

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BAR 13, INC.	:	DETERMINATION
	:	DTA NO. 830817
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, Bar 13, 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 videoconferencing hearing via CISCO Webex was held on April 20, 2022, with all briefs to be submitted by June 17, 2022. Petitioner, Bar 13, Inc., appeared by Robert A. Amaya, its employee. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel). After reviewing the entire record in this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Bar 13, Inc., conducted a business in the State of New York that was required to collect and remit sales tax to the Division of Taxation (Division). Prior to September 28, 2021, petitioner possessed a valid New York State sales tax certificate of authority.
2. On October 11, 2019, the Division issued a notice of proposed revocation of sales tax

certificate of authority to petitioner because the Division asserted that petitioner owed New York State over \$1 million of delinquent sales tax, interest and penalties. Petitioner filed a petition with the Division of Tax Appeals challenging the October 11, 2019 notice of proposed revocation. That matter was assigned DTA number 829933.

3. On July 28, 2021, petitioner executed a notice of withdrawal of petition and discontinuance of proceeding for DTA number 829933, withdrawing its petition, with prejudice, that challenged the October 11, 2019 notice of proposed revocation of petitioner's certificate of authority to collect sales tax. On an addendum to the July 28, 2021 withdrawal of petition and discontinuance of proceeding, the Division agreed to toll the revocation of petitioner's sales tax certificate of authority until September 27, 2021, so that petitioner could attempt to negotiate a mutually agreeable payment plan for its liabilities with the Division.

4. Petitioner and the Division did not reach a mutually agreeable payment plan by September 27, 2021, for the liabilities addressed in the July 28, 2021 notice of withdrawal of petition.

5. On September 28, 2021, the Division revoked petitioner's sales tax certificate of authority.

6. On September 30, 2021, petitioner filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Petitioner entered into evidence a copy of form 201, its voluntary petition for non-individuals filing for bankruptcy (bankruptcy petition). The bankruptcy petition is signed by Tom Sullivan, petitioner's president and sole shareholder, and dated September 30, 2021. No other documents from the bankruptcy proceeding were offered at the hearing.

7. On October 9, 2021, petitioner filed an application to register for a sales tax certificate of authority (form DTF-17) with the Division.

8. Upon the review of the petitioner's October 9, 2021 application to register for a sales tax certificate of authority, it is noted that on the application the name of the entity is listed as "13.bar." The federal employer ID number listed, however, is petitioner's federal employer ID number.¹ In addition, on the application, petitioner checked the box that it was "[s]tarting a new business." On the application, petitioner indicated that it began its business in New York State for sales tax purposes on October 9, 2021. On the application, petitioner checked the box indicating a "no" answer to the question "[h]as any tax assessment been issued to the entity that has not been paid in full?," petitioner also checked the box indicating a "no" answer to the question "[h]as the entity previously held a sales tax *Certificate of Authority* (emphasis in original)" and it did not provide a response to the question of whether the "certificate [had been] revoked or suspended in the last year?" The form listed Thomas Sullivan as the applicant's president.

9. On October 22, 2021, the Division issued a notice of proposed refusal to issue certificate of authority to petitioner.

10. On January 7, 2022, the Division issued a notice of final refusal to issue a certificate of authority to petitioner denying petitioner's October 9, 2021 application to register for a sales tax certificate of authority.

11. In response to the notice, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). BCMS issued a conciliation order dated January 21, 2022, sustaining the Division's notice refusing to issue petitioner a certificate

¹ The petition in this matter challenges the Division's notice denying its October 9, 2021 application to register for a sales tax certificate of authority. The petition in this matter was filed in petitioner's name ("Bar 13, Inc.") and petitioner has never challenged that it was petitioner itself that filed the subject October 9, 2021 application.

of authority.

12. On January 31, 2022, petitioner filed a petition with the Division of Tax Appeals challenging the January 21, 2022 BCMS conciliation order upholding the Division's refusal to issue petitioner a certificate of authority.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner asserts that it has attempted to work with the Division to find a mutually agreeable payment plan with regard to its agreed upon liabilities addressed in the July 28, 2021 notice of withdrawal of petition; however, petitioner alleges that the Division has not been responsive in addressing petitioner's proposals in this regard. Petitioner infers that its attempts at reaching a mutually agreeable payment plan should prevent the Division from refusing to issue a new certificate of authority to it.

14. The Division argues that the January 7, 2022 notice of final refusal to issue a sales tax certificate of authority to petitioner should be sustained because: (1) petitioner had unpaid New York State tax debts due, and (2) petitioner had a certificate of authority for sales tax revoked within one year of its October 9, 2021 application for another sales tax certificate of authority.

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 ... has been finally determined to be due from such person and has not been paid in full, ... [or] (vi) a certificate of authority issued to such person has been revoked or suspended [because, among other transgressions, the applicant willfully fails to prepay, collect, truthfully account for or pay over any sales tax] within one year from the date on which such certificate of registration is filed, ... the commissioner may refuse to issue a certificate of authority.”

B. Taking the two options at issue in order, the first question to be answered is whether sales taxes which have been finally determined to be due from petitioner remain unpaid.

In this regard, the Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 573 NYS2d 140 [1991]).

In this case, it is clear that petitioner executed the June 28, 2021 withdrawal of petition. Therefore, the related petition challenging the liabilities underlying the October 11, 2019 notice of revocation was no longer subject to the jurisdiction of the Division of Tax Appeals. The June 28, 2021 withdrawal of petition provided that the parties had until September 27, 2021 to work out a mutually agreeable payment plan and it is undisputed that no such payment plan was reached within the time period specified. Petitioner's liabilities pertaining to the October 11, 2019 notice of revocation are fixed and final and not subject to the jurisdiction of the Division of Tax Appeals for review.

Petitioner argues that the Division of Tax Appeals should dismiss the Division's January 7, 2022 refusal to issue a certificate of authority because petitioner attempted, and continues to seek, to reach a mutually agreeable payment plan for the liabilities related to the October 11, 2019 notice of revocation. However, the Division of Tax Appeals has no authority to mandate settlement agreements between parties (*see Matter of Snyder*, Tax Appeals Tribunal, May 5, 2011), and petitioner fails to cite to any authority in the Tax Law that requires the Division to issue petitioner a sales tax certificate of authority while petitioner attempts to arrange a payment plan to address its fixed and final tax liabilities. Accordingly, the requirement of Tax Law § 1134 (a) (4) (B) (i) has been met justifying the Division's refusal to issue petitioner a certificate

of authority for sales tax.

C. The second prong of Tax Law § 1134 (a) (4) (B) allows the Division to refuse to issue a sales tax certificate of authority if the applicant had a certificate of authority revoked or suspended within one year from the date of the application for a new certificate is made. In this case petitioner's initial certificate was revoked on September 28, 2021, and it thereafter filed an application for a new certificate on October 9, 2021, or eleven days later. Accordingly, the requirement of Tax Law § 1134 (a) (4) (B) (vi) has been met justifying the Division's refusal to issue petitioner a certificate of authority.

D. Petitioner filed for Chapter 11 bankruptcy on September 30, 2021; however, neither petitioner nor the Division address the effects of petitioner's bankruptcy status on this matter.

Petitioner's filing under Chapter 11 bankruptcy gives rise to an automatic stay preventing certain actions by parties including government agencies (*see* 11 USC § 362).²

The U.S. Bankruptcy Court has held that a bankrupt party has a right to pursue the reinstatement of a state sales tax license and that such a right is an asset of the Chapter 11 bankruptcy estate (*see In re Nu-Process Brake Engineers, Inc.*, 119 BR 700 [Bankr. ED MO 1990], citing § 541, Title 11, USC [addressing Missouri sales tax statute]). The court in *Nu-Process* held that the sole requirement that pre-petition taxes must be paid in full before a state can reinstate a sales tax license was violative of 11 USC § 362 (*id.*).³ However, in *Nu-Process* the court ultimately ruled that Missouri's failure to reinstate the bankrupt party's sales tax license

² It is noted that the United States Bankruptcy Code stay provisions of 11 USC § 362 do not apply to the Division's audits or assessments of tax liabilities against taxpayers (*see Matter of Heidi Otto*, Tax Appeals Tribunal, September 22, 2005).

³ It is noted that a state's ability to continue to pursue tax audits and assess related liabilities (as noted in the previous footnote herein) under the Bankruptcy Code automatic stay provisions were in effect at the time the Bankruptcy Court decided *Nu-Process* (*see* former 11 USC § 362).

was appropriate where denial of the reinstated license was premised upon more than just the requirement that the back taxes be paid in full (*id.*). In other words, the denial of reinstating a sales tax license cannot be based solely on the applicant's repayment of its back tax liabilities.

In the case at hand, the refusal of the Division to reinstate petitioner's sales tax certificate of authority was based upon two separate reasons. First, the existence of petitioner's preexisting tax liability, and second, the fact that petitioner had a certificate of authority revoked within a year of its application. Although the revocation of petitioner's sales tax certificate of authority was premised upon its failure to properly account for sales taxes, even if petitioner had paid off all of its existing sales tax liabilities, the Division could independently deny petitioner's application to reinstate its certificate of authority because of the timing of the revocation of its previous certificate of authority. Accordingly, the Division's denial of petitioner's application for a sales tax certificate of authority was appropriate.⁴

E. Sales tax remittances are governed by the trust fund provisions of the Bankruptcy Code (*see Matter of Lloyd W. Milne*, Tax Appeals Tribunal, February 17, 2005), and under that law, trust funds are not property of the bankruptcy estate (*see City of Farrell v Sharon Steel Co.*, 41 F3d 92 [3d Cir 994]). That is, a business collects the public's sales tax payments, and they are to be held in trust for the state and its expenditures for the public. The Bankruptcy Code also provides for an exception to the automatic stay where a state takes actions within its police powers to protect the public from, among other things, fraud (*see In re Express Grain Terminals, LLC*, Slip Op. 2022 [2002 WL 1051097] [Bankr. ND MI 2022], citing to 11 USC §

⁴ Petitioner failed to offer an order from the Bankruptcy Court instructing the Division that it was required to issue petitioner a new sales tax certificate of authority.

