

19-1434
TAX TYPE: SALES & WITHHOLDING TAX
TAX YEAR: NOT APPLICABLE
DATE SIGNED: 07/19/2019
COMMISSIONERS: M. CRAGUN, R. ROCKWELL, L. WALTERS
EXCUSED: J. VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 19-1434</p> <p>Tax Type: Sales and Withholding Tax License Denial</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER-1, Attorney at Law
REPRESENTATIVE FOR TAXPAYER-2, Former Member & Registered Agent, TAXPAYER
REPRESENTATIVE FOR TAXPAYER-3, Member TAXPAYER
For Respondent: REPRESENTATIVE FOR RESPONDENT-1, Assistant Attorney General
REPRESENTATIVE FOR RESPONDENT-2, Tax Compliance Manager
REPRESENTATIVE FOR RESPONDENT-3, Taxpayer Services

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on July 15, 2019 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Taxpayer” or “TAXPAYER”) is appealing Respondent’s (“Division’s”) denial to issue sales tax and withholding tax licenses to Petitioner. The Division’s Tax License Denial letter was issued on June 7, 2019, after the Division had notified Petitioner by letter dated April 11, 2019 that Petitioner needed to post bonds before the licenses could be issued. Petitioner did not post the requested bonds and the license was denied. At the hearing, it was Petitioner’s request that the licenses be issued without the bonds being posted.

APPLICABLE LAW

Under Utah law businesses that are required to collect sales tax are required to have a sales tax license. Utah Code Sec. 59-12-106 provides the following pertaining to the sales tax license:

(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:

...

(c) “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 an 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); . . . or (F) has a relationship to the applicant described in Subsection (1)(c)(i) that is similar to relationship described in Subsections (1)(c)(ii)(A) through (E) (emphasis added) . . .

...

(f) “licensee” means a person that is licensed under this section by the commission.

(2) 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: (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.

(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 (B) for a licensee that has posted a bond under this section with the commission, increase the amount of the bond posted with the commission . . .

(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) 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 . . . (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; . . .

. . .
(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.

. . .
(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 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.

The law at issue regarding withholding tax license provisions is Utah Code Sec. 59-10-405.5 and provides in relevant part:

(4) The Commission shall review an application and determine whether:
(a) the applicant meets the requirements of this section to be issued a license;
and

(b) a bond is required to be posted with the commission in accordance with Subsections (5) and (6) before the applicant may be issued a license.

(5)(a) An applicant shall post a bond with the commission before the commission may issue the applicant a license if:

(i) a license under this section was revoked for a delinquency under this part . . . or

(ii) there is a delinquency in withholding, reporting or remitting any amount under this part for: (A) an applicant; (B) a fiduciary of the applicant; . . .

(b) If the commission determines it is necessary to ensure compliance with this part, the commission may require a licensee to:

- (i) 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 (6); or
- (ii) for a licensee that has posted a bond under the section with the commission, increase the amount of bond posted with the commission.

DISCUSSION

The entity requesting the sales and withholding tax licenses in this matter, TAXPAYER, was formed by filing a Certificate of Organization with the Utah Department of Commerce on February 26, 2019. The Certificate of Organization stated that the only member and manager of the limited liability company was NAME-1. It also indicated the registered agent was NAME-1. At the time the Certificate of Organization was submitted, NAME-1 also filled out the application to obtain sales and withholding tax licenses on behalf of the limited liability company. This was the original application for sales and withholding tax licenses that would have been sent to the Division to process on February 27, 2019.

NAME-1 had owned a used car business that had failed in prior years and there was a tax delinquency NAME-1 was responsible for still remaining from that business. Because of that outstanding delinquency of sales and withholding tax owed by NAME-1, the Division made the determination that TAXPAYER Sales should post a bond. The bond amount was calculated based on NAME-1's prior delinquency and not an estimate of the amount of sales and withholding that TAXPAYER Sales might incur. The Division had issued the notice on April 11, 2019 that the bonds were required by May 13, 2019. This notice indicated it was in regards to an application filed on February 27, 2019, which would have been the original application filed by NAME-1. TAXPAYER did not post the bond and on June 7, 2019, the Division issued the Tax License Denial. This notice denied the tax licenses because the bond was not posted.

REPRESENTATIVE FOR TAXPAYER-3 and REPRESENTATIVE FOR TAXPAYER-2, who is married to NAME-1, appeared at the hearing. They and their attorney explained that TAXPAYER was supposed to be their business with the two of them as equal partners. They stated that NAME-1 was never supposed to be a member, manager or agent for TAXPAYER. REPRESENTATIVE FOR TAXPAYER-2 explained she had asked NAME-1 to file the papers to form the limited liability company for them because he knew how to do that and she did not. They surmised that NAME-1 put his own name on the business because he did not know if REPRESENTATIVE FOR TAXPAYER-3 wanted to be listed as a member in his own name or under a limited liability company for which REPRESENTATIVE FOR TAXPAYER-3 was the member\owner, which was BUSINESS. Why NAME-1 had not put REPRESENTATIVE FOR

TAXPAYER-2's name as the member and agent was not explained. NAME-1 did not attend the hearing.

REPRESENTATIVE FOR TAXPAYER-2 explained that in March they realized there was the problem with NAME-1 being on the limited liability company. She indicates that in March they removed NAME-1 and added herself and REPRESENTATIVE FOR TAXPAYER-3 as the principals for TAXPAYER. REPRESENTATIVE FOR TAXPAYER-2 then explained at the hearing that after talking with employees from the Division, she filed a new application for the sales and withholding tax licenses. She stated she thought that she had filed this new application in March, but neither she, nor the Division provided a copy of this new application as an exhibit. At the hearing, the Division's representative indicated the Division had responded to this second application, but if the Division did respond to this new application by letter, no letters were provided as exhibits at this hearing. REPRESENTATIVE FOR TAXPAYER-2 states that after further discussion with the Division, which indicated to her the Division would still not issue the licenses without TAXPAYER posting a bond, she decided that she would also resign as a member of TAXPAYER and leave REPRESENTATIVE FOR TAXPAYER-3 as the only principal of the limited liability company. She states she did so because she thought the license was being denied because she was married to NAME-1. She indicates she felt that holding up the license was unfair to REPRESENTATIVE FOR TAXPAYER-3.

REPRESENTATIVE FOR TAXPAYER-3 indicated at the hearing he had thought he or his limited liability company, BUSINESS, had been principals of TAXPAYER from the beginning, so only became aware at the hearing that the original filing only indicated NAME-1 as the principal. He stated, however, that he would prefer that both he and REPRESENTATIVE FOR TAXPAYER-2 be the principals of TAXPAYER, as that was their intent all along. He also expressed that although the intent was that NAME-1 be an employee of TAXPAYER, that NAME-1 would not be involved as a manager or principal of TAXPAYER. Because the business had not been issued a license, they were unable to start operations, which was a financial hardship.

Petitioner did not provide documentation to show that currently the only principal of the business was REPRESENTATIVE FOR TAXPAYER-3. However, the Division did concede at the hearing that NAME-1 was no longer a registered principal of TAXPAYER. The Division had provided printouts of on-line changes that had been made with the Department of Commerce. The

last one was dated April 24, 2019 and it showed REPRESENTATIVE FOR TAXPAYER-3 as the only registered principal of the business.¹

At the hearing, the representatives for Petitioner explained that they did intend that NAME-1 would be an employee of the business. The business was going to operate as a used car dealership and NAME-1 would be a salesperson for that business. REPRESENTATIVE FOR TAXPAYER-3 would also be a salesperson and work on obtaining inventory for the business and REPRESENTATIVE FOR TAXPAYER-2 would be the accountant and bookkeeper. It was their contention that NAME-1 would not be responsible for collecting and paying over the tax, and he would not be the manager of the business or have financial control over the business.

At the hearing, the Division's representative explained that they had determined that a bond should be required for Petitioner because of NAME-1's involvement with the business and the fact that there was still a substantial amount of tax delinquency from NAME-1's prior business. When the original application for TAXPAYER'S licenses was submitted, it had been submitted by NAME-1 and NAME-1 was the only registered principal of TAXPAYER. Therefore, there was clearly basis to deny that original application or require the bond. However, it was the Division's contention, that although NAME-1 was no longer a registered principal, he was still involved in the business as an employee and salesperson. The Division also argued the fact that NAME-1 had put his name on the original filings supported that the intent was for him to be involved in the management and control of the business. The Division saw NAME-1's involvement as a risk, even though at the hearing the Division acknowledged NAME-1 was no longer a registered principal of the business. The Division did not argue that either REPRESENTATIVE FOR TAXPAYER-2 or REPRESENTATIVE FOR TAXPAYER-3 had a tax delinquency that they were responsible for paying.

The Division argued two grounds under the statute for requiring the bond. The Division argued that NAME-1 was a "fiduciary of the applicant." Utah Code Subsection 59-12-106(2)(e)(i)(B) states the applicant "shall" post a bond before the Commission may issue the license if "there is a delinquency in paying a tax under this chapter" for a "fiduciary of the applicant." However, based on the evidence presented at the time of the second application and the time of the hearing, NAME-1 was not a "fiduciary of the applicant." NAME-1 was no longer a corporate officer, director or manager of the applicant. NAME-1 was, however, to be an employee of the applicant. "Fiduciary of the applicant" is defined at Utah Code Subsection 59-

¹ The several pages of "Summary of Online Changes" are a little unclear as to what they are showing. The Division also provided a copy of the Utah Department of Commerce records for BUSINESS, and that confirmed that REPRESENTATIVE FOR TAXPAYER-3 was the registered principal of that entity.

12-106(1)(c) to be a person “that: (i) is required to collect, truthfully account for, and pay over a tax under this chapter for an 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); . . . or (F) has a relationship to the applicant described in Subsection (1)(c)(i) that is similar (emphasis added).” The information proffered at the hearing was that NAME-1 was not going to be involved with collecting, accounting for, and paying over a tax. He was going to work as a motor vehicle salesperson. It is clear from the provision defining “fiduciary of the applicant” that being an employee alone is not enough. Therefore, the Division’s requiring a bond is not supported by Utah Code Subsection 59-12-106(2)(e)(i).

The Division also argued it had broad discretion to require the bond under Utah Code Subsection 59-12-106(2)(e)(ii). The subsection does provide, “If the commission determines it is necessary to ensure compliance” with sales tax provisions, including collecting and remitting tax, the Commission “may require a **licensee** (emphasis added)” to post a bond, or increase the amount of the bond. This subsection does confer broad discretion to the Commission to require a bond for a “licensee” but not an “applicant.” “Applicant” and “licensee” are specifically defined terms at Subsection 59-12-106(1) and because the Division has not yet issued a license, TAXPAYER is not a “licensee,” it is an “applicant.” Once the Division issues a license to TAXPAYER, if TAXPAYER then becomes delinquent or the Division then determines a bond is necessary to ensure compliance, the Division may require a bond under Utah Code Subsection 59-12-106(2)(e)(ii).²

Regarding withholding tax bond provisions, they are essentially identical to the sales tax provisions. Utah Code Subsection 59-10-405.5(5)(a) states that the applicant is required to post a bond if there is a delinquency in paying the withholding tax for a “fiduciary of the applicant.” “Fiduciary of the applicant” is defined for the withholding tax provisions at Utah Code Subsection 59-10-405.5(1) and that definition is the same as for the sales tax provisions.

Based on the evidence submitted at this hearing, NAME-1 is no longer a registered principal of TAXPAYER, and although the intent is that he may be an employee, the information proffered is that he is not going to be involved with collecting, accounting for or remitting the tax. The Division did not argue that either REPRESENTATIVE FOR TAXPAYER-2 or REPRESENTATIVE FOR TAXPAYER-3 had a tax delinquency from another business and TAXPAYER has not yet started to do business because it has not yet been issued a license, so it

² If after the license was issued, the Division then required a bond under Utah Code Subsection 59-12-106(2)(e)(ii) the amount of the bond would be based on the provisions of Subsection 59-12-106(2)(f).

does not have a tax delinquency of its own. The Division does not have a statutory basis to require TAXPAYER to post bonds at this time. Before issuing a license, the Division may require a new application from TAXPAYER, in which REPRESENTATIVE FOR TAXPAYER-2 and REPRESENTATIVE FOR TAXPAYER-3 are the only principals for the business, if it does not have one already to process, but should process the application consistent with this decision.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission orders the Division to allow and process Petitioner's new tax license application, which reflects that NAME-1 is no longer a principal of Petitioner, and issue the sales and withholding tax licenses without the requirement for the Petitioner to post the bonds. 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 _____, 2019.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner