

17-1313
TAX TYPE: MISCELLANEOUS
TAX YEAR: 2017
DATE SIGNED: 10/10/2017
COMMISSIONERS: J VALENTINE, M CRAGUN, R PERO, R ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 17-1313</p> <p>Account No. #####</p> <p>Tax Type: Cigarette/Tobacco License</p> <p>Tax Year: 2017</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR PETITIONER-1, Attorney at Law
REPRESENTATIVE FOR PETITIONER-2, Owner, Manager,
PETITIONER

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT-1, Director, Auditing Division
RESPONDENT-2, Auditor
RESPONDENT-3, Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 14, 2017 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The matter before the Commission is Petitioner's appeal of Respondent's ("Division's") decision to revoke Petitioner's Cigarette/Tobacco Products License. The Notice of Intent to Revoke was issued by the Division on July 7, 2017. The Petitioner timely appealed the decision and the matter proceeded to the Initial Hearing.

APPLICABLE LAW

Utah Code §26-42-102 defines terms used in the Utah Health Code, Chapter 42, Civil Penalties for Tobacco Sales to Underage Persons as follows in pertinent part:

(1) "Commission" means the Utah State Tax Commission.

....

(3) "Enforcing agency" means the state Department of Health, or any local health department enforcing the provisions of this chapter.

....

Utah Code §59-14-201(1) provides that “[i]t 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 Section 59-14-202.”

Utah Code §59-14-202 provides the following concerning cigarette licensing :

...

(5) No license may be granted, maintained, or renewed: . . . (b) until the applicant: (i) has paid any delinquent cigarette taxes; and (ii) has served the period of suspension resulting from any prior revoked license.

...

(8)(a) In addition to any civil or criminal penalty provided by law, the commission shall, after providing notice and a hearing, revoke the license of any person: (i) found to have violated this title; or (ii) who no longer qualifies for licensure under Subsection (5).

(b) In the case of a revocation under Subsection (8)(a)(i), a license may not be issued to that person within a period of two years after the violation.

The Commission is to suspend or revoke a license pursuant to Utah Code §59-14-203.5

as follows:

(1)(a) The commission shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 regarding suspension or revocation or a license due to the sale of cigarettes to a person younger than 19 years of age, upon receipt of notice of an enforcing agency’s finding of a violation of Section 26-42-103.

(b) The commission shall provide written notice of the suspension or revocation to the licensee.

(2) It is the duty of the enforcing agency to advise the commission of any finding of a violation of Section 26-42-103 for which suspension or revocation of the license is a penalty.

(3) When the commission revokes a licensee’s license under this section the commission may not issue to the licensee, or to the business entity using the license that is revoked, a license under Section 59-14-202 or 59-14-301 to sell tobacco at the location for which the license was issued for one year after:

(a) the day on which the time for filing an appeal of the revocation ends; or

(b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.

Regarding the sale of electronic cigarette products, Utah §59-14-803 provides in pertinent part:

(1) Except as provided in Subsection (2), a person may not sell, offer to sell, or distribute an electronic cigarette product in Utah without first obtaining a license to sell an electronic cigarette product from the commission under this section.

...

(5) The commission shall, after notifying a licensee, revoke a license described in Subsection (3) if an enforcing agency determines the licensee has violated a provision of:

(a) Title 26, Chapter 42, Civil Penalties for Tobacco Sales to Underage Persons; or

(b) Title 26, Chapter 57, Electronic Cigarette Regulations Act.

(6) If the commission revokes a person's license to sell an electronic cigarette product under Subsection (5), the commission may not issue a license to sell an electronic cigarette product, a license to sell cigarettes under Section 59-14-201, or a license to sell tobacco under Section 59-14-301 to the person until one year after:

(a) the day on which the time for filing an appeal of the revocation ends, as determined by the enforcing agency; or

(b) if the person appeals the enforcing agency's decision to revoke the license to sell an electronic cigarette product, the day on which the enforcing agency's decision to uphold the revocation is final.

(7) If the commission revokes a person's license under Subsection (5), the commission shall also revoke the person's license to sell cigarettes under Section 59-14-201, if any, and the person's license to sell tobacco under Section 59-14-301, if any.

Utah Code §59-14-301.5 provides for the Tax Commission to suspend or revoke a tobacco license as follows:

(1) (a) The commission shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 regarding suspension or revocation of a license due to the sale of tobacco products to a person younger than 19 years of age, upon receipt of notice of an enforcing agency's order or order of default, finding a violation of Section 26-42-103.

(b) The commission shall provide written notice of the suspension or revocation to the licensee.

(2) It is the duty of the enforcing agency to advise the commission of any order or order of default finding a violation of Section 26-42-103, for which suspension or revocation of the license is a penalty.

(3) When the commission revokes a licensee's license under this section the commission may not issue to the licensee, or to the business entity using the license that is revoked, a license under Section 59-14-202 or 59-14-301 to sell tobacco at the location for which the license was issued for one year after:

(a) the day on which the time for filing an appeal of the revocation ends; or

(b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.

Utah Code §26-42-103 addresses the consequences of selling tobacco to a person younger than 19 years of age and the role of the Tax Commission in suspending or revoking a tobacco license, as follows:

- (1) If, following an investigation or issuance of a citation or information under Section 77-39-101, an enforcing agency determines under Section 26-42-104 that a licensee or any employee has sold tobacco to a person younger than 19 years of age, as prohibited by Section 76-10-104, the enforcing agency may impose upon the licensee the following administrative penalties:
 - (a) upon the first violation, a penalty of not more than \$300;
 - (b) upon a second violation at the same retail location, and within 12 months of the first violation, a penalty of not more than \$750; and
 - (c) upon a third or subsequent violation at the same retail location and within 12 months of the first violation, a penalty of not more than \$1,000.
- (2) The enforcing agency shall notify the commission in writing of any order or order of default finding a violation of Subsection (1) which is a third or fourth violation.
- (3) The commission, upon receipt of the written notification under Subsection (2), shall take action under Section 59-14-203.5 or 59-14-301.5 against the license to sell tobacco:
 - (a) by suspending the licensee's license to sell tobacco at that location for not more than 30 days, upon receipt of notification of a third violation under Subsection (1)(c); and
 - (b) by revoking the license to sell tobacco at that location held by the licensee, including any license under suspension, upon receipt of notification of a fourth violation under Subsection (1)(c).
- (4) When the commission revokes a license under Subsection (3)(b), the commission may not issue to the licensee, or to the business entity using the license that is revoked, a license under Section 59-14-202, 59-14-301, or 59-14-803 to sell tobacco at the location for which the license was issued for one year after:
 - (a) the day on which the time for filing an appeal of the revocation ends; or
 - (b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.
- (5) This section does not prevent any bona fide purchaser of the business, who is not a sole proprietor, director, corporate officer, or partner or other holder of significant interest in the entity selling the business, from immediately applying for and obtaining a license to sell tobacco.

DISCUSSION

The issues in this appeal start with the prior entity that was operating as the CORPORATION-1. The CORPORATION-1 is a retail business that sells cigarette and tobacco products and is located at ADDRESS, Utah. The prior owner of this business, CORPORATION-1, had been operating the CORPORATION-1 as a DBA. The CORPORATION-1 received notice

of a 30-day suspension of its license to sell cigarette/tobacco products from the Division on March 16, 2017. The sole member and manager of CORPORATION-1 is NAME-1. The suspension was based on notification to the Division from the COUNTY Health Department that on three separate occasions within a twelve-month period, cigarettes or tobacco products were sold to persons under the age of 19. CORPORATION-1 appealed the suspension to the Utah State Tax Commission and the Utah State Tax Commission issued its decision on the appeal on May 3, 2017. The Tax Commission's decision ordered suspension of the license for the period from June 5 through June 20, 2017. The Tax Commission's decision was not appealed by CORPORATION-1.

Because cigarettes and tobacco products were sold from the business CORPORATION-1 during the suspension period, the Division issued a Notice of Intent to Revoke CORPORATION-1's Cigarette/Tobacco Products License on June 21, 2017. This Notice stated the revocation was pursuant to Utah Code Sec. 59-14-202(8)(a). This revocation was not appealed and the Cigarette/Tobacco Products License issued to CORPORATION-1 was revoked.

However, it was the assertion of the Petitioner in this matter, PETITIONER, that although CORPORATION-1 DBA was still operating under the same name and at the same location, as of May 26, 2017 it was owned and operated by PETITIONER. Additionally, as of May 26, 2017, the business was selling cigarettes and tobacco products under the Cigarette/Tobacco Products License issued to PETITIONER on May 10, 2017.

The facts were not in dispute at the Initial Hearing regarding when PETITIONER was formed and when it purchased the business and obtained its various licenses, and Petitioner has documented these factors with its Exhibits A through O. PETITIONER was organized and registered in Utah on April 25, 2017. REPRESENTATIVE FOR PETITIONER-2 was the sole member and manager of the limited liability company. PETITIONER had applied for and received a Federal Employer Identification Number on April 24, 2017. On April 25, 2017, REPRESENTATIVE FOR PETITIONER-2 registered PETITIONER with the Utah State Tax Commission and applied for employee income tax withholding accounts and sales and use tax accounts. She also applied with the Utah Department of Workforce Services for Unemployment Insurance. PETITIONER's form TC-69 was received by the Utah State Tax Commission on April 27, 2017 on which REPRESENTATIVE FOR PETITIONER-2 stated that she would begin selling cigarettes and tobacco products on May 20, 2017. This form did indicate that the address for the business would be ADDRESS, Utah, and the same address as the retail business still under the DBA of CORPORATION-1. It should be noted that on the Form TC-69, pg. 2, it did ask for the "DBA/Business Name" and this line was left blank. On May 10, 2017, the Utah State Tax

Commission issued a Cigarette/Tobacco Products License to PETITIONER for the location of ADDRESS, Utah. On May 20, 2017, the Utah State Tax Commission issued a Sales Tax License to PETITIONER. Petitioner also obtained a business license from CITY-1 on May 25, 2017. In addition to these government requirements for a new business, Petitioner had to enter into new agreements with the suppliers of the cigarettes and tobacco products.

After forming PETITIONER and obtaining the necessary licenses to sell cigarettes and tobacco products at the Riverton location, on May 26, 2017 PETITIONER entered into an Asset Purchase Agreement with CORPORATION-1 to purchase the retail business operated as the CORPORATION-1 at ADDRESS, Utah. The parties acknowledge that REPRESENTATIVE FOR PETITIONER-2 was married to NAME-1 at this time and had been married since December of 2016. Regardless, REPRESENTATIVE FOR PETITIONER-2 explained that she had paid NAME-1 a payment of \$\$\$\$ for the business, which amount came from her own money and she had executed a Promissory Note to make monthly payments of \$\$\$\$ per month for ##### years to pay the remainder of the purchase price. REPRESENTATIVE FOR PETITIONER-2 provided copies of the Asset Purchase Agreement, Bill of Sale and checks that she issued to NAME-1 as payments.

REPRESENTATIVE FOR PETITIONER-2 explained at the hearing why she had purchased the business. She said she knew NAME-1 since college. NAME-1 had been the sole owner and has operated the business CORPORATION-1 for several years. However, he knew that he was going to be incarcerated in federal custody for a period of time and asked her to watch over the business while he was away. He gave REPRESENTATIVE FOR PETITIONER-2 a Power of Attorney to take action on his behalf and she paid bills and taxes for the business, as well as watched over the manager who was on site at the business. During this period, however, there had been the sales to persons under 19. When NAME-1 was released in December 2016, he had inherited the problems with these underage sales and decided he no longer wanted to deal with the business, so he decided to sell the business. REPRESENTATIVE FOR PETITIONER-2 stated that after watching over the business for about two years, she was aware of its potential and decided she wanted to purchase the business and operate the business herself. She testified that she had her own money, which she used to purchase the business. She was aware at the time of the purchase of the suspension of the Cigarette/Tobacco Product License issued to CORPORATION-1. However, the CORPORATION-1 was operating as a DBA of PETITIONER, under PETITIONER's Cigarette/Tobacco Products License before the period of suspension issued against CORPORATION-1's license was to commence.

Although the Tax Commission had issued to PETITIONER a Cigarette/Tobacco Products License on May 10, 2017, on July 7, 2017 the Division issued its Notice of Intent to Revoke this license. In its Notice, the Division explained the reason for revocation to be, “A notice of Intent to Revoke CORPORATION-1, LLC tobacco license was issued on June 21, 2017 for continuing to sell during the suspension ordered by the Utah State Tax Commission dated May 3, 2017 and effective from June 5 through June 20, 2017. The new LLC is considered to be the same business as CORPORATION-1, LLC, and a new license should not have been issued.” PETITIONER, which is the Petitioner in this matter, timely, appealed this Notice.

At the hearing, the Division points out that CORPORATION-1 is the same retail business, operating under the same DBA name and from the same location before and after the transaction between REPRESENTATIVE FOR PETITIONER-2 and NAME-1. The Division argues that because it had revoked the license for CORPORATION-1, no new license could be issued for that location for one year under Utah Code Sec. 59-14-203.5(3). The Division argues that REPRESENTATIVE FOR PETITIONER-2 could not be a bona fide purchaser of the business because she was an insider and was aware that the license issued to CORPORATION-1 had been revoked. The Division also provided a copy of CORPORATION-1’s TC-69 filed February 5, 2016, which the Division indicated was submitted as a renewal for licenses issued by the Tax Commission. The Division points out that this form was signed on the line for the signature for the “sole proprietor” by REPRESENTATIVE FOR PETITIONER-2. However, the Division did not provide evidence to indicate that REPRESENTATIVE FOR PETITIONER-2 was an owner, member or manager of CORPORATION-1. REPRESENTATIVE FOR PETITIONER-2 explained that she had filed this renewal as the power of attorney for NAME-1 who was incarcerated at this time.

The Division also asserts that the purpose of Utah Code Sec. 59-14-203.5(3) providing that a new license not be issued for one year was to stop people from being able to keep a retail location open by setting up a new business entity and applying for a new license every time they were in violation. The Division also argued that REPRESENTATIVE FOR PETITIONER-2 and NAME-1 knew how to set up new business entities. The Division provided a printout from the Utah Department of Commerce on the Registered Principal Search. This search indicated that REPRESENTATIVE FOR PETITIONER-2 was involved in one other entity, CORPORATION-2. NAME-1 was indicated as a principal in twelve entities in total including CORPORATION-1 and CORPORATION-2. However, with respect to a number of these entities “NAME-1” was

listed only as the registered agent. It was not clear whether all these listings referenced the same NAME-1 that was formerly the sole member of CORPORATION-1.¹

The issue in this appeal is a matter of first impression before the Utah State Tax Commission. Additionally, the parties did not submit prehearing briefs. In its Notice of Intent to Revoke Tobacco License issued to CORPORATION-1 on June 21, 2017, the Division stated it revoked the license under Utah Code Subsection 59-14-202(8)(a)(i). It is clear that the Division would have had authority under Utah Code Subsection 59-14-202(8)(a)(i) to revoke the license issued to CORPORATION-1, if CORPORATION-1 had failed to comply with the ordered suspension. The facts discovered at this hearing, however, indicate that CORPORATION-1 ceased operating the business prior to the suspension period. Regardless, CORPORATION-1 did not appeal the revocation of its license.

Under Utah Code Subsection 59-14-202(8)(b), if the license was revoked under Subsection (8)(a)(i) “a license may not be issued to that person within a period of two years . . . (emphasis added).” CORPORATION-1 is not now requesting a license. PETITIONER, which is a separate legal entity, had requested a license. The new license was issued to PETITIONER, not to CORPORATION-1 or the DBA of CORPORATION-1. Therefore, absent a showing that the two entities, CORPORATION-1 and PETITIONER, were so related as to be the same “person,” Utah Code Subsection 59-14-202(8)(b) does not preclude the Commission from issuing a license to the new entity PETITIONER. The information at this hearing did indicate that these were two separate legal entities with different principals. The Commission finds that CORPORATION-1 and PETITIONER are not the same “person” for purposes of Subsection 59-14-202(8)(b).

At the hearing, the Division did not appear to be arguing that the two-year prohibition at Utah Code Subsection 59-14-202(8)(b) would apply. Instead, the Division argues that it cannot issue a license to sell at the same location for one year relying on Utah Code Subsection 59-14-203.5(3) for this position. Utah Code Subsection 59-14-203.5(3) provides, “when the commission

¹ The Division’s representative alleged that REPRESENTATIVE FOR PETITIONER-2 was a principal in 12 different businesses and NAME-1 in ##### businesses based on a document originally represented by the Division to be from the Utah Department of Commerce, but was later acknowledged by the Division to be from secure accurint.com. No foundation was provided regarding the report from secure accurint.com, other than it was a database for which the Division has a subscription. Although the Division had suggested this report indicated REPRESENTATIVE FOR PETITIONER-2 and NAME-1 were principals in all these businesses, the report itself stated it was “Business Link Results.” REPRESENTATIVE FOR PETITIONER-2 stated at the hearing that she was not a principal in ##### of the ##### businesses listed on the “Business Link Results” report and generally had no knowledge of the other ##### businesses. There was no foundation provided as to what secure accurint.com considered being a business link. The printout itself contains a warning that it may contain errors. This information was unreliable and does not substantiate that REPRESENTATIVE FOR PETITIONER-2 or NAME-1 were principals in any of these businesses.

revokes a licensee's license **under this section** the commission may not issue to the **licensee, or to the business entity using the license** that is revoked, a license . . . to sell tobacco at the location for which the license was issued for one year . . . (Emphasis added).” Based on the facts that were presented at the Initial Hearing, CORPORATION-1's license was not revoked “under this section,” it was instead revoked under Subsection 59-14-202(8).

Utah Code Subsection 59-14-203.5(1)(a) provides that the Commission “shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 . . .” Utah Code Subsection 26-42-103(3)(b) provides that the Commission is to revoke the license if there has been a fourth violation in a twelve month period of selling tobacco to someone under 19. There was no allegation of a fourth violation by CORPORATION-1 or the DBA CORPORATION-1. CORPORATION-1's license was suspended because of a third violation, originally for thirty-days, but the suspension was reduced to #####-days. This suspension was pursuant to Utah Code Subsection 59-14-203.5(1)(a). The license was later revoked under Subsection 59-14-202(8) because the Division had concluded that CORPORATION-1 was not complying with that suspension. Because the license was not revoked under Utah Code Subsection 59-14-203.5, the provisions of Utah Code Subsection 59-14-203.5(3) do not apply. Furthermore, even if the license had been revoked under Utah Code Sec. 59-14-203.5, this section would not bar the issuance of a license to PETITIONER. Utah Code Sec. 59-14-203.5(3) prohibits issuing for one year a license to the “licensee” or the “business entity using the license” at “the location for which the license was issued.” It does not restrict issuing a license to a new business entity. Although the Division had argued that Utah Code Sec. 59-14-203.5(3) prohibits the issuance of the license for one year, Subsection 59-14-203.5(3) is not applicable in this appeal because the license was not revoked “under this section.” The Division has not put forth any section that would prohibit a new license from being issued to a new business entity or that gives the Tax Commission discretion to deny a license to an entity that qualifies under the statutes.

The Cigarette/Tobacco Products License issued to PETITIONER should be reinstated.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Utah State Tax Commission orders the Division to reinstate the Cigarette/Tobacco Products License issued to PETITIONER. 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