STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **FLAIR BEVERAGES CORP.** 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.	:	DECISION DTA NO. 829839

Petitioner, Flair Beverages Corp., filed an exception to the determination of the Administrative Law Judge issued on March 11, 2021. Petitioner appeared by Stroock & Stroock & Lavan, LLP (Jerry H. Goldfeder, Esq., and Robert A. Mantel, Esq., of counsel) and Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard by teleconference on October 7, 2021.

The decision in this matter is issued in accordance with the time limitations for expedited hearings set forth in Tax Law § 2008 (2).

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

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

We find the facts as determined by the Administrative Law Judge except that we have modified findings of fact 2, 5, 9, 10, 13, 14, 17, 18, 19 and 22 to reflect the record more fully and accurately. We have also deleted the last sentence of the Administrative Law Judge's finding of fact 3 as that sentence is a legal conclusion and not a factual finding. As so modified, the Administrative Law Judge's findings of fact appear below.

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, according to Mr. Gagliardi, serves an average of between 1,000 to 1,400 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 clarifies that the missing returns are the annual information returns required of alcoholic beverage wholesalers by Tax Law § 1136 (i) (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 relevant web page 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. Under the heading "Penalties," the same web page lists monetary penalties for failure to comply with the information return law. At the hearing, the Division presented a list of alcoholic beverage wholesalers who filed information returns for the reporting periods ended February 28, 2017, February 28, 2018, and February 28, 2019. For the reporting period ended February 28, 2017, approximately 680 alcoholic beverage wholesalers filed returns. There is no other evidence in the record regarding the comparability of the business operations of any of the 680 listed wholesalers and petitioner.

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 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, in 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 (***Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson***, 2010 WL 749828 [SD NY, March 1, 2010, No. 09 Civ 10339]).

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 in the prior Division of Tax Appeals matter, it took six employees three months to compile the information for a one-month period and it cost him an estimated $15,000.00. The Division did not propose to revoke petitioner's certificate of authority in the prior DTA matter.

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 Mr. Viall's staff called petitioner on six different days in 2016. On five of those calls a staff member attempted unsuccessfully to speak with Mr. Gagliardi. On one call, a staff member spoke to another

individual. Two of the six contact log entries make specific reference to the information returns. Two others make a reference to an "urgent tax matter." Petitioner had a power of attorney (POA) on file with the Division in 2016 in connection with an ongoing sales tax audit. The contact log does not show any attempt by Mr. Viall's staff to contact petitioner's representatives in 2016.

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 ended 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, during 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 stated that the information petitioner needed to file the information return would be available starting with the reporting period ended 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). At the hearing, in response to the question of whether petitioner's failure to file was willful, Mr. Gonzalez testified that he "wouldn't know . . . exactly for sure now . . . I have no reason not to believe him . . . ." In response to a similar question, he testified that "if I'm speculating, I would say he was making an attempt, but . . . I could not be concrete one way or the other."

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 then-handwritten 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. At some point after 1992 and before 2018, petitioner provided identification cards to its wholesale customers. Such cards were used by petitioner to imprint certain customer information on receipts in lieu of the prior practice of hand-writing such

information. The record indicates, however, that as of the second audit period (***see*** finding of fact 17), the imprinted information did not include the customer's name. An entry in an auditor's contact log from the second audit, dated September 13, 2016, states: "The customer name is not on the card." Also, a letter from the Division to petitioner's representative dated November 3, 2016 states: "No names were included in the imprinted card information."

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 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 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. 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. Mr. Gagliardi testified that 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. The second audit was conducted from January 2016 through March 2019. The Division's contact log for the second audit shows frequent contact between the Division and petitioner's representatives throughout this time. Mr. Gagliardi testified that the sales tax audits took up so much time that they negatively impacted his ability to resolve the information returns issue.

18. In his testimony, Mr. Gagliardi emphasized his fear of filing an information return that might turn out to be inaccurate. His fear derived, in part, from a newspaper article he read about an investigation done by the State Liquor Authority 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." According to Mr. Gagliardi, Jetro's information returns identified a purchaser who, as later revealed by a Division audit, did not actually make any purchases from Jetro. Also according to Mr. Gagliardi, a subsequent State Liquor Authority investigation of Jetro revealed that Jetro employees intentionally misidentified purchasers for reporting purposes and the Authority levied a fine against Jetro.

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 significant 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."

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 Administrative Law Judge, 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 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 cards, 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."

23. As of the September 24, 2020 hearing before the Administrative Law Judge, the system was not yet fully functional, 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."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that the Division may revoke a sales tax certificate of authority for, among other reasons, willful failure to file a report or return required under article 28 of the Tax Law (sales and compensating use taxes). The Administrative Law Judge further observed that petitioner was required to file the subject information returns, that it was aware of this obligation, and that it did not do so.

The Administrative Law Judge rejected petitioner's contention that the Tax Law does not authorize the revocation of a certificate of authority for failure to file a required information return as contrary to the relevant statutory language.

The Administrative Law Judge noted petitioner's contention that the Division's sales tax published guidance did not specifically apprise alcoholic beverage wholesalers that a failure to file information returns could result in certificate of authority revocation. The Administrative

Law Judge found, however, that the lack of any reference to revocation in those publications was insignificant, given the clear language authorizing revocation in the Tax Law and the Division's December 3, 2018 letter to petitioner that stressed the possibility of revocation.

The Administrative Law Judge then examined whether petitioner's failure to file annual information returns during the relevant reporting periods, i.e., the annual periods ended February 28, 2017, February 28, 2018, and February 28, 2019, was willful. The Administrative Law Judge determined that "willful" for purposes of the revocation statute means "knowing, deliberate and voluntary" and "something more than accidental."

The Administrative Law Judge found that petitioner should have known that it would require computer assistance to file its information returns at least as of 2015. He also found that petitioner failed to take any action to make its sales data ready for computer analysis until the data processing trial with TechSpeed in March 2018, at which point the due date for the information return for the period ended February 28, 2017 had long since passed and the due date for the period ended February 28, 2018 was about to pass. The Administrative Law Judge observed that the record lacked evidence to show why petitioner could not have launched the data processing trial with TechSpeed earlier. He also noted that, although the information return law imposed considerable burdens on alcoholic beverage wholesalers, approximately 680 such wholesalers filed information returns in 2017. Additionally, the Administrative Law Judge found that petitioner failed to prove its contention that, as a cash and carry business, it faced unique difficulties in complying with the information return law. The Administrative Law Judge also found that petitioner's large volume of annual sales and the fact that petitioner had to deal with sales tax audits did not establish a lack of willfulness in its failure to file information returns for the periods ended February 28, 2017 and February 28, 2018. The Administrative Law Judge

thus concluded that petitioner's failure to file information returns for those periods was willful for purposes of the revocation statute.

The Administrative Law Judge reached the same conclusion for the reporting period ended February 28, 2019. He faulted petitioner for choosing a scanning method to put its records into an electronic format, noting the failure of that method when petitioner tried it in 1992. He also faulted petitioner for its inaction during the four-month period from the failure of the TechSpeed trial in August 2018 to the beginning of its efforts to install a new computer system in December 2018-January 2019. The Administrative Law Judge was also critical of petitioner's decision to do much of the computer system work in-house. The Administrative Law Judge concluded, therefore, that petitioner's failure to file the information return for the period ended February 28, 2019 was not accidental, but was the result of a lack of urgency on petitioner's part, as well as the result of a series of knowing and voluntary decisions not to take the necessary steps to ensure that it would be able to file a return for that period.

The Administrative Law Judge thus sustained the notice of proposed revocation of petitioner's certificate of authority.

ARGUMENTS ON EXCEPTION

Petitioner contends that the Administrative Law Judge omitted material facts and mischaracterized the record in concluding that petitioner willfully failed to file information returns. Petitioner asserts that the record, properly construed, shows that petitioner made reasonable efforts to comply with the information return requirement, but has not been able to do so. Under such circumstances, petitioner argues, its failure to comply was not willful and the proposed revocation of its certificate of authority is arbitrary and capricious.

Petitioner also contends that revoking its certificate of authority violates its due process

rights because it was not adequately notified that its failure to file information returns could result in revocation. Citing the Division's published guidance, petitioner asserts that the Division had a policy that only monetary penalties under Tax Law § 1145 (i) (2) would be imposed for failure to file information returns. Petitioner argues that the Division changed its policy to include revocation of a certificate of authority for such a failure without providing fair notice of that change. Petitioner disagrees with the Administrative Law Judge's conclusion that the Tax Law provides sufficient notice of potential revocation for failure to comply with the information return requirement. Rather, petitioner asserts that the relevant Tax Law provisions are unclear on this point. Noting again that the Division's published guidance refers to monetary penalties, petitioner contends that the first time it had any reason to believe that its failure to file information returns could result in the revocation of its certificate of authority was the Division's December 3, 2018 letter, a few months before the end of the last relevant reporting period.

Petitioner contends that article 28 of the Tax Law contains two pertinent definitions of willful and that the Administrative Law Judge applied the wrong one in determining that petitioner's failure to file information returns properly resulted in revocation of its certificate of authority. Petitioner compares the language of Tax Law § 1145 (i), requiring the imposition of monetary penalties for failure to file information returns where such failure is due to willful neglect and not reasonable cause, and Tax Law § 1134 (a) (4) (A) (i), which permits the revocation of a certificate of authority for the same failure where such failure is willful, defined in the determination as "more than accidental." Petitioner argues that, to the extent that these provisions contain two definitions of willful, they are void for vagueness and, accordingly, revocation would violate its due process rights. Petitioner also contends that there was no rational basis for the Administrative Law Judge to have chosen one interpretation over the other.

Finally, asserting that the Administrative Law Judge's interpretation of willfully as used in Tax Law § 1134 (a) (4) (A) (i) essentially sets a low bar for revocation, petitioner questions whether the Legislature intended to make it less difficult for the Division to revoke an alcoholic beverage wholesaler's certificate of authority and thereby put the wholesaler out of business than to impose monetary penalties against the same wholesaler for the same conduct.

The Division contends that the Administrative Law Judge applied the correct standard in determining that petitioner's failure to file the information returns was willful and that the revocation of petitioner's certificate of authority was consistent with Tribunal precedent. The Division asserts that the facts show that petitioner was aware of the information return requirement in 2009 and that its failure to meet the requirement was willful. The Division contends that petitioner's failure to take any meaningful steps to comply until March 2018 was neglectful. The Division observes that the outcome of the prior DTA matter, by which an assessment of monetary penalties for failure to file information returns was reduced but sustained, did not impel petitioner to take action to comply. Noting petitioner's annual sales revenue, the Division contends that petitioner has resources, but chose not to allocate them in a manner necessary to comply with the requirement. The Division thus argues that petitioner's failure is more than accidental and that its certificate of authority is properly revoked.

OPINION

Any person making retail sales or sales for resale in New York must hold a certificate of authority issued by the Division pursuant to Tax Law § 1134 (a). Petitioner is such a person.

Tax Law § 1134 (a) (4) (A) invests the Division with the discretion to revoke a certificate of authority on certain grounds as listed therein ("the commissioner *may* revoke" [emphasis added]). One of the grounds so listed is willful failure to file a report or return required by article

28 of the Tax Law (sales and compensating use taxes) (Tax Law § 1134 [a] [4] [A] [i]). A decision by the Division to revoke a certificate of authority is made "on the basis of the circumstances in each case" (20 NYCRR 539.4 [a]).

Once a notice of revocation of a certificate of authority has become final, the person holding the certificate is prohibited from engaging in any business in New York for which such a certificate is required (Tax Law § 1134 [a] [4] [E]). Revocation is thus a severe penalty.

The missing returns that are the basis of the notice of proposed revocation at issue are annual information returns required of alcoholic beverage wholesalers pursuant to Tax Law § 1136 (i) (1) (C). Enacted in 2009 as part of article 28 of the Tax Law, that provision requires every wholesaler (as defined in Alcoholic Beverage Control Law § 3) who makes sales of alcoholic beverages without collecting sales or use tax (with exceptions not relevant here) to file annual information returns with the Division (***see*** L 2009, c 57).[1] Those returns require wholesalers to provide identifying information for each vendor to whom the wholesaler makes non-taxable sales of alcoholic beverages and the amount of total monthly sales of non-taxable alcoholic beverages to each such vendor (Tax Law § 1136 [i] [1] [C]; ***see also*** TSB-M-09[10]S *New Requirement for the Filing of Information Returns for Alcoholic Beverage Wholesalers* [July 7, 2009]).

Petitioner is an alcoholic beverage wholesaler subject to the information return requirement.

Petitioner has not filed any information returns since Tax Law § 1136 (i) went into effect.

[1] The same provision imposes separate information return requirements on motor vehicle insurers and franchisors (Tax Law § 1136 [i] [1] [A] and [B]).

Petitioner has thus failed to file returns required by article 28 of the Tax Law.[2] Therefore, the Division was authorized to revoke petitioner's certificate of authority if its failure was willful in accordance with the language of Tax Law § 1134 (a) (4) (A) (i).

Notice of a proposed revocation of a certificate of authority must be given "within three years from the date of the act or omission" giving rise to the proposed revocation (Tax Law § 1134 [a] [4] [D]). As the Administrative Law Judge found, petitioner's non-filing of information returns for the annual periods ended February 28, 2017, February 28, 2018, and February 28, 2019 are the specific omissions that are the basis of the October 1, 2019 notice of proposed revocation at issue.[3] However, petitioner's entire course of conduct from the enactment of the information return requirement is relevant to the question of whether its failure to file those specific returns was willful.

The Tax Law also imposes a monetary penalty for failing to file an information return required by Tax Law § 1136 (i). Tax Law § 1145 (i) (2) provides that every person failing to file such an information return will be subject to a penalty of $500 to $2,000 for each such failure.[4] "If . . . any of the failures that are subject to penalty under [Tax Law § 1145 (i)] was entirely due to reasonable cause and not due to willful neglect, the [Division] must remit the penalty imposed under [Tax Law § 1145 (i)]" (Tax Law § 1145 [i] [4]). This penalty was enacted along with the information return requirement in 2009 (***see*** L 2009, ch 57).

Petitioner bears the burden of proof to show that the Division's notice of proposed revocation was improper (20 NYCRR 3000.15 [d] [5]).

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[2] Petitioner does not contest this point.

[3] Those returns were due on the March 20 following the end of the annual period (Tax Law § 1136 [i] [1] [C] [3]).

[4] Similarly, Tax Law § 1145 (i) (1) imposes penalties for failing to provide any of the information required on a return and for failing to provide true and correct information on the return.

Whether petitioner's failure to file information returns was willful

An alcoholic beverage wholesaler's failure to file information returns as required under Tax Law § 1136 (i) is willful for purposes of Tax Law § 1134 (a) (4) (A) (i) where such failure is "knowing, deliberate and voluntary" (***Matter of Yonkers Wholesale Beer Distrib., Inc.***, Tax Appeals Tribunal, January 27, 2020). The language in ***Matter of Yonkers Wholesale*** is consistent with that of ***Matter of Levin v Gallman*** (42 NY2d 32 [1977]), upon which the determination below relies. ***Levin v Gallman*** addressed whether a person required to collect and pay over withholding tax "willfully" failed to do so, thereby rendering that person personally liable for a penalty equal to the amount of the unpaid tax pursuant to Tax Law § 685 (g). The court found that "only something more than accidental nonpayment is required" for conduct to be willful within the meaning of the statute and concluded that the taxpayer had acted willfully because he "knowingly, deliberately and voluntarily disregarded his obligations under the statute" (42 NY2d at 34).

Contrary to petitioner's contention, the reasonable cause provision in Tax Law § 1145 (i) (4), quoted above, expressly applies to the abatement of penalties imposed under Tax Law § 1145 (i). Petitioner offers no basis to apply that language to revocation of a certificate of authority under Tax Law § 1134 (a) (4) (A). Accordingly, there is no support for petitioner's contention that, to the extent that these two statutes contain two definitions of willful they are void for vagueness as applied here.

As we have determined that Tax Law § 1145 (i) (4) does not apply to revocation of a certificate of authority, we do not address petitioner's contention that our interpretation of willful for purposes of Tax Law § 1134 (a) (4) (A) sets a lower bar for the Division to revoke a certificate of authority than to impose monetary penalties for the same failure.

As to whether petitioner willfully failed to file its information returns within the meaning of Tax Law § 1134 (a) (4) (A), we first observe that Mr. Gagliardi knew from the time the information return law was enacted in 2009 that compliance would impose a burden on alcoholic beverage wholesalers. As noted, petitioner supported the lawsuit brought by the Empire State Beer Distributor Association challenging the constitutionality of the new law (***see*** finding of fact 8). The suit's basis was the burden imposed on wholesalers by the new law.[5] Petitioner knew that the complaint was dismissed by an order dated March 1, 2010 (***id.***).

Petitioner also knew from the outset that its compliance with the new law would require some effort. Its existing Micros point of sale system could not capture the information required for the information returns and its high volume of annual sales (about 300,000 transactions and about $100,000,000 in sales per year) would make manual compliance difficult (***see*** finding of fact 16). The unfeasibility of manual compliance was confirmed by the unsuccessful efforts by petitioner's employees to manually capture the necessary information during the first sales tax audit in or about 2014 (***see*** findings of fact 9 and 17).

Despite petitioner's clear need for computer assistance, it took no discernable action toward obtaining such assistance until about March 2018 when it began to work with TechSpeed (***see*** finding of fact 20). At that point, petitioner had failed (or was about to fail) to file

[5] As the court's decision summarized, the complaint made the following allegations:
"[M]any wholesalers in New York do not keep paper or electronic lists of purchasers, but would be required by the [Information] Return Law to compile that information from many different paper sources, at such great a cost that it would put many of them out of business. (Compl., ¶ 20.) Many New York wholesalers also lack cash registers that are synchronized with computers or computer software that would collect the necessary information from individual sales and store it in a retrievable format. (Compl., ¶ 22.) Further, many wholesalers lack employees with sufficient education and technical experience to install and operate the necessary technology to comply with the Amendments to the [Information] Return Law (Compl., ¶¶ 23-24.)" (***Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson***, 2010 WL 749828 [SD NY, March 1, 2010, No. 09 Civ 10339]).

information returns for the first ten reporting periods for which such returns were due, including the annual periods ended February 28, 2017 and February 28, 2018.

Petitioner's TechSpeed experiment was deemed a failure in or about August 2018, or about five months after it began. Petitioner did not begin the process of installing a new computer system until December 2018 or January 2019, or a few months before the due date for the February 28, 2019 information return. Petitioner's installation process, consisting of "mix-matching" different systems, "find[ing] equipment cheap" and "doing a lot of it in-house" (***see*** finding of fact 21 and 22) did not yield a working system until about July 2020 and was not yet fully functional in September 2020 (***see*** finding of fact 23). We agree with the Administrative Law Judge that petitioner's process of belatedly installing a new computer system does not demonstrate any sense of urgency to comply with the return requirement. Indeed, the process practically assured that petitioner would be unable to comply with the return requirement for the period ended February 28, 2019.

Petitioner's knowing failure to file information returns as required under Tax Law § 1136 (i) for the periods at issue ultimately results from a lack of a system of recordkeeping that would enable it to comply. Taxpayers have a duty to maintain an adequate tax compliance system (***see Matter of Phillip Morris Inc.***, Tax Appeals Tribunal, April 29, 1993 [lack of such a system "is not an acceptable explanation for a taxpayer's failure to meet its tax obligations"]). Considering that Tax Law § 1136 (i) imposed new information-gathering requirements on alcoholic beverage wholesalers, petitioner's lack of such a system is perhaps understandable as of the enactment of the new law. However, as discussed, petitioner took no significant steps to solve this problem for the first nine years after the law went into effect. This was a conscious decision to disregard its duty to file the information returns and was therefore willful (***see Matter of Paramount***

Pictures Corp., Tax Appeals Tribunal, March 14, 1991 [conscious decision not to comply with Tax Law requirement insufficient to abate penalties]). Petitioner's belated efforts to comply commencing in March 2018 do not make its failure for the annual period ended February 28, 2019 any less willful. Rather, such efforts underscore petitioner's long and willfully neglectful failure to address the problem. Moreover, petitioner's partial success in digitizing its records in 2020 (***see*** findings of fact 21 and 23) belies any claim that compliance was practically impossible and suggests that petitioner could have complied with the information return requirement as of the annual reporting periods at issue if it had addressed the problem in a timely manner.

In response to the Administrative Law Judge's finding that petitioner "did nothing until March 2018" to comply with the information return law, petitioner contends that at some point before March 2018, it gave its customers ID cards to imprint customer information on receipts rather than relying on cashiers to hand-write such information, as had been the prior practice (***see*** finding of fact 14). The record indicates, however, that as of the second audit period, the ID cards did not imprint the customer's name on receipts (***id.***). Hence, the utility of such cards in complying with a law that requires wholesalers to identify their customers is unclear. Additionally, while petitioner was aware of legibility problems with its hand-written invoices in or about 1992 (***id.***), the record does not show when petitioner gave its customers these ID cards. Accordingly, we cannot construe this first use of customer ID cards as part of an effort to comply with the information return law.

Petitioner also contends that the way it conducted its business operations created unique problems in complying with the information return mandate. Specifically, petitioner asserts that its status as a cash and carry business added to its compliance difficulties. We agree with the Administrative Law Judge that petitioner has not proven this claim. As the Administrative Law

Judge noted, businesses that accept credit cards generally also accept cash. Hence, it is not clear that such businesses have a recordkeeping advantage over cash businesses. Petitioner also contends that its sale of non-alcoholic beverages and ice made compliance difficult. Petitioner offered no evidence, however, to show that its sale of such items was an uncommon practice among alcoholic beverage wholesalers and, accordingly, that any recordkeeping problems created by such a practice were also unique.

We are also unconvinced by petitioner's contention that the sales tax audits took up so much time that they negatively impacted its ability to resolve the information return issue. While sales tax audits certainly occupied some part of petitioner's time during the relevant period, petitioner has not shown that those audits impeded its ability to address the information return issue.

Petitioner characterized Mr. Gonzalez's testimony regarding petitioner's efforts to comply with the information return law as "completely undermin[ing]" a finding that petitioner's failure to file the returns was willful. We disagree. In our reading of the transcript, Mr. Gonzalez equivocated in response to questions regarding petitioner's willfulness (***see*** finding of fact 13).

Finally, we do not give any evidentiary weight to the filing of information returns by other alcoholic beverage wholesalers during the relevant period (***see*** finding of fact 5). Without additional information, we cannot relate this fact to petitioner's circumstances.

Accordingly, pursuant to the foregoing discussion, we find that petitioner's failure to file information returns as required pursuant to Tax Law § 1136 (i) (1) (C) for the reporting periods ended February 28, 2017, February 28, 2018, and February 28, 2019 was "knowing, deliberate

and voluntary" and therefore willful for purposes of Tax Law § 1134 (a) (4) (A) (***Matter of Yonkers Wholesale Beer Distrib., Inc.***).

Petitioner's due process challenge

As noted, petitioner also contends that the Division's revocation of its certificate of authority violates its due process rights because it was not adequately notified that its failure to file information returns could result in revocation. Petitioner's claim rests on its contention that the Division had a policy, evinced by published guidance, to impose only monetary penalties under Tax Law § 1145 (i) (2) for failure to file returns required by Tax Law § 1136 (i) (1) (C) and that the Division changed that policy without notice. Petitioner thus makes an as-applied constitutional challenge, which we may consider (***Matter of Frog Design, Inc.***, Tax Appeals Tribunal, April 15, 2015). Relatedly, petitioner asserts that the relevant statutory language is unclear on the question of revocation of a certificate of authority for willful failure to file information returns and, in any event, conflicts with the Division's published guidance.

Pursuant to the following discussion, we reject petitioner's due process claim.

To begin, we disagree with petitioner's contention that the statutory language is unclear on the question of revocation of a certificate of authority for willful failure to file information returns. As discussed previously in this decision, Tax Law § 1134 (a) (4) (A) (i) plainly allows the Division to seek revocation for willful failure to file information returns. As to the question of fair notice, we observe that this provision was in effect at the time the information return statute was enacted in 2009 and remained in effect at all times relevant (***see*** L 1985, ch 65). "[P]etitioner is charged with knowledge of the relevant provisions of the Tax Law" (***Matter of Casa Di Pizza, Inc.***, Tax Appeals Tribunal, November 12, 2015, quoting ***Nathel v Commissioner of Taxation & Fin. of State of N.Y.***, 232 AD2d 836 [3d Dept 1996]). We note

also that the Division published guidance during the relevant period expressly providing for revocation of a certificate of authority as a potential sanction for willful failure to file a report or return required under the sales tax law (***see*** Publication 900 *Important Information for Business Owners*, p. 2 [5/11]).

As evidence of an asserted Division policy to impose only monetary penalties under Tax Law § 1145 (i) for failure to file information returns, petitioner cites a technical memorandum and the Division's website (TSB-M-09[10]S *New Requirement for the Filing of Information Returns for Alcoholic Beverage Wholesalers* [July 7, 2009] and *Alcoholic Beverage Wholesalers Annual Reporting Requirement* available at https://www.tax .ny.gov/enforcement/audit/alcbev.htm). Petitioner correctly notes that, under the heading "Penalties," the cited guidance refers to the monetary penalties imposed under Tax Law § 1145 (i) for the failure of an alcoholic beverage wholesaler to meet its reporting obligations under Tax Law § 1136 (i). The cited guidance makes no reference to revocation of a certificate of authority for failure to file the information returns.

Taxpayers may rely on a longstanding policy of the Division and the Division may not retroactively change such a policy (***Matter of Meredith Corp. v Tax Appeals Trib.***, 102 AD3d 156, 159 [3d Dept 2012]). Technical memoranda, such as the cited guidance, are statements of the Division's policies (20 NYCRR 2375.6 [a] [1]). Moreover, it is the Division's policy that "[t]axpayers have the right to know what they need to do to comply with the tax laws" and "are entitled to clear explanations of the laws and procedures in all tax forms, instructions, publications, notices and correspondence" (https://www.tax.ny.gov/tra/bill-of-rights.htm *Your Rights as a New York State Taxpayer*; ***see also*** Tax Law § 3004).

As noted, the guidance cited by petitioner is silent on the question of revocation of a certificate of authority as a sanction for failure to file an information return. Considering that the relevant statutory language does provide for such a sanction and that the information return requirement was a new law in 2009, the guidance appears to fall short of the Division's policy of clearly explaining tax laws and procedures to the public. We do not find, however, that the guidance indicates a Division policy to refrain from seeking revocation for willful failure to file information returns. "Public policy favors full and uninhibited enforcement of the Tax Law" (***Matter of Turner Constr. Co. v State Tax Commn.***, 57 AD2d 201, 203 [3d Dept 1977]). Guided by this rule, we have found that there must be a clear manifestation of the Division's intent to refrain from such full and uninhibited enforcement (***see Matter of Morgan***, Tax Appeals Tribunal, February 19, 2004 [petitioner failed to show a clear manifestation of intent by the Division to relinquish its right to assert income tax liability against petitioner]; ***see also Matter of Jamestown Lodge 1681 Loyal Order of Moose [Catherwood]*** 31 AD2d 981, 982 [3d Dept 1969] [waiver of a right generally may not be imputed to the State]). There is no such clear expression of intent in the guidance cited by petitioner (***cf***. TSB-M-11[17]S *New Policy Relating to Responsible Person Liability Under the Sales Tax Law* [September 19, 2011] [Division announces policy of limiting personal liability of LLC members under certain circumstances]; ***New York Assn. of Convenience Stores v Urbach***, 275 AD2d 520 [3rd Dept 2000], ***appeal dismissed*** 95 NY2d 931 [2000], ***lv denied*** 96 NY2d 717 [2001], ***cert denied*** 534 US 1056 [2001] [referring to the Division's publicly known nonenforcement policy with respect to the taxation of on-reservation retail sales of cigarettes to non-Native American purchasers]). Accordingly, we do not find that the Division had a policy to refrain from seeking revocation of a certificate of authority for failure to file information returns pursuant to Tax Law § 1136 (i) (1) (C).

Petitioner asserts that Administrative Law Judge determinations issued during the relevant period similarly indicate that the maximum penalty allowed by law for failure to file an information return is the monetary penalty imposed pursuant to Tax Law § 1145 (i). We disagree. The determinations identified by petitioner do involve assessments of monetary penalties against alcoholic beverage wholesalers for failure to file information returns (***Matter of Carousel Beverage Corp.***, Division of Tax Appeals, October 20, 2016; ***Matter of Flair Beverages Corp.***, Division of Tax Appeals, September 29, 2016; ***Matter of 415 Devoe Beer Corp.***, Division of Tax Appeals, April 7, 2016).[6] However, the fact that the Division did not seek to revoke the wholesalers' certificates of authority in those three cases does not indicate a policy to not seek revocation of a certificate of authority for failure to file information returns. The Division has discretion in enforcement of the Tax Law so long as it does not act arbitrarily (***see Matter of J.C. Penney Co., Inc.***, Tax Appeals Tribunal, April 27, 1989).

Petitioner contends that the first time it had any reason to believe that failing to file an information return could lead to the revocation of its certificate of authority was the Division's December 3, 2018 letter (***see*** finding of fact 11).[7] Given the clear statutory language and the rule that petitioner must be aware of the Tax Law, as discussed previously, we reject this contention. The December 3, 2018 letter does, however, represent the first time the Division expressly advised petitioner of the possibility of revocation. In our view, a more equitable and effective practice would advise a noncompliant alcoholic beverage wholesaler of the possibility of revocation of its certificate of authority early in the process of attempting to bring such a

[6] We are mindful that Administrative Law Judge determinations are non-precedential, not to be cited, and not to be given any force or effect in any other proceeding (Tax Law § 2010[5]). We reference these determinations here only in the context of petitioner's lack of notice claim.

[7] Consistent with petitioner's use of Division of Tax Appeals determinations as indicia of the Division's position on this question, we observe that the determination in ***Matter of Yonkers Wholesale Beer Distrib., Inc.***, wherein a notice of revocation was sustained, was issued on October 18, 2018, about six weeks before the December 3, 2018 letter.

wholesaler into compliance with the information return law. In any event, petitioner had about 10 months from the December 3, 2018 letter to the October 1, 2019 notice of proposed revocation and almost another year to the September 24, 2020 hearing in which to comply with a requirement that it had been aware of since 2009, but failed to do so.

Petitioner cites two cases in support of its due process claim, both of which are distinguishable. In ***F.C.C. v Fox Television Sta., Inc.*** (567 US 239 [2012]), the Supreme Court found a due process violation where the Federal Communications Commission sought to apply a new policy regarding indecency to conduct or language that was broadcast before the new policy was announced. Specifically, conduct or language that would not have resulted in sanctions under the old policy became punishable under the new policy without fair notice to broadcasters. Here, as discussed, the Division did not have a policy to forgo revocation of a certificate of authority for failure to file information returns. Hence, the Division's action to revoke petitioner's certificate of authority is not a change in policy. The second case, ***Christopher v SmithKline Beecham Corp.*** (567 US 142 [2012]), involves whether an agency's interpretation of its own regulations is entitled to deference. The Court applied due process principles of fair notice in concluding that the agency's interpretation of its regulations, which was announced after the conduct in question had occurred and which was contrary to long-standing industry practice, was not entitled to deference. Here, there is no issue of regulatory or statutory interpretation. As discussed, the relevant statutory language clearly permits the Division to revoke a certificate of authority for willful failure to file information returns.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Flair Beverages Corp. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Flair Beverages Corp. is denied; and

4. The notice of proposed revocation, dated October 1, 2019, is sustained.

DATED: Albany, New York
December 2, 2021

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner