

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : DETERMINATION
OLEK, INC. : DTA NO. 827819
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, Olek, Inc., 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 small claims hearing was held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on January 27, 2017 at 10:30 A.M. A briefing period ending February 24, 2017 was provided. Pursuant to § 3000.18 (a), (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure, the due date for issuance of this determination was 21 days thereafter. Petitioner appeared by its president, Peter Triestman. The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Olek, Inc., a business engaged in performing restoration and preservation work on historic buildings, filed an Application to Register for a Sales Tax Certificate of

Authority (Application) with the Division of Taxation (Division) dated July 6, 2016.¹ The Application indicated that petitioner was an S Corporation, with Peter Triestman owning 100 percent of the corporation. Mr. Triestman was listed on the Application as the responsible person for petitioner for sales tax purposes.

2. On July 15, 2016, the Division responded to petitioner's Application by issuing a Notice of Proposed Refusal to Issue a Certificate of Authority (Notice of Proposed Refusal) to petitioner, and to petitioner's president, Peter Triestman. As grounds for refusing to issue a Certificate of Authority, each of the notices of proposed refusal cited to Tax Law § 1134(a)(4)(B) and provided as follows:

a) as to petitioner:

“an officer, owner, or other person required to collect tax on behalf of your business has unpaid New York State tax debts. Tax Law 1134(a)(4)(B)(ii). We are notifying this person under separate cover.

a shareholder of the business owns more than 50% of the voting stock and is entitled to vote for the election of directors or trustees, and

this shareholder owns or owned more than 50% of the voting stock of another corporation that has unpaid New York State tax debts. Tax Law 1134(a)(4)(B).”

b) As to petitioner's president, Peter Triestman:

“you are an officer, owner, or other person required to collect tax on behalf of this business, and

you have unpaid New York State sales tax debts. Tax Law 1134(a)(4)(B)(ii). The enclosed *Consolidated statement of tax liabilities* (Form DTF-967-E) provides more information. Tax Law 1134(a)(4)(B)(i).

you own more than 50% of the voting stock of the business and are entitled to vote for the election of directors or trustees, and

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 July 7, 2016. This discrepancy was not explained by either party.

you own or owned more than 50% of the voting stock of another corporation that has unpaid New York State tax debts. Tax Law 1134(a)(4)(B).”

3. Accompanying the Notice of Proposed Refusal pertaining to Peter Triestman was a consolidated statement of tax liabilities for him, reflecting the following:²

Tax Type	Assessment ID	Per. Ended	Tax	Interest	Penalty	Credits	Balance Due
Income	L-029286697-7	12/31/05	\$1,312.00	\$1,520.83	\$0.00	\$257.00	\$2,575.83
Sales	L-026499127-4	8/31/03	\$1,120.04	\$1,457.97	\$0.00	\$302.81	\$2,275.20
Total	-----	-----	-----	-----	-----	-----	\$4,851.03

4. The foregoing notices of proposed refusal advised that failure to either: a) file a protest (i.e., file a Request for a Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services [BCMS] or a petition for a hearing with the Division of Tax Appeals), or b) make full payment of the outstanding liabilities, within 30 days of the date of the notices of proposed refusal would result in the denial of petitioner’s Application.

5. Neither of the foregoing two options was exercised, and thus the Division issued to petitioner a Notice of Final Refusal to Issue a Certificate of Authority (Notice of Final Refusal) dated August 29, 2016. The Notice of Final Refusal advised petitioner that its Application had been refused upon the bases specified in the July 15, 2016 notices of proposed refusal, i.e., that a shareholder owning more than 50% of petitioner’s stock owned more than 50% of the stock of another corporation that has unpaid New York State tax debts, and that such shareholder, Peter Triestman, has unpaid New York State tax debts.

² The copy of the consolidated statement of tax liabilities placed in the record by the Division is dated July 15, 2016. In order to authenticate this document, the Division presented the testimony of Shelby Harrison, 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. Harrison confirmed that the consolidated statement entered into evidence represented an update to the outstanding liabilities owed by Mr. Triestman, less any payments or credits applied, as of the July 15, 2016 date of the Notice of Proposed Refusal.

6. A petition dated July 25, 2016 challenging the Notice of Proposed Refusal pertaining to the liabilities owed by Mr. Triestman (*see* Findings of Fact 2[b], 3), was received by the Division of Tax Appeals on August 2, 2016. Correspondence between petitioner's president, Mr. Triestman, and the Division of Tax Appeals resulted in the filing of a corrected petition challenging the Notice of Proposed Refusal pertaining to petitioner. The corrected petition was dated as signed on September 2, 2016, and was received by the Division of Tax Appeals on September 6, 2016. This corrected petition included and challenged the Division's August 29, 2016 Notice of Final Refusal.

7. In its answer to the petition, the Division states that petitioner's president, Peter Triestman, owns more than 50% of the voting stock of petitioner, and that he also owned more than 50% of the voting stock of a predecessor corporation, Triestman & Sons, Inc., with respect to which New York State sales tax, corporation tax and withholding tax have been finally determined to be due and have not been paid in full. Accordingly, the Division maintains that its refusal to issue a Certificate of Authority was proper and should be sustained.

8. At the hearing, the Division provided a New York S Corporation Shareholders' Information Schedule (Form CT-34-SH) for Triestman & Sons, Inc., for each of the years 2004, 2005 and 2006. Attached to each of these forms was Schedule B (Shareholders' Identifying Information) listing Peter Triestman as owning, individually, 100% of the stock of Triestman & Sons, Inc.

9. The Division also provided a Consolidated Statement of Tax Liabilities pertaining to Triestman & Sons, Inc., dated January 25, 2017, and listing some 25 tax assessments subject to collection.³ These assessments, grouped by tax type, are as follows:

Corporation Tax

Assessment ID	Period Ended	Tax Am't	Interest Am't	Penalty Am't	Credits	Balance
L-027095437	12/31/03	\$0.00	\$336.93	\$250.00	\$0.00	\$586.93
L-027025445	12/31/04	\$100.00	\$662.76	\$375.00	\$0.00	\$1,137.76
L-029143528	12/31/05	\$100.00	\$539.22	\$375.00	\$0.00	\$1,014.22
L-028765965	12/31/06	\$0.00	\$285.85	\$251.50	\$0.00	\$537.35
L-031488267	12/31/07	\$100.00	\$411.36	\$375.00	\$0.00	\$886.36
L-024530332	12/31/02	\$1,000.00	\$2,389.05	\$250.00	\$0.00	\$3,639.05
L-033478101	12/31/08	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Total	-----	-----	-----	-----	-----	\$7,801.67

Sales Tax

Assessment ID	Period Ended	Tax Am't	Interest Am't	Penalty Am't	Credits	Balance
L-023233380	08/31/03	\$1,120.04	\$4,849.11	\$294.36	\$302.81	\$5,960.70
L-024340783	02/29/04	\$0.00	\$361.40	\$133.81	\$132.95	\$362.26
L-025058556	08/31/04	\$0.00	\$650.68	\$501.97	\$502.13	\$650.52
L-025306492	11/30/04	\$0.00	\$868.97	\$947.11	\$884.01	\$932.07
L-027921056	08/31/05	\$0.00	\$14.66	\$88.92	\$16.00	\$87.58
L-029562068	08/31/07	\$0.00	\$0.00	\$50.00	\$0.00	\$50.00
Total	-----	-----	-----	-----	-----	\$8,043.13

³ More specifically, the consolidated statement lists 7 corporation tax assessments, 6 sales tax assessments and 12 withholding tax assessments, and the amounts shown are those calculated to be due as of January 25, 2017. At hearing, the Division clarified and conceded that there are no open (outstanding) assessments against petitioner, itself.

Withholding Tax

AssessmentID	Period Ended	Tax Am't	Interest Am't	Penalty Am't	Credits	Balance
L-022916975	03/31/03	\$0.00	\$233.73	\$111.18	\$0.00	\$344.91
L-022971210	06/30/03	\$0.00	\$144.70	\$66.33	\$0.00	\$211.03
L-029289309	03/31/04	\$1,609.42	\$3,665.93	\$764.15	\$0.00	\$6,039.50
L-029230193	06/30/04	\$464.25	\$919.07	\$116.00	\$0.00	\$1,499.32
L-029230194	09/30/04	\$135.31	\$261.39	\$33.50	\$0.00	\$430.20
L-029230195	12/31/04	\$57.39	\$107.81	\$14.00	\$0.00	\$179.20
L-028334913	06/30/05	\$0.00	\$193.20	\$115.96	\$0.00	\$309.16
L-028334914	09/30/05	\$0.00	\$198.87	\$116.96	\$0.00	\$315.83
L-028334915	12/31/05	\$0.00	\$156.15	\$108.19	\$0.00	\$264.34
L-028334916	09/30/06	\$0.00	\$429.95	\$285.40	\$0.00	\$715.35
L-024293256	03/31/04	\$0.00	\$1,724.17	\$1,000.00	\$0.00	\$2,724.17
L-023836413	12/31/03	\$0.00	\$1,759.01	\$1,000.00	\$0.00	\$2,759.01
Total	-----	-----	-----	-----	-----	\$15,792.02

10. At the hearing, petitioner's president, Mr. Triestman, did not dispute that he owns 100% of the stock of petitioner, and that he owned 100% of the stock of Triestman & Sons, Inc., during the periods with respect to which the assessed liabilities listed above pertain. Likewise, Mr. Triestman does not dispute that he was a person responsible to collect and remit taxes on behalf of Triestman & Sons, Inc.

11. Petitioner presented a spreadsheet listing the same assessed liabilities with respect to Triestman & Sons, Inc., as are set forth on the foregoing consolidated statement provided by the Division.⁴ Petitioner directly addressed, by comments on the face of the spreadsheet and attached

⁴ The balance due amounts are those computed as of September 13, 2016, and are therefore slightly less than the balance due amounts shown on the Division's statement of consolidated tax liabilities, dated January 25, 2017 and set forth above.

documents, five of the seven listed corporation tax assessments, and one of the six listed sales tax assessments, as follows:

a) for the year 2002, petitioner provided a copy of a corporation tax return (Form CT-3-S), claimed that the same was in fact filed by Triestman & Sons, Inc., and that the assessment for 2002 (L-024530332) therefore should not have been issued. However, no proof was provided establishing that the form was, in fact, filed as claimed.

b) for each of the years 2005, 2006 and 2007, petitioner provided a copy of Form CBT-100S (New Jersey Corporation Business Tax Return) listing a Newark, New Jersey address for Triestman & Sons, Inc. Petitioner states that as of 2004, the “business was completely out of New York,” and that the assessments with respect to the years 2005, 2006 and 2007 should not have been issued.

c) for the year 2008, petitioner provided a copy of a corporation tax return (Form CT-3-S) for the year 2007 marked as “final,” claimed that the same was in fact filed by Triestman & Sons, Inc., and that the assessment for 2008 (L-033478101) therefore should not have been issued. However, no proof was provided establishing that the form was, in fact, filed as claimed.

d) for the sales tax period ended August 31, 2003, petitioner claims that the assessment (L-023233380) has been paid in full. Specifically, petitioner submitted a one-page transaction confirmation, dated September 13, 2016, reflecting a payment in the amount of \$2,309.43 made by Peter Triestman. This document lists the “amount due” as \$4,918.28, leaving an apparent (and unexplained) unpaid difference of \$2,608.85.

12. With regard to the remainder of the assessments listed on the spreadsheet, petitioner makes no specific claims that the same represent incorrect or invalid assessments. Rather, petitioner simply noted, on its spreadsheet, the bases for the assessments.⁵ Petitioner expressed the desire that some of such assessments be reduced or compromised by the Division so as to arrive at a lower amount of unpaid assessed liabilities, thus allowing for the establishment of an

⁵According to Mr. Triestman: a) the corporation tax assessments for 2003 and 2004 resulted from failures to timely file returns for such years; b) the sales tax assessments represent only interest and/or penalty amounts; and c) the withholding tax assessments resulted from cash flow problems due to unavoidable project failures experienced by Triestman & Sons, Inc., that in turn caused late wage (and withholding tax) payments.

installment payment agreement (deferred payment arrangement) acceptable to both parties and, in turn, allowing for the issuance of a Certificate of Authority.

13. Other than the partial payment noted above (*see* Finding of Fact 9), petitioner did not place into evidence any checks or other proof of payment for any of the outstanding liabilities listed in the consolidated statement. It also did not present any evidence of any established installment payment agreement.

14. The liabilities pertaining to Triestman & Sons, Inc. (*see* Finding of Fact 9), have not been challenged via BCMS conference requests or a petition for a hearing before the Division of Tax Appeals. By contrast, the individual liabilities against Peter Triestman, as a person under a duty to collect and remit taxes on behalf of Triestman & Sons, Inc., are the subject of a challenge based upon the filing of a petition for a hearing with respect thereto.⁶ The Division acknowledged that any reductions to the individual liabilities against Mr. Triestman resulting from such challenge will apply to reduce any related derivative or joint liabilities against Triestman & Sons, Inc. Similarly, the Division concedes that the \$2,309.43 payment made by Peter Triestman and applied by the Division against his individual liability for the sales tax period ended August 31, 2003, serves to reduce the amount of the liability assessed against Triestman & Sons, Inc., for the same period (*see* Findings of Fact 9, 11[d]).

15. Provision was made, at the close of the hearing, for petitioner to submit one additional document as an exhibit in evidence. This document, submitted with petitioner's brief, is a letter from the Division to petitioner, dated December 7, 2016, advising petitioner that it is required to file a Form ST-100 (New York State and Local Quarterly Sales and Use Tax Return) on a

⁶ The record in this matter only reflects two assessments outstanding against Mr. Triestman (*see* Finding of Fact 3), and does not disclose whether any additional assessments are included or are at issue under the petition filed by Mr. Triestman.

quarterly basis, that its (then) next-due return was to be filed by December 20, 2016 (i.e., 20 days after the end of the sales tax quarterly period spanning September 1, 2016 through November 30, 2016), and that failure to file the required return (even if no tax is due) would result in the imposition of a penalty. Mr. Triestman explained that petitioner has been filing an annual return and paying tax (presumably on taxable sales made by petitioner in New York State) “voluntarily” since 2007, and does not understand why he is required to file quarterly returns even though he does not possess a certificate of authority and is not a registered vendor for sales and use tax purposes.⁷

16. The Division’s witness noted in response that when the Division found no existing sales tax account for petitioner upon its first filing in 2007, a “forced vendor” account was created, essentially providing a place within the Division’s systems to account for the monies collected and paid over with the returns filed by petitioner as an unregistered vendor.

CONCLUSIONS OF LAW

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 (i) any tax imposed under this chapter or any related statute, as defined in section eighteen hundred of this chapter, has been finally determined to be due from such person and has not been paid in full, (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, . . . , (v) a shareholder owning more than fifty percent of the number of shares of stock of such person (where such person is a corporation) entitling the holder thereof to vote for the

⁷ The December 7, 2016 letter was accepted in evidence and marked as petitioner’s Exhibit “2.” Additional documents were attached to petitioner’s post-hearing brief. These documents appear to concern the parties’ ongoing efforts aimed at arriving at a mutually acceptable resolution of the outstanding liabilities (e.g., payment, cancellation, or compromise leading to an installment payment agreement) such that a certificate of authority could be issued. Given the nature of these additional documents, and the fact that no provision was made for their post-hearing submission in evidence, the same were not considered in rendering the determination herein.

election of directors or trustees, who owned more than fifty percent of the number of such shares of another person (where such other person is a corporation) at the time any tax imposed under this chapter or any related statute as defined in section eighteen hundred of this chapter was finally determined to be due and where such tax has not been paid in full... the commissioner may refuse to issue a certificate of authority.”⁸

B. The record in this matter clearly reveals that petitioner’s president and 100% shareholder, Peter Triestman, was also president and 100% shareholder of Triestman & Sons, Inc., and that sales, corporation and withholding taxes that have been finally determined to be due from Triestman & Sons, Inc., remain unpaid. Further, there is no dispute that Mr. Triestman is, and was, a person under a duty to collect, account for and remit taxes on behalf of both of the corporate entities. Accordingly, the Commissioner properly denied petitioner’s July 6, 2016 Application to Register for a Sales Tax Certificate of Authority, and acted within his authority under Tax Law § 1134(a)(4)(B) and 20 NYCRR 539.3(a) in refusing to issue a Certificate of Authority (*see Matter of Womble*, Tax Appeals Tribunal, August 17, 2006). Finally, the fact that the parties are attempting to arrive at a mutually acceptable installment payment agreement, and continue ongoing negotiations, provides no basis for an order herein compelling the issuance of a Certificate of Authority. This forum does not have the jurisdictional authority to mandate a settlement agreement between petitioner and the Division (*see Matter of Cal Snyder*, Tax Appeals Tribunal, May 5, 2011).

⁸ The term “person” is defined to include a corporation (Tax Law § 1101[a]).

C. The petition of Olek, Inc., is hereby denied and the Notice of Final Refusal to Issue a Certificate of Authority, dated August 29, 2016, is sustained.

DATED: Albany, New York
March 16, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE