

18-1053
TAX TYPE: SALES & USE TAX
TAX YEAR: NOT APPLICABLE
DATE SIGNED: 07/12/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL
EXCUSED: R. PERO
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 18-1053</p> <p>Tax Type: License Denial / Sales and Use Tax</p> <p>Account No: #####</p> <p>Judge: Chapman</p>
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Owner
For Respondent: REPRESENTATIVE FOR RESPONDENT-1, from Taxpayer Services
Division
REPRESENTATIVE FOR RESPONDENT-2, from Taxpayer Services
Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing in accordance with Utah Code §59-1-502.5, on June 20, 2018.

On February 2, 2018, TAXPAYER (“Petitioner” or “TAXPAYER”)¹ applied for a sales and use tax license. On April 18, 2018, the Taxpayer Services Division (“Respondent” or “Division”) issued a “Tax License Denial” letter, in which it informed the Petitioner that it was denying “your request for a Withholding Tax License because you did not provide the required bond and you did not resolve your tax

¹ For ease of reference, REPRESENTATIVE FOR TAXPAYER, the Petitioner’s sole owner, may also be referred to as the “Petitioner.”

debt by Mar[.] 12, 2018.”² REPRESENTATIVE FOR TAXPAYER is appealing the Division’s denial of the Petitioner’s request for sales and use tax license and asks the Commission to grant the license without requiring the Petitioner to post a bond. Because of the relative complexity of the case, a chronology of events is provided below.

Chronology of Events

1. Since 2003, TAXPAYER has operated a specialty foods store and deli in CITY-1. The Petitioner had had a sales and use tax license since purchasing the store and deli in 2003 until September 27, 2017, when its sales and use tax license was revoked for a delinquency. At one time, the Petitioner also had a withholding tax license, but it relinquished its withholding tax license once it started to “lease” employees in 2009 and no longer had employees of its own.

2. In regards to the Petitioner’s prior sales and use tax license, on October 17, 2016, the Division submitted a request for the Commission to revoke that license, in which it indicated that the Petitioner owed \$\$\$\$ in delinquent sales and use tax, penalties, and interest. This request was designated *USTC Appeal No. 16-1543* and scheduled for an Initial Hearing.

3. On December 2, 2016 (before an Initial Hearing Order was issued for *Appeal No. 16-1543*), the Commission issued an order in that appeal in which it approved a Stipulation into which the parties had entered to allow the Petitioner to retain its sales and use tax license, subject to certain conditions set forth in the Stipulation.

4. On August 11, 2017, the Division submitted an Affidavit of NAME-1 in *Appeal No. 16-1543*, in which NAME-1 informed the Commission that the Petitioner was no longer in compliance with the terms of the Stipulation and in which the Division asked the Commission to revoke the Petitioner’s sales and use tax license.

² The Division proffered that this Tax License Denial letter contained a “clerical error” because it referred to the Petitioner’s request for a withholding tax license, whereas it should have referred to its request for a sales and use tax license. The Division later corrected this error by issuing a revised Tax License Denial letter.

5. On August 12, 2017, the Commission issued an Order to Show Cause in *Appeal No. 16-1543*, in which it ordered the Petitioner to submit a written statement within 10 days to show cause as to why its sales and use tax license should not be revoked and in which it informed the Petitioner that its license would be revoked if it failed to show cause within the 10-day period.

6. The Petitioner did not respond to the Commission's Order to Show Cause in *Appeal No. 16-1543*. On September 27, 2017, the Commission issued an Order of Revocation in *Appeal No. 16-1543*, in which it revoked the Petitioner's sales and use tax license. The Petitioner did not appeal this decision to court.

7. Even though its sales and use tax license was revoked on September 27, 2017, the Petitioner has continued to operate its specialty foods store and deli and has continued to collect sales and use tax on its taxable sales. As of the date of the Initial Hearing in the instant appeal, the Petitioner is still operating and collecting sales and use tax on its taxable sales.³

8. On December 8, 2017, NAME-1 conducted a field check, discovered that the Petitioner was still operating its store and deli, and informed REPRESENTATIVE FOR TAXPAYER that she needed to close the business and post a bond to receive a new sales and use tax license before the business could reopen.

9. The Petitioner elected not to close its business. On February 8, 2018, however, the Petitioner submitted an application to the Division so that it could obtain a new sales and use tax license.

10. On February 12, 2018, the Division issued a "New Application – Bond Required" letter to the Petitioner, in which the Division informed the Petitioner that the Division "cannot process your Utah State Business and Tax Registration, form TC-69," because Tax Commission records show that the

³ The Division indicated that it has notified city authorities that the Petitioner's sales and use tax license has been revoked, but has not yet sought criminal charges against REPRESENTATIVE FOR TAXPAYER for operating the Petitioner's business without a sales and use tax license. *See* Utah Code Ann. §§59-12-106(2)(a) and (2)(i). It also appears that the Petitioner has stopped leasing employees and currently has six or seven employees of its own, even though the Petitioner does not have a withholding tax license. The Commission notes that under Utah Code Ann. §59-10-405.5(2), a person who pays wages to employees at a Utah business is guilty of a criminal violation if the business is operating without a withholding tax license.

Petitioner “has unpaid tax debt on an associated account.” In this letter, the Division further informed the Petitioner “what to do” to presumably receive a sales and use tax license, as follows:

What to Do

- You must make payment arrangements or post a bond in the amount of \$\$\$\$ in order to complete the registration process.
- Send a completed Sales Tax Surety Bond, form TC-763ST and a copy of this letter by March 14, 2018, or deliver them in person. . . .
- You must file returns and pay taxes monthly on all open business accounts.
- **You may avoid posting a bond if you make arrangements to pay the taxes owed by [the Petitioner] on the associated account(s) by March 14, 2018. . .** (emphasis in original).

11. REPRESENTATIVE FOR TAXPAYER proffered that around the time she received the Division’s February 12, 2018 New Application – Bond Required letter, she called the Division because the letter seemed to give the Petitioner the option of paying off the Petitioner’s delinquency or posting a bond in order for the Petitioner to receive a new sales and use tax license and because the Division’s written statements were inconsistent with verbal statements she had received from Division employees who told her that her only option was to post a bond. REPRESENTATIVE FOR TAXPAYER claims that after meeting with REPRESENTATIVE FOR RESPONDENT-1 and asking whether the Petitioner would have to post a bond, REPRESENTATIVE FOR RESPONDENT-1 told her that she needed to post a bond and that she needed to pay the Petitioner’s delinquency within two weeks or “we will shut you down.” In addition, REPRESENTATIVE FOR TAXPAYER indicates that she spoke with NAME-2, of Taxpayer Services Division, who also told her that she needed to post a bond in order for the Petitioner to receive a new sales and use tax license.

12. On February 16, 2018, the Petitioner paid \$\$\$\$ to satisfy its delinquent sales and use tax deficiency and to reduce its account balance to \$0. Since making this payment, the Petitioner has continued to file sales and use tax returns and remit sales and use taxes. The Division indicates that as of the hearing date, the Petitioner does not owe any delinquent taxes.

13. On April 18, 2018, the Division issued a Tax License Denial letter to the Petitioner, in which it denied the Petitioner’s request for a “withholding tax license” because the Petitioner “did not provide the required bond and . . . did not resolve [its] tax debt by Mar[.] 12, 2018.” In this letter, the

Division stated that “[a]pplicants with a history of filing and paying late are required to resolve tax debts **or** post a bond before licensing a new business” (emphasis added).

14. On May 21, 2018, the Petitioner submitted its Petition for Expedited Hearing, in which it asked the Commission to grant it sales and use tax license without having to post a bond.

15. Also on May 21, 2018, the Division issued a second Tax License Denial letter to the Petitioner, in which it corrected the “clerical error” on the April 18, 2018 Tax License Denial letter and denied the Petitioner’s request for a “sales and use tax license” because the Petitioner “did not provide the required bond and . . . did not resolve [its] tax debt by Mar[.] 13, 2018.” In the May 21, 2018 Tax License Denial letter, the Division also stated that “[a]pplicants with a history of filing and paying late are required to resolve tax debts **or** post a bond before licensing a new business” (emphasis added).

Parties’ Arguments

The Division contends that under Utah Code Ann. §59-12-106(2)(e)(i)(A), an applicant that has had a sales and use tax license revoked for a delinquency must post a bond before the applicant can receive another sales and use tax license. Because the Petitioner’s prior sales and use tax license was revoked for a delinquency on September 27, 2017, the Division claims that Utah law precludes the Petitioner from receiving a new sales and use tax license without posting a bond.⁴

In addition, the Division contends that under Subsection 59-12-106(2)(f)(iv), an applicant who is required to post a bond before receiving a sales and use tax license must post a bond of at least \$\$\$\$.

⁴ The Division acknowledges that its February 12, 2018 New Application – Bond Required letter and its April 18, 2018 and May 21, 2018 Tax License Denial letters appear to give the Petitioner the option of either paying its delinquency or posting a bond in order to receive a new sales and use tax license. The Division contends, however, that regardless of what was stated in those letters, Utah law does not provide this option to an applicant whose prior license was revoked for a deficiency.

The Division explained that for an applicant who *has not* previously had a license revoked for a deficiency, the letters it sent the Petitioner correctly provided the option of paying the unpaid tax debt or posting a bond. The Division further explained that it also sends these letters to an applicant, such as the Petitioner, who *has* previously had a license revoked for a deficiency because it does not have letters that specifically apply to such an applicant’s circumstances. It also appears that the two Tax License Denial letters that the Division sent to the Petitioner also do not specifically apply to the Petitioner’s circumstances because they both indicate that the Petitioner had not satisfied its tax debt by March 12, 2018 (in the first letter) or by March 13, 2018 (in the second letter), whereas the Petitioner satisfied its tax debt on February 16, 2018.

Because the Petitioner currently does not owe any taxes, the Division contends that the Petitioner must post a bond of \$\$\$\$ in order to receive a new sales and use tax license, pursuant to Subsections 59-12-106(2)(f)(ii) and (2)(f)(iii). The Division also contends that the Petitioner's prior and current disregard of the law poses a risk. For these reasons, the Division asks the Commission to find that the Petitioner must post a \$\$\$\$ bond in order to receive a new sales and use tax license.

The Petitioner asks the Commission to grant it a new sales and use tax license without having to post a bond because it has satisfied its tax debt, which is one of the options that the Division provided in its February 12, 2018 New Application – Bond Required letter and in its April 18, 2018 and May 21, 2018 Tax License Denial letters. Furthermore, even if the Division's written statements are contrary to Utah law and Utah law requires the Petitioner to post a bond to receive a new sales and use tax license, the Petitioner contends that it was harmed by the Division's actions. The Petitioner specifically proffers that it was harmed by the Division's February 12, 2018 letter because the Petitioner paid its tax debt on February 16, 2018, under the belief that this payment would enable the Petitioner to receive a new sales and use tax license without having to post a bond.

REPRESENTATIVE FOR TAXPAYER further stated that it is unreasonable to require the Petitioner to post a \$\$\$\$ bond because the Petitioner's sales and use tax liabilities each year are around \$\$\$\$ and because the Petitioner would have to pay collateral of \$\$\$\$ and an annual premium of \$\$\$\$ to receive a \$\$\$\$ bond. Because the \$\$\$\$ total cost to post a \$\$\$\$ bond is nearly as much as the Petitioner's annual sales and use tax liability, the Petitioner proposes an alternative or compromise for the Commission to consider. Specifically, the Petitioner proposes that it pay a negotiated amount in advance into its sales and use tax account and maintain this amount throughout the year to ensure that it pays its monthly sales and use tax liabilities on time. For these reasons, the Petitioner asks the Commission to grant it a new sales and use tax license without having to post a \$\$\$\$ bond.

APPLICABLE LAW

Utah Code Ann. §59-12-106 provides guidance concerning the application process and the requirements needed to obtain a sales and use tax license, including posting a bond, as follows in pertinent part:

- (1) As used in this section:
 - (a) "applicant" means a person that:
 - (i) is required by this section to obtain a license; and
 - (ii) submits an application:
 - (A) to the commission; and
 - (B) for a license under this section;
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 - (2) (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.
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 - (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; or
 - (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) (i)
 - (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) 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:
 - (I) the amount of any delinquency that served as a basis for revoking the license under this section of:

- (Aa) the applicant;
- (Bb) a fiduciary of the applicant; or
- (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; 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; or
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- (iv) Notwithstanding Subsection (2)(f)(ii) or (2)(f)(iii), a bond required by Subsection (2)(e) may not:
 - (A) be less than \$\$\$\$; or
 - (B) exceed \$500,000.
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- (h) (i) The commission shall, on a reasonable notice and after a hearing, revoke the license of any licensee violating any provisions of this chapter.
- (ii) A license may not be issued to a licensee described in Subsection (2)(h)(i) until the licensee has complied with the requirements of this chapter, including:
 - (A) paying any:
 - (I) tax due under this chapter;
 - (II) penalty as provided in Section 59-1-401; or
 - (III) interest as provided in Section 59-1-402; and
 - (B) posting a bond in accordance with Subsections (2)(e) and (f).
- (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.
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For the instant matter, UCA §59-1-1417(1) provides guidance concerning which party has the burden of proof, as follows:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
 - (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
 - (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
 - (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
 - (i) required to be reported; and
 - (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

The Petitioner has applied for a new sales and use tax license. Because the Petitioner's prior sales and use tax license was revoked for a deficiency, Subsection 59-12-106(2)(e)(i) provides that the Tax Commission may not issue a new sales and use tax license to the Petitioner unless the Petitioner posts a bond.⁵ In addition, where an applicant must post a bond pursuant to Subsection 59-12-106(2)(e), Subsection 59-12-106(2)(f)(iv) provides that the bond may not be less than \$\$\$\$\$. Furthermore, Utah law does not allow the Commission to waive this bond requirement or accept an alternative payment proposal in lieu of posting a bond, even if the cost to obtain the bond is greater than the applicant's annual sales and use tax liability.⁶ For these reasons, Utah law clearly provides that the Commission cannot issue a new sales and use tax license to the Petitioner until the Petitioner posts a \$\$\$\$ bond.

Nevertheless, the Petitioner contends that it should be granted a new sales and use tax license without posting a bond because the Division (in its "February 12, 2018 letter") indicated in writing that the Petitioner could avoid posting a bond if it paid its outstanding tax liability by March 14, 2018, and because the Petitioner paid its outstanding tax liability in full prior to this March 14, 2018 date. The Petitioner is essentially arguing that the Division should be equitably estopped from now requiring the Petitioner to post a bond to receive a new sales and use tax license where the Division had previously indicated in writing that the Petitioner could avoid posting a bond by paying its outstanding tax liability.

The elements necessary to invoke "equitable estoppel" are: (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675 (Utah App. 1990).

5 *See also* Subsection 59-12-106(2)(h)(i).

6 It appears that the Petitioner may be suggesting that the current law is unfair and should be changed. While the Commission is charged with implementing the laws as they currently exist, the Commission is not authorized to change the law to achieve what the Petitioner may consider to be a better tax policy. That is the role of the Utah Legislature.

Utah courts have found that “equitable estoppel” should only be applied against a state agency in unusual situations. In *Holland v. Career Serv. Review Bd.*, 856 P.2d 678 (Utah App. 1993), the Utah Court of Appeals found that “it is well settled that equitable estoppel is only assertible against the State or its institutions in unusual situations in which it is plainly apparent that failing to apply the rule would result in manifest injustice.” The Court further stated that in such cases, “the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception.”

In *USTC Appeal No. 11-297* (Revised Initial Hearing Order, Aug. 25, 2011),⁷ the Commission found that the Tax Commission should be equitably estopped from imposing additional income tax that had been assessed to a Utah resident. *Appeal No. 11-297* concerned a taxpayer who had received written information from an employee of Taxpayer Services Division as to whether the taxpayer could claim a credit against her Utah income tax liability for income taxes paid to a township in STATE. The Tax Commission employee erroneously informed the taxpayer that she could claim a credit against her Utah tax liability for the taxes paid to the township.

In *Appeal No. 11-297*, the taxpayer relied on the erroneous information to determine that she would not need to sell her Utah residence or move her domicile to STATE. The taxpayer claimed that had the Tax Commission employee given her the correct information, she would have sold her Utah residence and moved to STATE because she could not afford to pay tax twice on the same income. The Commission determined that the taxpayer “arranged her living arrangements for 2007 in reliance on the advice” and determined that all three elements of equitable estoppel existed because the written statement from the Tax Commission employee made “clear what advice was given and that the advice was specific to the facts of [that taxpayer’s] situation,” because the taxpayer took reasonable action on the advice for the year at issue, and because “she relied on this advice to decide that she would continue to maintain her Utah domicile, rather than sell her house and move.” The Commission specifically pointed out that

⁷ This and other selected Commission decisions can be viewed in a redacted format on the Commission’s website at <https://tax.utah.gov/commission-office/decisions>.

“[h]ad she changed domicile, she would not have this tax liability. There is injury to the [taxpayer] that would result if the Commission now repudiates the statement based on her reliance.”

In the current case, however, it appears that: 1) REPRESENTATIVE FOR TAXPAYER telephoned the Division to receive verbal confirmation that the written advice she had received in the Division’s February 12, 2018 letter was correct before the Petitioner paid its outstanding tax liability; and 2) REPRESENTATIVE FOR TAXPAYER was verbally told by one or more Division employees that regardless of what was stated in the February 12, 2018 letter, the Petitioner could not receive a new sales and use tax license without posting a bond. As a result, it appears that REPRESENTATIVE FOR TAXPAYER decided to go ahead and pay the Petitioner’s outstanding tax liability even though she was aware that the Petitioner would need to post a bond to receive a new sales and use tax license.

Under these circumstances, the second and third elements of “equitable estoppel” do not exist. The second element requires the Petitioner to take reasonable action or inaction on the basis of the Division’s written statement. Because REPRESENTATIVE FOR TAXPAYER was verbally informed that the written statement in the Division’s February 12, 2018 letter was incorrect before the Petitioner paid its outstanding tax liability, the Petitioner cannot reasonably argue that the Petitioner paid its outstanding tax liability with the understanding that this would enable it to obtain a new sales and use tax license without posting a bond.

Furthermore, the third element of “equitable estoppel” requires there to be an injury to the Petitioner if the Division is allowed to contradict or repudiate the written statement in its February 12, 2018 letter. There is no injury where the Division verbally informed the Petitioner that it could not obtain a new sales and use tax license by paying the outstanding tax liability unless it also posted a bond. However, even if REPRESENTATIVE FOR TAXPAYER had not telephoned the Division and found out that the Petitioner would have to post a bond to receive a new sales and use tax license, the Commission would not find that the Petitioner was injured by paying the delinquent sales and use taxes that it had collected from its customers and had failed to remit to the Tax Commission. For these reasons, the

Commission finds that “equitable estoppel” does not exist to preclude the Division from asserting that the Petitioner must post a bond before receiving a new sales and use tax license.

In summary, because the Petitioner has not posted a \$\$\$\$ bond, Utah law provides that the Petitioner may not receive a new sales and use tax license. Accordingly, the Commission should deny the Petitioner’s appeal.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Petitioner’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
CITY-1, 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 _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner