

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARTIN D. FLUDER, JR. : DETERMINATION
 : DTA NO. 831342
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, Martin D. Fluder, Jr., filed a petition for a 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 formal hearing by videoconference was held before Nicholas A. Behuniak, Administrative Law Judge, on October 6, 2023, with briefs to be submitted by January 5, 2024, which date began the period for the issuance of this determination pursuant to Tax Law § 2008 (2). Petitioner appeared by IRS Help, Inc. (Keith C. Carlson, EA). The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

ISSUE

Whether petitioner has established that the proposed revocation of his sales tax certificate of authority was improper and should be cancelled.

FINDINGS OF FACT

1. Petitioner, Martin D. Fluder, Jr., who does business as Buckwheats Florists and Greenhouses, possesses an active sales tax certificate of authority.

2. The Division of Taxation's (Division's) records indicated that petitioner had several outstanding sales tax liabilities issued against him relating to his operation of Buckwheats Florists and Greenhouses.

3. By a notice of proposed revocation of sales tax certificate of authority (notice of proposed revocation), dated April 7, 2023, the Division notified petitioner of its intention to revoke his sales tax certificate of authority, pursuant to Tax Law § 1134 (a) (4) (A), based upon outstanding unpaid tax liabilities owed to the Division by petitioner.

4. Accompanying the notice of proposed revocation was a consolidated statement of tax liabilities (consolidated statement), dated April 7, 2023, pertaining to petitioner and listing the following liabilities as unpaid sales tax assessments subject to collection actions in the following then-due amounts:

Assessment ID Number:	For Tax Period Ending:	Balance of Tax, Interest and Penalty Due:
L-057607698	11/30/22	\$1,126.60
L-052960566	11/30/20	\$130.88
L-052247706	2/29/20	\$3,681.68
L-048030144	2/28/18	\$5,566.16
L-047759744	11/30/17	\$4,956.95
L-046165372	2/28/17	\$5,607.83
L-045892010	11/30/16	\$5,459.89
L-045140011	2/29/16	\$5,999.76
L-044755997	11/30/15	\$6,160.52
L-043749423	8/31/15	\$17,854.84
L-042663442	2/28/15	\$7,767.64
L-042336906	11/30/14	\$6,305.21
L-041968603	8/31/14	\$22,063.13
L-040905265	2/28/14	\$2,115.54
L-040606880	11/30/13	\$6,531.13
L-040162842	8/31/13	\$22,662.97
L-039018946	11/30/12	\$9,969.31
L-037444869	2/29/12	\$16,221.65
L-037289163	11/30/11	\$14,662.39
L-035814204	2/28/11	\$6,903.61
L-035427984	11/30/10	\$4,135.23
L-039602595	2/28/13	\$40,558.36

5. Petitioner requested a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting the notice of proposed revocation. By conciliation order, CMS No. 000352428, dated June 23, 2023, BCMS sustained the notice of proposed revocation.

6. Petitioner challenged the conciliation order by filing a petition with the Division of Tax Appeals, on July 21, 2023. The petition alleges, in substance, that petitioner has operated the business his entire life, he believes the tax liabilities at issue can be solved with an offer in compromise, and if his certificate of authority is revoked, he will not be able to pay the Division the subject liabilities.

7. At the hearing, petitioner reiterated the representations made in the petition and agreed he was liable for the amounts listed on the consolidated statement.

CONCLUSIONS OF LAW

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

“Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, gives or causes to be given a report, return, certificate or affidavit required under this article which is false ... (iv) willfully fails to prepay, collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter ... the commissioner may revoke or suspend such certificate of authority and all duplicates thereof” (*see* 20 NYCRR 539.4).

B. There is no dispute that petitioner underreported his sales tax and failed to file the return at issue. However, the Division fails to address the “willfulness” requirement of Tax Law § 1134 (a) (4) (A). In this regard, petitioner’s uncontested liabilities span a period of approximately 12 years and amount to approximately \$216,000.00. Such an extended period of failing to pay his sales tax liabilities coupled with the significant dollar amount at issue supports the conclusion that petitioner’s actions were sufficiently “willful” (*see Matter of Flair Beverages Corp.*, Tax Appeals Tribunal, Dec. 2, 2021 [the Tax Appeals Tribunal, citing other

cases, noted that “only something more than accidental nonpayment is required” for conduct to be willful, and a taxpayer may act willfully if he “knowingly, deliberately and voluntarily disregarded his obligations under the statute”]).

Petitioner requests that the proposed revocation of his certificate of authority be cancelled because he has operated the business for several years, he wants to enter into an Offer in Compromise to have the amounts reduced, and revocation of his certificate of authority would make repayment impossible. However, the Division of Tax Appeals has no authority to mandate a settlement agreement between petitioner and the Division (*see Matter of Snyder*, Tax Appeals Tribunal, May 5, 2011).¹ Furthermore, it is a well-settled principle that economic hardship does not relieve petitioner of his duty to pay over taxes collected on behalf of the State (*id.*).

Accordingly, petitioner has failed to establish that the proposed revocation of his sales tax certificate of authority was improper and should be cancelled.

C. The petition of Martin D. Fluder, Jr. is denied, and the notice of proposed revocation of sales tax certificate of authority, dated April 7, 2023, is sustained.

DATED: Albany, New York
January 25, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE

¹ Payment plan negotiations are administered by the Division’s Offer in Compromise Program Unit (*see* Publication 220 [Offer in Compromise Program]).