

17-1102
TAX TYPE: TAX LICENSE DENIAL
TAX YER: 2017
DATE SIGNED: 7-28-2017
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 17-1102 Tax Type: Tax License Denial Tax Year: 2017 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR PETITIONER, Attorney at Law
REPRESENTATIVE-2 FOR PETITIONER, CEO of PETITIONER
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT-1, Deputy Director, Taxpayer Services Division
RESPONDENT-2, Taxpayer Services Division
RESPONDENT-3, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on July 13, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioner is appealing Respondent's ("Division's") denial to issue a sales and use tax license to Petitioner after requiring Petitioner to post a \$\$\$\$ bond. Petitioner did not post the required bond and the Division issued its Tax License Denial letter on May 11, 2017. Petitioner appealed this denial and bond requirement and the matter proceeded to the Initial Hearing.

APPLICABLE LAW

Under Utah law businesses that are required to collect sales tax have 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: (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: . . . (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 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).

(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: . . . or (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; . . .

. . .

(f)(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 exceed \$500,000.

. . .

(i) Any person required to collect a tax under this chapter within this state without having secured a license to do so is guilty of a criminal violation as provided in Section 59-1-401.

For purposes of Utah Code Sec. 59-12-106 "fiduciary of the applicant" is defined at Subsection 59-12-106(1)(c) as follows:

"fiduciary of the applicant" means a person that:

(i) is required to collect, truthfully account for, and pay over a tax under this chapter for applicant; and

(ii)(A) is a corporate officer of the applicant described in Subsection (1)(c)(i); (B) is a director of the applicant described in Subsection (1)(c)(i); (C) is an employee of the applicant described in Subsection (1)(c)(i); (D) is a partner of the applicant described in Subsection (1)(c)(i); or (F) has a relationship to the applicant described in Subsection (1)(c)(i) that is similar to a relationship described in Subsections (1)(c)(ii)(A) through (E) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

DISCUSSION

The Division had required that a bond be posted because “fiduciaries” of Petitioner owed a substantial amount of tax relating to other businesses that they owned. On the Application for Tax License filed by Petitioner, two of the persons listed as Officer/Owners of Petitioner were OWNER-1 and OWNER-2. The two additional entities listed were BUSINESS-1 and BUSINESS-2, which the Division asserted were related to OWNER-1 and OWNER-2. It was the Division’s position that OWNER-1 and OWNER-2 were fiduciaries and owners of COMPANY-1, COMPANY-2 and the COMPANY-3 in CITY-1 and that these three businesses had a total delinquency amount of \$\$\$\$\$. A portion of this amount, however, was comprised of penalties. Additionally, some of this is based on estimates because these three businesses had not filed returns for 2016. It was the Division’s position that because OWNER-1 and OWNER-2 were considered “fiduciaries of the applicant” as it is defined at Utah Code Sec. 59-12-106(1)(c) and were responsible for such a large tax liability, the Petitioner was required to post a bond before the Division could issue a license to Petitioner. The Division had concluded the appropriate amount for the bond was \$\$\$\$\$, which was the largest amount allowed under the statute.

Petitioner’s representative explained that although OWNER-1 and OWNER-2, who owned and operated the water and amusement parks, had some ownership interest in Petitioner, PETITIONER, PETITIONER was a software company primarily operated by REPRESENTATIVE-2 FOR PETITIONER and NAME-1. REPRESENTATIVE-2 FOR PETITIONER and NAME-1 were OWNER-1 and OWNER-2’s sons. Although at the hearing REPRESENTATIVE-2 FOR PETITIONER acknowledged that he was sometimes involved with the water park business on a minimal basis, he proffered that he and his brother NAME-1’s involvement with the waterpark and amusement parks were very minimal and these businesses were primarily run by other people. Petitioner’s representative pointed out that PETITIONER was a small business, with a low level of taxable sales. When filing its application for a sales tax license PETITIONER had indicated it would have less than \$\$\$\$\$ in annual net sales. Sales tax

on this amount would be around \$\$\$\$ or less. Petitioner's representative also indicated that it was not possible for PETITIONER to post a \$\$\$\$ bond.

The representative for Petitioner stated that he also was working with the water and amusement park operations and the principals of those businesses were currently making "aggressive" payments toward the tax deficiency balance. The deficiency was due in part to the fact that in 2016 the water and amusement parks failed to file returns or pay any sales and use tax. These businesses are now making weekly payments toward the tax liability, have paid more than \$\$\$\$ at this point and by the end of the season plan to have \$\$\$\$ paid. The representative for Petitioner asks that the Tax Commission take into account that these related businesses are making a sincere effort to get current.

At the hearing the representative for the Division had argued that the higher amount of bond was appropriate, noting that the deficiency amount of the fiduciaries' other businesses was one of the largest tax deficiency amounts that he had seen in his lengthy career. He also said because returns have not yet been filed for 2017, it is not known if the amount being paid actually covers the current periods as they become due. So how much of this will pay the past due deficiency is not yet known. He said if the Division issued the license to Petitioner, there would be nothing to stop these fiduciaries from using PETITIONER for their other business operations. He also argued that the Division had a process or procedure for determining the amount of the bond based on an average of three returns or estimates.¹

After reviewing the facts and the applicable law in this matter, the Commission first notes that the bond requirement and the amount of the bond is set by statute and there is no discretion given to the Commission to disregard the requirements based on a request for leniency or that the fiduciary is starting to make payments toward a substantial delinquency. Utah Code Sec. 59-12-106(2)(e)(i) says, "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 tax under this chapter for: . . . (II) a fiduciary of the applicant. . ." In this matter there is a very substantial tax delinquency on the part of fiduciaries of the applicant and a bond is required.

The amount of the bond is to be determined based on Utah Code Sec. 59-12-106(2)(f)(ii) which states, "the commission shall calculate the amount of a bond on the basis of: (A) commission estimates of: (I) an applicant's tax liability under this chapter . . . and (B) any amount of a delinquency described in Subsection (2)(f)(iii)." Subsection (2)(f)(iii) includes in its

¹ Although at the hearing the Division's representative had stated that the determination of the amount of the bond was set by a process or procedure of the Division, the process for determining the amount of the bond is specifically set out at Utah Code Sec. 59-12-106 (2)(f)(ii).

definition of delinquency the amount of sales and use tax owed by a fiduciary of the applicant as well as others. This is basically a mathematical formula in which the Division adds the estimate of applicant's liability plus the amount of delinquency which equals the amount of the bond, subject to the limitations that the bond must be not less than \$\$\$\$ and not more than \$\$\$\$.

Step one in the equation is for the Division to estimate the applicant's sales and use tax liability.² Step two is to add that to the delinquencies. The Division has indicated the fiduciaries' other businesses owe nearly \$\$\$\$ in tax, penalties and interest. In determining the amount of the bond, it is the tax amount owed by a fiduciary of the applicant, not penalties and interest that is added to the estimate of the applicant's sales and use tax liability. Based on the information presented, the sales and use tax amount that would be the personal responsibility of OWNER-1 or OWNER-2 would still be over \$\$\$\$\$. Because the tax amount owed by the fiduciary of the applicant is higher than the \$\$\$\$ limit imposed on the bond, the Commission does not look further at the Division's estimate of Petitioner's tax liability. Therefore, it was appropriate for the Division to impose the maximum bound amount.

Based on the information provided at the hearing and the applicable law, the Division appropriately requested a \$\$\$\$ bond under Utah Code Sec. 59-12-106(2)(e) & (f), 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 different entity. The bond requirements are set by statute and there is no discretion given to the Commission to disregard the requirements based on a request for leniency. Petitioner has not shown under the law why imposition of the bond is improper.

Jane Phan
Administrative Law Judge

² Utah Code Sec. 59-12-106(2)(f)(ii)(A)(I) states as part of the equation to determine the amount of the bond, the Commission is to estimate "an applicant's tax liability under this chapter. . ." The statute is silent on the length of time for the estimate of the applicant's tax liability, for example should this be an estimate of one year's worth of tax, or one tax period. The explanation from the Division on how the bond was calculated was somewhat confusing at the Initial Hearing, but the Division's representative did indicate the Division estimates the amount based on an average of three tax periods. An employee of the Division, however, explained that she had used an average of three audit deficiencies issued against the fiduciaries of the applicant's three other businesses to determine the estimate. Regardless, because the total tax delinquency amount owed by the fiduciary was so much more than the \$\$\$\$ bond limit, the estimate of the applicant's liability becomes irrelevant.

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer's appeal. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files 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, or emailed, 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

or emailed to:
taxappeals@utah.gov

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

DATED this _____ day of _____, 2017.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner