STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FLAIR BEVERAGES CORP.	:	DETERMINATION DTA NO. 829839
for Review of a Notice of Proposed Revocation of a License, Permit or Registration Pursuant to Article 28 of the Tax Law, dated October 1, 2019.	:	

Petitioner, Flair Beverages Corp., filed a petition for review of a notice of proposed revocation of a license, permit or registration, pursuant to article 28 of the Tax Law, dated October 1, 2019.

An expedited hearing was held on September 24, 2020, in Albany, New York, at 11:00 a.m., with all briefs to be submitted by February 19, 2021. Petitioner appeared by Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel). After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner, Flair Beverages Corp., has established that the proposed revocation of its certificate of authority was improper and should be canceled.

FINDINGS OF FACT

1. Petitioner, Flair Beverages Corp., is an alcoholic beverage wholesaler licensed by the New York State Liquor Authority (SLA) and is located at 3857 9th Avenue, New York, New York. Paul Gagliardi is petitioner's president and sole shareholder. Petitioner sells alcoholic beverages, water, juices, ice, and other non-alcoholic beverages and most of its sales are to vendors for resale. Petitioner is a "cash and carry" business, meaning that it does not make deliveries, does not accept credit cards or checks, and maintains no accounts receivable.

2. Petitioner's store is about 100,000 square feet in size and serves an average of between 1,000 to 1,200 customers a day. To make a purchase, customers must present an identification card issued by petitioner at one of the eight cash registers. The business uses a cash register sold by a company identified in the record only as Micros. The cashier rings up a sale by identifying the product purchased and finding the key on the register associated with the product. The cash registers produce a receipt with the customer's name at the top and a listing of items purchased, and any tax charged. Petitioner's Micros cash registers either do not capture the sales information or do not retain the information.

3. By a notice of proposed revocation of sales tax certificate of authority (notice of proposed revocation), dated October 1, 2019, the Division of Taxation (Division) notified petitioner of its intention to revoke its certificate of authority, pursuant to Tax Law § 1134 (a) (4) (A), on the ground that petitioner "willfully failed to file all reports or returns required by the New York State Sales Tax Law." The notice of proposed revocation does not identify the returns in question, but the Division's answer clarified that the missing returns are the annual information returns required of alcoholic beverage wholesalers by Tax Law § 1136 (i). Under that provision, which was enacted in 2009, every alcoholic beverage wholesaler licensed by the

SLA that sells alcoholic beverages without collecting sales or use tax is required to file an annual transaction information return (information return) with the Division (***see*** L 2009, ch 57, pt V-1, subpt G, eff April 7, 2009) (information return law).

4. The first information returns required by Tax Law § 1136 (i) were due on or before September 20, 2009 and covered the period March 1, 2009 through August 31, 2009. The next information returns were due on or before March 20, 2010 and covered the period September 1, 2009 through February 28, 2010. All subsequent information returns were required to be filed on or before March 20th of each year and to cover the period spanning March 1st of the previous year through the last day of February of the then-current year.

5. The annual information returns are required to be filed electronically through the Division's web site. The web site contains instructions describing how to file the "Annual Beer, Wine, & Liquor Wholesalers Transaction Information Return" by downloading an Excel spreadsheet template from a provided link, entering the necessary data, and then uploading the completed file to the Division's online tax system. At the hearing, the Division presented a list of alcoholic beverage wholesalers who filed information returns for the reporting periods ending February 28, 2017, February 28, 2018, and February 28, 2019. For the reporting period ending February 28, 2017, approximately 680 alcoholic beverage wholesalers filed returns.

6. The Division uses the sales information reported on the information returns to determine the purchases of the sales tax vendors to whom the wholesaler sold the product in order to help it determine the accuracy of the taxable sales reported by the vendors.

7. On September 14, 2009, petitioner filed a request for a 90-day extension to file the annual transaction information return for the initial reporting period of March 1, 2009 through August 31, 2009. The Division granted the request and extended the due date for the initial

reporting period to December 21, 2009. On March 19, 2010, petitioner filed a request for a 90-day extension of time to file the annual transaction information return for the reporting period September 1, 2009 through February 28, 2010. The Division again granted the request, extending the due date for filing that information return to June 21, 2010. Petitioner, however, failed to file either of the information returns for which the Division had granted 90-day extensions and has also not filed any information returns since then.

8. Petitioner supported a lawsuit brought by the Empire State Beer Distributor Association, on behalf of its members, challenging the constitutionality of the information return law in federal court filed in December 2009. In March 2010, the United States District Court in the Southern District of New York rejected the constitutional claims and granted defendant New York State's motion to dismiss the complaint (***see Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson***, No. 09 CIV. 10339 DAB, SD NY [Mar. 1, 2010], 2010 WL 749828).

9. As a result of petitioner's failure to file information returns for the first five tax periods for which information returns were due, i.e., all tax periods through February 28, 2013, the Division issued to petitioner a notice of determination, asserting a non-filing penalty for each period pursuant to Tax Law §§ 1136 (i) and 1145 (i). After petitioner challenged that notice of determination by filing a petition with the Division of Tax Appeals (prior DTA matter), the Division of Tax Appeals issued a determination, dated September 29, 2016, reducing the amount of penalties asserted by the Division for each tax period to $500.00, but otherwise sustained the notice of determination. At the hearing in the prior DTA matter, held on September 1, 2015, Mr. Gagliardi testified that it was "physically impossible" for petitioner to comply with its information return filing responsibilities because of the sheer volume of the invoices that would

need to be processed to obtain the information. He explained that to compile the information for each vendor to whom petitioner made sales for resale, he would need to have his employees copy the information from the 250,000 to 300,000 receipts petitioner issued per year. When petitioner had to similarly process its sales information for a sales tax audit approximately a year before the hearing, it took six employees three months to compile the information for a one-month period and it cost him an estimated $15,000.00.

10. At the hearing in this matter, David Viall, Tax Auditor 3, testified for the Division. Mr. Viall manages the Division's Audit Identification and Selection unit, which uses the information returns and oversees their proper filing by contacting those taxpayers who are required to file information returns and have failed to do so. According to Mr. Viall, his staff had made many attempts to reach out to petitioner to get the company to file information returns. This testimony is consistent with the notes those employees left in the event management tab of the Division's e-mpire database system (contact log), which maintains notes made by the Division's employees of their contacts with taxpayers. The log shows that the employees called on six different days in 2016 to try to speak to Mr. Gagliardi about the company's failure to file the information returns.

11. After petitioner continued not to file the required information returns, the Division sent a letter dated December 3, 2018 to petitioner. The letter was signed by John Gonzalez, a project manager with the Division who oversaw Mr. Viall's unit starting in July 2018. The letter advised petitioner that, because of the company's failure to file information returns for the reporting periods ending February 28, 2015, February 29, 2016, February 28, 2017, and February 28, 2018, petitioner may be subject to non-filing penalties under Tax Law § 1145 (i) and/or the revocation of its certificate of authority.

12. The contact log reflects that Mr. Gonzalez spoke with one of petitioner's representatives, Mr. Isaac Sternheim, on December 5, 2018, to confirm that petitioner received his letter, in the course of which conversation Mr. Sternheim mentioned that petitioner would be implementing a new computer system in January 2019, and that it expected to be able to file the information return due on March 20, 2019 (for the period February 28, 2018 to February 28, 2019). After the March 1, 2019 due date for the information return passed without petitioner having filed a return, Mr. Gonzalez called petitioner's representatives several times. The contact log describes a conversation Mr. Gonzalez had with the representative on June 6, 2019 as follows:

> "Spoke with POA Isaac Sternheim. I reiterated all our numerous phone calls between Mr. Sternheim and me regarding our request for [petitioner] to file their information return for wholesale alcoholic beverages. I stated that I had numerous conversations with him (Mr. Sternheim) where he had stated to me that there would be a new computer system in place to make filing information return possible for the last return (3/20/19), as of today we have not received any information return. He was aware of the penalties that were issued for failure to file such returns and the possibility of the taxpayers [sic] Certificate of Authority to be revoked. I continued to state that if the return was not filed by Thursday June 13th, the process of revoking the Certificate of Authority will begin."

13. According to the contact log, on July 17, 2019, Mr. Gonzalez had a subsequent conversation with Jacob Herskovits, another representative of petitioner, in which Mr. Herskovits promised that the information petitioner needed to file the information return would be available starting with the reporting period ending February 29, 2020. Mr. Gonzalez pointed out in the conversation that the Division had been promised the return for the prior reporting period and advised that, due to the non-filing of that return, the Division would be issuing a revocation of petitioner's certificate of authority, which the Division eventually did (***see*** finding of fact 3).

14. At the hearing in this matter, Mr. Gagliardi explained that the information return law was not the first time that the Division had requested that petitioner compile information about sales for resale of certain products. In 1992, the Division had made a similar request based on its own administrative authority. Petitioner attempted to comply by having its paper invoices sent to a data processing company. The attempt was unsuccessful because too many of the invoices came back as illegible. The Division later dropped the request, so petitioner took no additional action.

15. Mr. Gagliardi further testified that, after the Empire State Beer Association lawsuit failed, petitioner filed the requests to extend the time to file the information returns mentioned above but was not able to file the returns:

> "We kept . . . trying to do it [file the returns], but five years later it went to a hearing on reporting [where] I showed . . . how hard it was to do. And from that point we were fined . . . five hundred dollars a reporting period. And from that point on we've been trying to -- to get this done."

16. As he did at the 2015 hearing, Mr. Gagliardi attributed petitioner's inability to compile the necessary information to the sheer volume of invoices that needed to be processed to obtain the information – petitioner did 300,000 transactions a year, for around $100,000,000.00 in sales. His Micros point-of-sale system did not record sales information by customer. He had a business need to know who the purchaser was at the time of the sale in order to determine whether the purchaser qualified to make a tax-exempt purchase for resale. To document the claimed sales for resale, petitioner maintained a database in which information about its customers was stored in order to substantiate which customers were entitled to purchase for resale. He had no business need to aggregate the monthly total of the alcoholic beverage sales for each customer to whom he made sales for resale, which was the information he needed for the information returns.

17. Apparently to illustrate the difficulty of obtaining the necessary sales information from his invoices, Mr. Gagliardi testified at length about two sales tax audits of petitioner conducted by the Division: one for the December 1, 2009 through August 31, 2012 period, and the second for the June 1, 2013 through November 30, 2015 period. According to Mr. Gagliardi, the auditor for the first audit asked petitioner to "report" for a single month, which meant to isolate its sales of alcoholic beverages for that month by eliminating sales of other items, such as soda and ice, and exempt sales. It took petitioner three months, using three employees and a computer program, to do the necessary processing, to derive the information. When he sent the information on to the auditor, the auditor responded with a proposed assessment of around $20,000,000.00 based on the discrepancy between the total of the sales so derived and petitioner's bank deposits for that month. After petitioner added back the sales the auditor allegedly had petitioner omit, no tax was found due on the audit. On the second audit, the Division's auditor tried to extract sales information from petitioner's Micros system. After that attempt failed, the Division used an audit team of four auditors to trace petitioner's claimed exempt sales for a single month to the claimed exempt purchasers. According to Mr. Gagliardi, the auditors made "mistakes" in the order of $150,000.00 in sales out of total sales for the month of $5,000,000.00 to $7,000,000.00. Petitioner then reviewed the receipts of the month and, according to Mr. Gagliardi, was able to match up all the sales to exempt customers, although the matter is still under protest.

18. In his testimony, Mr. Gagliardi emphasized his fear of filing an information return that might turn out to be inaccurate. His fear derived from a newspaper article he read about an investigation done by the SLA of another beer wholesaler, which he identified only as Jetro Cash & Carry (Jetro). He testified that Jetro "was set up similar to the way I am." Jetro had a

computer system similar to petitioner's and used an ID card similar to the magnetic stripe card that petitioner adopted in 2020. Unlike petitioner, however, Jetro used a computer, not a cash register, and recorded the sale on the computer. Although Mr. Gagliardi admitted that he was "not 100% sure of what happened," he gave the following explanation of the SLA's investigation. Jetro was filing the information returns, but Jetro's employees would sometimes record the sale to the wrong purchaser. The Division performed a sales tax audit of a store that, according to the data in Jetro's information return, was buying product from Jetro. When the store was able to show that it was not buying any product from Jetro, the Division informed the SLA about the discrepancy. The SLA then performed a sting operation on Jetro and found Jetro's cashiers willing to falsely attribute its investigators' purchases of beer to someone else. The SLA levied a $1,250,000.00 fine against Jetro, which caused it to close five of its locations and to surrender five SLA licenses to sell beer. Petitioner did not introduce a copy of the newspaper article that Mr. Gagliardi saw regarding the SLA's actions against Jetro, nor any other documentary proof of that investigation.

19. Another case that Mr. Gagliardi discussed at some length in his testimony was the litigation resulting in the Tax Appeals Tribunal decision in ***Matter of Yonkers Wholesale Beer Distribs., Inc.*** (Tax Appeals Tribunal, January 27, 2020). In that case, according to Mr. Gagliardi, when Yonkers Wholesale Distributors, Inc. (Yonkers) filed its information return, it was subject to a sales tax audit, and when it ceased to file the required information returns, it was subject to another sales tax audit, which resulted in a $9,000,000.00 liability, and the revocation of its certificate of authority. After explaining the facts in that case, he concluded that "[s]o what I am basically saying, I'm damned if I do, and I'm damned if I don't report electronically." Review of the Tax Appeals Tribunal's decision in that matter confirms that the Division

performed a sales tax audit of Yonkers after determining that the company's information returns appeared to understate its sales.

20. With regard to concrete steps that petitioner took to comply with the information return law, Mr. Gagliardi was asked by his representative, whether, after Mr. Sternheim's "conversations with Mr. Gonzalez," petitioner attempted to file the information return due in March 2019. In response, petitioner explained that he had paid a company by the name of TechSpeed to capture the information from his invoices for March and April 2018, by optically scanning them and then applying character recognition to transfer the information to an electronic file. The company came back with 13,255 instances of invoices that it could not process out of a total number of around 60,000 receipts for the two months because either the customer's name or the items purchased could not be read. The company's charge for its services was $12,522.00 for the March 2018 receipts and $39,209.00 for the April 2018 receipts. To get the information from those invoices, petitioner's employees would have to input the information manually, which petitioner did not do because of the cost.

It is not clear from the record when petitioner first contracted with TechSpeed to data process its receipts, as petitioner did not submit the contract, and Mr. Gagliardi's testimony is contradictory. Petitioner's representative's question to him as to his work with TechSpeed refers to the representative's conversations with Mr. Gonzalez. Mr. Gonzalez did not commence his position of overseeing the Audit Selection and Identification Unit until July 2018 and review of the events log indicates that Mr. Gonzalez's first conversation with Mr. Sternheim regarding petitioner's non-filing issue was on December 5, 2018, shortly after the issuance of his December 3, 2018 warning letter. That would place the commencement of petitioner's effort with TechSpeed sometime after December 5, 2018. On cross-examination, however, Mr.

Gagliardi testified that he first began his efforts to get the necessary information through TechSpeed's data processing services in March 2018. Based on that testimony, which Mr. Gagliardi confirmed upon questioning from the undersigned, it is concluded that petitioner began to work with TechSpeed in March 2018.

21. Mr. Gagliardi testified that it took three to four months to get back the results from TechSpeed's attempt to scan petitioner's invoices into an electronic file. After concluding that the scanning attempt had failed due to the large percentage of receipts that proved unscannable, petitioner began the process of installing a new computer system, starting sometime around December 2018 or January 2019, according to Mr. Gagliardi's testimony. The effort involved giving each customer an identification card with a magnetic strip that the customer would then run through a magnetic card reader on checking out. The magnetic card reader was able to pull information about the sale from the Micros register, such as the number of the register, and the time of the sale, but not an itemization of the products bought, match it with the relevant customer information from petitioner's electronic customer database, and then store all the information on a hard drive. Petitioner had some initial problems with the system but finally got it to work eight to ten weeks before the hearing. Some of the necessary programming was done by Micros, and some programming or system work was done in-house by, in Mr. Gagliardi's various descriptions, petitioner's "in house guys," "computer . . . guy" or "I.T. guy." According to Mr. Gagliardi, "we're doing a lot of it in-house, but . . . we go wherever we could find equipment cheap." During this same time period, he had to "correct all the errors that the tax department made when they did the audits."

22. With the use of the magnetic identification card, which allowed him to track the dollar amounts and frequency of purchases by customer, Mr. Gagliardi noticed that some

customers were coming into the store to make purchases multiple times a day. He believed that at least some of those customers were purchasing beer not just on behalf of their own business, but also for other vendors to whom they would then deliver the beer. This caused him to fear that any sales information petitioner gave on an information return would not be accurate, so he decided to require every purchaser to use a personal identification number (PIN), in addition to swiping the magnetic ID card. This required his "in-house guy" to work with Micros to make sure that the PIN reader also worked with the Micros register. That work is on-going, as Mr. Gagliardi explained:

> "we are having trouble finding even the machines that match up with the register and go to the software. It's a little trouble. It's not as easy, you know, because were mix-matching a whole bunch of systems."

Mr. Gagliardi did not mention whether there were computer systems on the market that petitioner could have bought to accomplish the electronic capture of the necessary sales information, or whether he researched the issue before deciding to do some of the work in-house.

23. The system is not fully functional yet, as Mr. Gagliardi testified that "there's problems with it, the system goes down."

24. Mr. Gagliardi testified that, while he had not "put a cost on it yet," he estimated the cost of his efforts to compile the information needed for the information returns using the magnetic cards at "[$2,000.00] a week at this point in time."

25. When asked by the Division's representative on cross-examination why petitioner had not been able to file an information return in the intervening time after seeking extensions to file the returns in 2009, Mr. Gagliardi alluded to petitioner's attempt to gather the necessary information by working with TechSpeed, that since then it has begun its use of magnetic ID cards, that it had trouble getting the magnetic card reader to connect properly with petitioner's

electronic customer database, and that he had also to deal with "all the errors that the tax department made when they did the audits."[1]

CONCLUSIONS OF LAW

A. Tax Law § 1136 (i) (1) (C) requires persons who qualify as wholesalers of alcoholic beverages under Alcoholic Beverage Control Law § 3 to file information returns with the Division. If a person covered by that requirement fails to file the returns, the Division may impose penalties of up to $2,000.00 for failure to file each return (***see*** Tax Law § 1145 [i] [1]). In addition, or alternatively, the Division can revoke the wholesaler's sales tax certificate of authority, pursuant to Tax Law § 1134 (a) (4) (A), which, as pertinent, provides:

> "Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article . . . the commissioner may revoke or suspend such certificate of authority and all duplicates thereof."

Under subparagraph (D) of Tax Law § 1134 (a) (4), notice of a proposed revocation of a certificate of authority must be given "within three years from the date of the act or omission" that is the basis of the proposed revocation. Accordingly, the three annual reporting periods for which petitioner failed to file an information return relevant to the Division's issuance of the notice of proposed revocation at issue herein are the annual periods ending February 28, 2017, February 28, 2018, and February 28, 2019 (reporting periods in question).

B. Petitioner does not dispute that, since the information return law became effective, (i) it has qualified as a wholesaler of alcoholic beverages, (ii) it has made sales of alcoholic

[1] The Division submitted 11 proposed findings of fact with its hearing brief. The proposed findings of fact are accepted and are substantially incorporated into the above findings of fact, except for proposed findings of fact 8 through 10, which are modified to more accurately reflect the record, and, as modified, are substantially incorporated into the above findings of fact. The Division's proposed finding of fact 10 asserts that petitioner began the processing of installing a computer system to capture the necessary sales information in March 2018. On the transcript page cited by the Division, however, Mr. Gagliardi appears to be referring to when petitioner commenced its effort to capture the necessary sales information through working with TechSpeed, and not the installation of the new computer system (***see*** finding of fact 20).

beverages without collecting sales tax, (iii) as a result, it was required to file information returns with the Division, pursuant to Tax Law § 1136 (i), for the reporting periods in question, and (iv) it has not done so. Petitioner also does not dispute that it was aware of the information return filing requirement.

C. Petitioner's first argument in opposition to the notice of proposed revocation is that the Tax Law does not authorize the revocation of a certificate of authority based on a taxpayer's failure to file a required information return. This argument is rejected. As discussed in conclusion of law A, the Tax Law clearly authorizes the Division to revoke the certificate of authority of any vendor upon the vendor's willful failure to file any return required by article 28 of the Tax Law (***see*** Tax Law § 1134 [a] [4] [A]). Just as plainly, section 1136 (i) (1) (C) of article 28 requires petitioner, as an alcoholic beverage wholesaler, to file information returns. Accordingly, it follows that the Division may penalize petitioner for its failure to file information returns for the reporting periods in question by revoking its certificate of authority, if its failure to file those returns is willful.

D. Petitioner next argues that the Division's various written sales tax publications failed to adequately apprise taxpayers that an alcoholic beverage wholesaler's failure to file information returns could result in its certificate of authority being revoked. While it is true that the technical services bureau memorandum discussing the new information return law does not mention the revocation penalty (***see*** TSB-M-09[10]S), that is of no moment here because the penalty's applicability is set forth clearly in the Tax Law, as shown above, and the Division's December 3, 2018 letter to petitioner stressed the possible application of that penalty if petitioner continued its failure to file the required information returns.

E. Petitioner's main argument here is that its failure to file the information returns was

not willful. Petitioner cites the facts that it has spent tens of thousands of dollars on trying to comply with the information return requirement and that it has implemented a check-out system with a PIN for each customer to prevent its customers from deceiving the Division about the extent of their purchases for resale.

F. The sales tax regulations require vendors, when they make sales for resale on which sales tax was not collected, to be able to associate each of those sales with a particular resale certificate (***see*** 20 NYCRR 533.2 [b] [4]). To be able to do that, the vendor must know the identity of the purchaser, and retain documentation of that identity. Thus, alcoholic beverage wholesalers, like all sales tax vendors, have always had a business need to be able to identify a purchaser making a tax-free purchase and to substantiate that identity. The information return law required alcoholic beverage wholesalers to do much more: it required them to aggregate all the sales for resale of certain types of tangible personal property, alcoholic beverages, for each purchaser to whom it made such sales. This meant that the wholesaler had to be able to exclude all other products it might have sold to that purchaser during that reporting period, along with bottle deposit fees, in order to isolate the dollar value of the alcoholic beverages sold. While the information return law thus obviously imposed considerable burdens on alcoholic beverage wholesalers, the fact remains that approximately 680 wholesalers managed to file the information returns in 2017. The question here is whether petitioner, in not filing the information returns for the reporting periods at issue, acted willfully.[2]

G. In interpreting the "willful" standard in the context of Tax Law § 685 (g)'s

[2] Petitioner argues that, as a cash and carry business, it faces unique difficulties in complying with the information return law, but it failed to provide testimony to explain the added difficulties. While an alcoholic beverage wholesaler that accepts credit cards will have a magnetic card reader that the business could use to identify those customers using a credit card, that magnetic card reader would not help it identify those customers who choose to pay with cash, so it is not clear that non-cash and carry alcoholic beverage wholesalers have a decisive advantage over petitioner in complying with the information return law.

withholding tax penalty, the Court of Appeals has focused on whether the evidence showed that, in failing to meet its withholding tax obligations under the Tax Law, a taxpayer acted "knowingly, deliberately and voluntarily," and that the failure was due to "something more than accidental" inaction (***see Matter of Levin v Gallman***, 42 NY2d 32, 34 [1977]).

H. With between 250,000 and 300,000 transactions a year even as of 2015, and in light of the difficulty and expense the company incurred in doing a manual analysis for a sales tax audit (***see*** finding of fact 9), it should have been obvious to petitioner that the company needed computer assistance to analyze its sales in order to collect the information needed for the information returns. There were two ways petitioner's sales data could be readied for computer analysis: either the sales could be recorded in digital format by the POS register used to ring up the sale (point of sale method), or the paper invoices could be digitalized at a later date through a scanning process (scanning method). The problem is that, instead of choosing between these options, and figuring out how to compile the necessary information, petitioner did nothing until March 2018 (***see*** finding of fact 20). At that point the return due date for the period ending February 28, 2017, had already passed, while the March 20, 2018 due date for the period ending February 28, 2018 had either passed or was within a few weeks of passing. In his response to the question of why petitioner had not been able to file an information return for more than 10 years after first learning of the information return requirement, Mr. Gagliardi mentioned the difficulty of dealing with the huge number of sales petitioner made every year, and the fact that he had to deal with two sales tax audits during those years (***see*** finding of fact 25). These reasons do not establish his lack of willfulness in failing to file the returns for the periods ending February 28, 2017 and February 28, 2018 -- the difficulty of the task certainly did not justify him in doing essentially nothing for those periods. To the contrary, it should have galvanized him into action.

If he believed that the scanning method might be a viable method of obtaining the necessary information, then he should have launched the attempt to use that method right away to confirm that it would work, especially since the method had failed when he tried it in 1992. As for his need to deal with the on-going sales tax audits, petitioner's evidence at hearing was completely lacking in detail about the amount of time those audits took Mr. Gagliardi, as opposed to the time of his representatives, and his staff. Moreover, launching the data processing trial with TechSpeed presumably only required petitioner to identify a suitable data processing company and box up the two months of records and ship them to the company. In short, petitioner's evidence is insufficient to show why petitioner could not have launched his two-month trial with TechSpeed prior to March 2018, when the filing deadline for the reporting period ending February 28, 2017 had passed, and the filing deadline for the reporting period ending February 28, 2018 was about to pass or had passed. This amounts to a knowing, voluntary, and non-accidental failure to comply with the duty to file information returns for those reporting periods, and thus constitutes a willful failure on petitioner's part to meet its filing obligations (***see Matter of Levin***).

I. The analysis for the reporting period ending February 28, 2019 leads to the same conclusion. By failing to take any action towards filing the return until March 2018 when the reporting period had already commenced, petitioner certainly lowered the likelihood that it was going to be able to file a complete information return. Furthermore, petitioner has not proven that it acted with urgency and in good faith in choosing the scanning method as the method to put the sales records into an electronic format for computer processing. After all, that route had not worked when petitioner tried it in 1992, and petitioner did not establish at hearing that it did anything to assure itself that the results would be different this time. It is also questionable

whether it was reasonable to test the method by sending off two months of sales records for scanning and then waiting three to four months to get results back, only to find out that the TechSpeed could not process over 20 percent of the invoices. During the time spent testing the scanning method, petitioner was not installing a new computer system to capture the necessary sales data at the point of sale, which meant that, if the scanning method failed, petitioner would have no practical way to report for all the months when results of the two-month scanning trial were still pending. The more reasonable course would have been to ask TechSpeed for some preliminary results in order to confirm that the scanning method would work. Moreover, crediting Mr. Gagliardi's testimony that it took three to four months to get results back from TechSpeed means that petitioner received the results back at the latest in August 2018, yet Mr. Gagliardi testified that petitioner did not attempt to install a computer system until the December 2018-January 2019 timeframe. Petitioner has not explained that four-month delay. By that point, the reporting period ending February 28, 2019 was two-thirds over with no sales information gathered for that portion of the period, and no computer system in place to capture the sales at the point of sale for the remaining third of the year.

Finally, in installing the new computer system, petitioner chose to do much of the work in-house, even though that process involved "mix-matching" different systems (i.e., the Micros register, the magnetic card reader, and petitioner's electronic customer database). This might have been a reasonable course of action, assuming no "off the shelf" option was available and affordable for a company with $100,000,000.00 in sales, and that petitioner's information technology staff had adequate capabilities. Petitioner, however, chose to submit no evidence on any of those questions and thus failed to show that it felt any great degree of urgency with regard to the information returns even as late as December 2019, a mere four months before the

information return was due.

Thus, for the reporting period ending February 28, 2019, petitioner's failure to file an information return was not accidental, but rather appears to have resulted from petitioner's knowing and voluntary decisions not to take the necessary steps to ensure it would be in a position to file a timely information return for that period (***see Matter of Levin***; ***see also Matter of Paramount Pictures Corp.***, Tax Appeals Tribunal, March 14, 1991 ["If a taxpayer decides to allocate its resources in a manner which places a low priority on tax compliance, then it should also assume the additional costs brought on by this decision. Thus, if timely reporting was a 'physical impossibility,' it appears this resulted from petitioners' decision to have it remain so"]).

J. It is true that petitioner went to some effort and incurred some expense in its belated attempt to use the scanning method to obtain the necessary information to file an information return and in trying to implement a PIN system to ensure that its information returns would be accurate. But those efforts do not excuse its overall knowing lack of urgency in complying with the information return filing requirement. Accordingly, the notice of proposed revocation of petitioner's certificate of authority is sustained.

K. The petition of Flair Beverages Corp. is denied, and the notice of proposed revocation, dated October 1, 2019, is sustained.

DATED: Albany, New York
March 11, 2021

----/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE