

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : DETERMINATION
BIRDS AND BEES WILDLIFE MANAGEMENT, LLC : DTA NO. 827598
for Review of a Denial, Suspension, Cancellation or :
Revocation of a License, Permit or Registration under :
Articles 28 and 29 of the Tax Law. :

Petitioner, Birds and Bees Wildlife Management, LLC, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 28 and 29 of the Tax Law.

An expedited hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in Albany, New York, on June 16, 2016 at 10:30 A.M. At petitioner's request, a briefing period ending September 6, 2016 was provided. On September 3, 2016, petitioner filed a motion to reopen submission of evidence and schedule new hearing. The Division of Taxation filed a response to the motion on September 21, 2016, which date began the 30-day period for the issuance of this determination pursuant to section 3000.18(b) of the Tax Appeals Tribunal Rules of Practice and Procedure. Petitioner appeared by Brett A. McDonnell, its sole member. The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly refused to issue petitioner a certificate of authority to collect sales tax.

II. Whether petitioner's motion to reopen the record should be granted.

FINDINGS OF FACT

1. Petitioner, Birds and Bees Wildlife Management, LLC, filed an Application to Register for a Sales Tax Certificate of Authority (application) with the Division of Taxation (Division) dated November 30, 2015.¹ The application indicated that petitioner was a member-managed LLC with Brett A. McDonnell as its sole member. Mr. McDonnell was listed on the application as the responsible person for petitioner for sales tax purposes.

2. On December 9, 2015, the Division responded to petitioner’s application by issuing a Notice of Proposed Refusal to Renew a Certificate of Authority (notice of proposed refusal). As grounds, the notice of proposed refusal cited to Tax Law § 1134(a)(4)(B)(ii) and indicated that Mr. McDonnell was “an officer, owner, or other person required to collect tax on behalf of [petitioner],” and he had “unpaid New York State tax debts.”

3. Accompanying the notice was a consolidated statement of tax liabilities for Mr. McDonnell.² The consolidated statement contained two categories of sales tax liabilities. The first listed those liabilities that are subject to collection action:

Assessment #	Period Ended	Tax	Penalty	Interest	Balance Due
L-036267206	8/31/08	\$101.99	\$30.39	\$146.38	\$128.14
L-036267205	5/31/09	\$24.87	0	\$17.56	\$42.43

¹ Despite instructions to file the application at least 20 days before starting business in New York State, the application stated that petitioner would start doing business on October 22, 2015. This discrepancy was not explained by either party.

² The copy of the consolidated statement of tax liabilities placed in the record by the Division is dated June 15, 2016. In order to authenticate the document, the Division presented the testimony of Donna Tilley, an employee with its Sales Tax Registration unit, whose responsibilities include review of applications for sales tax certificates of authority and outstanding liabilities associated therewith. Ms. Tilley confirmed that the consolidated statement entered into evidence represented an update to the outstanding liabilities owed by Mr. McDonnell at the time the notice of proposed refusal was issued. She also stated that the relevant liabilities remained outstanding.

L-036267203	11/30/09	\$2,249.36	\$674.73	\$3,505.14	\$6,429.23
L-036267202	2/28/10	\$165.52	0	\$100.54	\$266.06
L-036267201	8/31/10	\$20.45	0	\$11.13	\$31.58
Total					\$6,897.44 ³

The second category contained sales tax returns that had not been filed:

Assessment #	Period Ended	Tax	Penalty	Interest	Balance Due
L-029710271	11/30/05	\$3,754.53	\$1,126.25	\$12,707.55	\$17,212.84
L-036267207	11/30/07	\$1,500.73	\$450.07	\$3,598.88	\$5,549.68
L-036267204	2/28/09	\$101.99	\$100.00	\$189.08	\$391.07
L-042568064	2/28/13	0	0	0	0
L-042568063	2/28/14	0	0	0	0
Total					\$23,153.59

The outstanding liabilities emanated from Mr. McDonnell's involvement as a responsible person in a former business named McDonnell-Hebdon, Inc., during those periods.

4. At the hearing, petitioner conceded that Mr. McDonnell had an outstanding liability against him of approximately \$7,500.00.

5. Petitioner presented the testimony of Rolaine Stoddard, its current tax preparer and a former enrolled agent. Ms. Stoddard testified that the outstanding liability resulted from numerous errors made by Mr. McDonnell's former accountants concerning the tax filings and payments for both McDonnell-Hebdon, Inc., and its predecessor company, Critter Control of WNY, a sole proprietorship previously owned by Mr. McDonnell. Ms. Stoddard explained that she was attempting to review and reconstruct the entire tax history of both companies for Mr.

³ The balance due reflects payments or credits applied to Mr. McDonnell's account.

McDonnell. Nevertheless, she stated that based on her review as of the date of the hearing, Mr. McDonnell's outstanding sales tax liability was \$8,700.00.

6. Petitioner did not place into evidence any checks or other proof of payment for any of the liabilities listed in the consolidated statement. It also did not present any evidence of an established installment payment agreement.

7. The record was closed at the conclusion of the hearing on June 16, 2016. Near the end of the hearing, petitioner confirmed that there was no additional testimonial, documentary or other evidence it wished to offer.

8. In its post-hearing brief, petitioner changed its position presented at hearing and argued that there are no outstanding liabilities for any of the entities owned by Mr. McDonnell.

9. On September 3, 2016, petitioner filed a "motion to reopen submission of evidence and schedule new hearing if needed." As grounds, petitioner cites to and attaches to its motion two "subsequently acquired" documents that it asserts rebut the Division's case. The first is a spreadsheet prepared by Ms. Stoddard purportedly of an analysis of the tax liabilities and payments relevant to this case. Petitioner maintains in its motion that the spreadsheet could not be completed by the June 16, 2016 hearing, but all source documents used in its preparation can now be provided.

10. The second set of subsequently acquired materials are collection documents dated June 14, 2016 from the Division relating to a company named "A"quipment Repairs & The Hood Cleaners, LLC. According to petitioner, this was a company previously owned by Ms. Stoddard. Petitioner maintains that the Division reopened its collection efforts against Ms. Stoddard in retaliation to her testimony on its behalf at the hearing in this matter and that the activity constitutes witness tampering.

11. The Division opposes petitioner's motion, maintaining that what has been offered is not newly discovered evidence and could have been produced at hearing.

CONCLUSIONS OF LAW

The Notice of Proposed Refusal

A. Tax Law § 1134(a)(4)(B) provides in relevant part as follows:

“Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the commissioner ascertains that . . . , (ii) a tax due under this article or any law, ordinance or resolution enacted pursuant to the authority of article twenty-nine of this chapter has been finally determined to be due from an officer, director, partner or employee of such person, and, where such person is a limited liability company, also a member or manager of such person, in the officer's, director's, partner's member's, manager's or employee's capacity as a person required to collect tax on behalf of such person or another person and has not been paid . . . , the commissioner may refuse to issue a certificate of authority.”

B. The primary issue in the instant matter is whether sales taxes that have been finally determined to be due from Mr. McDonnell, the responsible person for petitioner, remain unpaid so that the Commissioner may refuse to issue the certificate of authority. Here, the record clearly shows that sales taxes for the periods at issue were finally determined to be due from Mr. McDonnell. Specifically, the Division presented evidence that Mr. McDonnell had outstanding liabilities for numerous sales tax periods at the time of petitioner's application. Petitioner, in turn, conceded approximately \$7,500.00 remained unpaid, while petitioner's witness, Ms. Stoddard, testified that the amount outstanding was \$8,700.00. Moreover, there is no dispute that Mr. McDonnell was a responsible person for petitioner. Accordingly, the Commissioner acted within his authority in issuing the proposed refusal to issue a certificate of authority (*see Matter of Womble*, Tax Appeals Tribunal, August 17, 2006).

C. Petitioner's post-hearing argument in its brief that all liabilities have been paid in full contradicts its position at the hearing and is unsupported by the record. To the extent that it relies upon investigation or statements by Ms. Stoddard first presented in its brief and that post-date the closing of the record, such argument cannot be considered as evidence (*see Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012; *Matter of Café Europa*, Tax Appeals Tribunal, July 13, 1989).

Petitioner's Motion to Reopen the Record

D. Petitioner additionally seeks to reopen the record to allow for the introduction of two sets of documents.⁴ The Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed. In *Matter of Schoonover* (Tax Appeals Tribunal, August 15, 1991), the Tribunal affirmed the administrative law judge's decision to reject such late-offered documents and provided the following explanation:

“In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (*see, Matter of Oggi Rest.*, Tax Appeals Tribunal November 30, 1990; *Matter of Morgan Guar. Trust Co. of N.Y.*, Tax Appeals Tribunal, May 10, 1990; *Matter of International Ore & Fertilizer Corp.*, Tax Appeals Tribunal, March 1, 1990; *Matter of Ronnie's Suburban Inn*, Tax Appeals Tribunal, May 11, 1989; *Matter of Modern Refractories*, Tax Appeals Tribunal, December 15, 1988).”

E. In the present motion, the offered documents do not constitute newly discovered evidence, the standard that would warrant reopening of the record and hearing (*see generally*

⁴ 20 NYCRR 3000.16 allows for a motion to reopen the record within 30 days of service of a determination where there is the existence of newly discovered evidence that probably would have produced a different result. In the instant case, petitioner's motion was made prior to issuance of this determination. Nevertheless, it will be addressed in light of the standards of 20 NYCRR 3000.16 (*see* 20 NYCRR 3000.0[c]).

Evans v. Monaghan, 306 NY 312 [1954]; *Matter of New Cingular Wireless PCS LLC*, Tax Appeals Tribunal, February 16, 2016; *see also* 20 NYCRR 3000.16). Petitioner has not provided an adequate explanation as to why the evidence could not have been discovered with due diligence in time to produce it at the hearing (*see Matter of Reeves*, Tax Appeals Tribunal, September 2, 2004). Indeed, the source records purportedly relied upon for preparation of the offered spreadsheet existed at the time of the hearing and could have been offered then by petitioner. Further, despite ample opportunity, petitioner did not request that the record be left open to permit subsequent submission of the records. Instead, petitioner consented to the closing of the record. Judicial efficiency and finality require that it remain closed (*see Matter of Schoonover*).

Meanwhile, the additional materials offered concerning Ms. Stoddard's business are irrelevant to the instant proceeding. They concern the liabilities of a company that is unrelated to petitioner. Additionally, petitioner's claim regarding witness tampering by the Division is without merit.

F. Petitioner's motion to reopen the record, dated September 3, 2016, is denied. The petition of Birds and Bees Wildlife Management, LLC is denied and the Notice of Proposed Refusal to Renew a Certificate of Authority dated December 9, 2015 is sustained.

DATED: Albany, New York
October 6, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE