

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Unregistered Debt- Settlement Services of Tax Tiger MN LLC **RECOMMENDATION AND ORDER ON MOTION FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a motion hearing on March 4, 2021, on a Motion for Summary Disposition (Motion) filed by the Minnesota Department of Commerce (Department). The record on the Motion closed on March 4, 2021.

Allen Cook Barr, Assistant Attorney General, represents the Department. Jeffery Haff, Dady & Gardner, P.A., represents Tax Tiger MN LLC (Respondent).

Based on the record, and for the reasons explained in the accompanying Memorandum, which is incorporated herein, the Administrative Law Judge makes the following:


RECOMMENDATION

The Department's Motion for Summary Disposition should be **GRANTED**.

ORDER

As this recommendation resolves all issues pending before this tribunal, all further proceedings in this matter are **CANCELLED** and the record shall be transmitted to the Commissioner of the Department (Commissioner) for issuance of a final decision.

Dated: April 30, 2021


JESSICA A. PALMER-DENIG
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of the Department of Commerce, Attn: Heidi Retterath, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 539-1445, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline to be imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department contends that Respondent violated requirements applicable to debt-settlement services providers under Minn. Stat. §§ 332B.02-.14 (2020). Specifically, the Department asserts that Respondent performed debt settlement services for a Minnesota consumer without being registered with the Department to perform those services.¹ The Department alleges that the contract Respondent entered into with the consumer did not contain required disclosures and a warning, in violation of Minn. Stat. § 332B.06, subd. 4, and that it did not apprise the consumer of the right to cancel the contract at any time on ten days' written notice, in violation of Minn. Stat. § 332B.07, subd. 2. The Department further maintains that Respondent violated Minn. Stat. § 332B.09, subd. 2, by collecting payment from the consumer before performing all services, and that Respondent collected a finance charge in violation of Minn. Stat. § 332B.09, subd. 4. The Department seeks summary disposition as to all claims.

Respondent does not dispute that it was not registered with the Department. Respondent does not contend that its contract with the consumer contained the required elements and does not deny that it contracted for payment as alleged by the Department. Instead, Respondent argues that it is exempt from the requirements related to debt-settlement services providers and that federal regulations preempt the state statutes as applied to Respondent.

¹ See Minn. Stat. § 332B.03.

I. Factual Background

Respondent is a Minnesota limited liability company (LLC) that provides federal tax resolution services to consumers in disputes with the Internal Revenue Service (IRS).² Jon Call is Respondent's sole owner.³ Mr. Call is an enrolled agent permitted to practice before the IRS under that agency's regulations.⁴ As an entity, Respondent is not an enrolled agent with the IRS; only individuals can serve in that capacity.⁵ Respondent has never registered with the Department to provide debt-settlement services.⁶

In May 2018, Respondent contracted with Minnesota consumer J.A. to prepare and submit an offer in compromise of a tax debt on J.A.'s behalf.⁷ For this service, Respondent utilized a "Retail Installment Contract" and charged J.A. \$6,400 to be paid through a down payment and installment payments.⁸ The contract also provided for a finance charge.⁹ The contract did not advise J.A. that Respondent was not registered as a debt-settlement services provider or recount a cautionary warning using statutory disclosure language.¹⁰

J.A. subsequently filed a complaint with the Department contending that her offer was rejected by the IRS and that she believed Respondent failed to comply with Minnesota law.¹¹ The Department concluded that Respondent failed to comply with statutory requirements in connection with its services for J.A., and on July 16, 2020, the Department commenced this action seeking to impose sanctions upon Respondent.¹²

II. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.¹³ A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.¹⁴ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

² Declaration (Decl.) of Jon Call (Call Decl.) at ¶¶ 1-2.

³ *Id.* at ¶ 1.

⁴ *Id.* at ¶ 2-3.

⁵ Decl. of Jaime Awoyinka (Awoyinka Decl.) at Ex. 3.

⁶ *Id.* at ¶ 2.

⁷ *Id.* at Ex. 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Respondent maintains that its work for J.A. was successful and that J.A. obtained a positive outcome in her tax dispute. Call Decl. at ¶ 4. Facts relating to the substance and outcome of J.A.'s tax dispute are not material to the determination of this matter.

¹² Notice and Order for Prehearing Conference (Notice and Order) (July 10, 2020).

¹³ *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).

¹⁴ *Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.¹⁵ The Administrative Law Judge does not weigh the evidence;¹⁶ instead, the judge views the facts and evidence in a light most favorable to the non-moving party.¹⁷

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.¹⁸ A fact is material if its resolution will affect the outcome of the case.¹⁹ If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.²⁰ A genuine issue is not a "sham or frivolous" one,²¹ and it cannot rely on mere allegations or denials.²² Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.²³

III. Analysis

A. Regulatory Framework

Under Minn. Stat. § 332B.03:

[I]t is unlawful for any person, whether or not located in this state, to operate as a debt settlement services provider or provide debt settlement services including, but not limited to, offering, advertising, or executing or causing to be executed any debt settlement services or debt settlement services agreement, except as authorized by law, without first becoming registered as provided in this chapter.²⁴

"'Debt settlement services provider' means any person offering or providing debt settlement services to a debtor domiciled in this state, regardless of whether or not a fee is charged for the services and regardless of whether the person maintains a physical presence in the state."²⁵ "Debt settlement services" include, in relevant part, "offering to provide advice, or offering to act or acting as an intermediary between a debtor and the federal government, state government, or their political subdivisions to delay payment of delinquent taxes owed, establish a payment plan for delinquent taxes owed, or obtain a

¹⁵ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

¹⁶ *See id.*

¹⁷ *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

¹⁸ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

¹⁹ *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

²⁰ *Thiele*, 425 N.W.2d at 583.

²¹ *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

²² *DLH*, 566 N.W.2d at 71.

²³ *See* Minn. R. Civ. P. 56.05.

²⁴ The statute contains a time limitation that is not relevant to the facts of this case.

²⁵ Minn. Stat. § 332B.02, subd. 13.

settlement for less than the full amount of delinquent taxes owed.”²⁶ The statute further defines “person” as “an individual, firm, partnership, association, or corporation.”²⁷

B. Respondent is Not Exempt from the Registration Requirement

The U.S. Department of the Treasury and the IRS have established a comprehensive regulatory framework governing the eligibility to practice before the IRS.²⁸ Individuals who are not attorneys or certified public accountants may practice before the IRS if they enroll as agents by fulfilling a specific set of requirements.²⁹ Mr. Call is an enrolled agent with the IRS.³⁰ Respondent argues that it is exempt from registering as a debt-settlement services provider due to Mr. Call’s status as an enrolled agent.

Minnesota law provides that “it is unlawful for any person . . . to operate as a debt settlement services provider or provide debt settlement services . . . except as authorized by law, without first becoming registered as provided in this chapter.”³¹ The Department brought this case against Respondent, which is an independent legal entity, and not against Mr. Call.³² The contract at issue here was an agreement between Respondent and J.A., not between Mr. Call and J.A. Respondent is not an enrolled agent. In fact, Respondent cannot be an enrolled agent because only individuals are eligible for that qualification.³³ As an LLC, Respondent cannot rely on Mr. Call’s enrolled agent status to exempt it from the state’s registration requirements. Respondent provided debt-settlement services to J.A. by representing her in an effort to negotiate a resolution of her tax obligations. This activity qualifies as debt-settlement services under Minn. Stat. § 332B.02, subd. 10(3). Under Minn. Stat. § 332B.03, Respondent was required to register as a debt-settlement-services provider. Respondent failed to do so and is subject to sanctions.

Respondent also contends that it should be treated in the same manner as a law firm. Respondent argues that a law firm is the entity through which licensed attorneys practice and that Respondent is merely the entity through which Mr. Call engages in authorized practice before the IRS.³⁴ According to Respondent, Mr. Call is authorized to practice before the IRS and it does not matter whether he establishes a legal entity, or the type of legal entity he creates, to manage this practice. This argument is unavailing. The regulation of lawyers in Minnesota by the Minnesota Supreme Court is unique and is accomplished under a framework of rules and requirements quite different from the

²⁶ *Id.*, subd. 10(3).

²⁷ *Id.*, subd. 15.

²⁸ See 31 C.F.R. §§ 10.1-10.93 (2021).

²⁹ 31 C.F.R. §§ 10.4-10.5.

³⁰ Call Decl. at ¶ 2.

³¹ Minn. Stat. § 332B.03.

³² See Minn. Stat. § 322C.0104, subd. 1 (2020) (providing that “[a] limited liability company is an entity distinct from its members.”).

³³ Awoyinka Decl. at Ex. 3.

³⁴ Mr. Call avers that another enrolled agent, Austin Havig, actually performed the services for J.A., though under Mr. Call’s supervision. Call Decl. at ¶ 4. This fact further distances the work Respondent performed from Mr. Call’s enrolled agent status and his ownership of Respondent.

consumer protection regulations applicable to legal entities engaging in regulated businesses. It should also be noted that attorneys and law firms that regularly engage in the provision of debt-settlement services would also be required to register.³⁵ Finally, the definition of “person” in Minn. Stat. § 332B.02, subd. 15, is broad enough to encompass Respondent as an LLC. The definition includes a “firm,” which means “the name or title under which a company transacts business,” and “a business unit or enterprise.”³⁶

C. It is Not Necessary to Address Respondent’s Preemption Claims

Respondent argues that the registration requirement under Minn. Stat. § 332B.03, interferes with an enrolled agent’s federally-authorized practice before a federal agency, and is thus preempted under the Supremacy Clause of the U.S. Constitution.³⁷ The Department contends that this issue is outside the jurisdiction of this tribunal. Respondent, in turn, maintains that it does not raise a facial challenge to the statute, but rather, an “as applied” constitutional claim. Respondent argues that deciding this issue is within the Administrative Law Judge’s authority.

It is true that administrative law judges have no power to declare a statute unconstitutional on its face; these are powers accorded to the judicial branch.³⁸ It is not so clear, however, that this tribunal lacks authority to hear a preemption challenge to a statute as applied to the regulated party.³⁹ Nonetheless, it is not necessary to address Respondent’s preemption claim in this case. Mr. Call is an enrolled agent authorized to practice before the IRS. Respondent, an LLC, is not and cannot be an enrolled agent, and so the federal regulations permitting representation and appearances by Mr. Call do not apply to Respondent. The Department brought this case only against Respondent and does not seek to sanction Mr. Call individually. Therefore, there is no conflict between the state statute regulating Respondent and the IRS rules allowing Mr. Call to act as an enrolled agent.

D. The Commissioner May Impose Sanctions Upon Respondent

Respondent admits it has never registered with the Department as a debt-settlement services provider.⁴⁰ By failing to register, Respondent violated Minn.

³⁵ See Minn. Stat. § 332B.02, subs. 13, 13a, 15 (defining an exemption for attorneys whose exclusive or principal practice does not involve providing debt-settlement services, but also defining the term person to include a “firm.”).

³⁶ *Firm*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/firm> (last visited Apr. 26, 2021).

³⁷ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

³⁸ See, e.g., *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993).

³⁹ See *In re Enforcement Action Against Liquor License No. 26788, Issued to Boardwalk Bar & Grill, LLC*, No. 8-2400-37252, 2021 WL 1202221 at *7 (Minn. Office Admin. Hearings Mar. 26, 2021) (discussing authority to hear an “as applied” constitutional challenge in a contested case).

⁴⁰ Decl. of Allen Cook Barr (Barr Decl.) at Ex. 1.

Stat. § 332B.03. Respondent also failed to disclose to J.A. whether or not it was registered, as required by Minn. Stat. § 332B.06, subd. 4(a).⁴¹

The contract Respondent entered into with J.A. did not contain all required information and assessed fees in a manner not authorized by law. Respondent acknowledges that its contract with J.A. did not contain the verbatim cautionary notice required under Minn. Stat. § 332B.06, subd. 4(b), and did not contain a notice advising J.A. that she had a right to cancel the contract at any time on ten days' written notice, in violation of Minn. Stat. § 332B.07, subd. 2.⁴² Respondent's contract with J.A. also provided for a down payment and assessment of a finance charge.⁴³ Under Minn. Stat. § 332B.09, subd. 3, "a debt settlement services provider may not impose or collect any payment pursuant to a debt settlement services agreement before the debt settlement service provider has fully performed all of the following: (1) the debt settlement services contained in the agreement; and (2) any additional services the debt settlement services provider has agreed to perform." Additionally, Minn. Stat. § 332B.09, subd. 4, provides that "[n]o fees, charges, assessments, or any other compensation may be claimed, demanded, charged, collected, or received other than the fees allowed under this section. Any fees collected in excess of those allowed under this section must be immediately returned to the debtor."

Minn. Stat. § 45.027, subd. 6 (2020), authorizes the Commissioner to impose a civil penalty not to exceed \$10,000 per violation upon a person who has violated any law enforced by the Commissioner. Respondent has violated laws within the Commissioner's enforcement authority and is subject to imposition of a sanction.

IV. Conclusion

The Department has established that there are no material facts in dispute and that it is entitled to disposition as a matter of law. Therefore, the Department's Motion should be **GRANTED**. Further proceedings in this matter are cancelled and the record will be transmitted to the Commissioner for issuance of a final decision.

J. P. D.

⁴¹ *Id.*; Minn. Stat. § 332B.06, subd. 4(a) ("A person offering to provide or providing debt settlement services must disclose both orally and in writing whether or not the person is registered with the Minnesota Department of Commerce and any registration number.").

⁴² Barr Decl. at Ex. 1; Minn. Stat. § 332B.06, subd. 4(b) (stating that "[n]o person may provide debt settlement services unless the person first has provided, both orally and in writing, on a single sheet of paper, separate from any other document or writing" a verbatim, cautionary notice); Minn. Stat. § 332B.07, subd. 2 ("A debt settlement services agreement must contain, on its face, in an easily readable type immediately adjacent to the space for signature by the debtor, the following notice: 'Right to Cancel: You have the right to cancel this contract at any time on ten days' written notice.'").

⁴³ Awoyinka Decl. at Ex. 2; Respt's' Mem. in Opp. To Mot. for Summ. Disposition and Request for Hearing at 3 (Jan. 28, 2021).