division determined a bond would be necessary for the new account. The Division had originally asked for a bond of \$\$\$\$ which is the maximum amount. At the hearing the Division representatives lowered their request on the bond amount to \$\$\$\$\$, the amount of tax, penalty and interest from the original sole proprietorship owned by PETITIONER REP. 2. They requested the bond on the basis of the provision at Utah Code Sec. 59-12-106, pursuant to which a bond is required when a fiduciary or responsible party for the new entity is responsible for a tax liability from a prior entity. However, they concluded that the reduced amount of \$\$\$\$ would be sufficient to comply with provisions of the statute and to protect the state from further losses.

The Taxpayer's representatives explained that they could not afford to post a bond in that amount and the requirement would put them out of business. They asked that the bond amount could be lowered and noted if the Taxpayer went out of business there would be no funds from which to pay the past due delinquencies.

Upon review of the requirements of Utah Code Sec. 59-12-106, it is clear that the Division is required to impose a bond on the Taxpayer under subsection (2)(e)(i)(B), because of the prior delinquency of PETITIONER REP. 2 from his sole proprietorship. Subjection (f)(ii) specifies how the amount of the bond is

to be calculated. The statute provides no authority to the Commission to impose a lesser amount based on financial hardship or any other reasons. The Commission is directed under these provisions to determine the amount of the bond by adding the applicant's sales tax liability to the "amount of tax" that any fiduciary or responsible party of the applicant owes. At this time the applicant's sales tax liability is about \$\$\$\$\$. Reading the statutory requirements for the second part of the equation, the statute does specify the "amount of tax" owed by a fiduciary at Utah Code Sec. 59-12-106(2)(f)(iii), not the amount of liability.<sup>1</sup> The \$\$\$\$\$ liability from the prior business includes tax, penalties and interest. The amount of the tax is only \$\$\$\$\$. Although there had been some payments totaling \$\$\$\$\$, payments are applied first toward the penalties and interest, which in this case were more than the payment amounts and so these payments did not change the amount of tax still owed on this account. The Division is correct that because there has not yet been a personal penalty assessment against PETITIONER REP. 2 directly for the liability for the corporate entity, the tax amount owed by that entity should not be added to the bond amount.

The bond requirements are set by statute and there is no discretion given to the Commission to set a bond at a lower amount than as specified in the statute. In this case the amount of the bond, rounded, would be \$\$\$\$\$. The Commission should require a bond to be posted in this amount.

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Jane Phan  
Administrative Law Judge

#### DECISION AND ORDER

Based on the forgoing, the Commission sustains the Division's determination that the Taxpayer must post a bond, but finds that the amount of the bond should be reduced to \$\$\$\$\$. Should the Taxpayer post a bond in the amount of \$\$\$\$\$, the Division is to issue the sales tax license to the Taxpayer. If the Taxpayer fails to post this bond the license is denied. 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:

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<sup>1</sup> "Liability" is defined at Utah Code Sec. 59-1-1402(5) to include tax, penalties and interest.

Appeal No. 11-724

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 \_\_\_\_\_, 2011.

R. Bruce Johnson  
Commission Chair

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

*JKP/11-724.int*