

**United States Small Business Administration
Office of Hearings and Appeals**

IN THE MATTER OF:

General Moving Co, Inc.,

Petitioner

SBA No. BDP-416

Decided: September 26, 2011

ORDER GRANTING MOTION FOR SUMMARY DECISION

I. Procedural History

On May 6, 2011, pursuant to 13 C.F.R. § 124.304(d), the Associate Administrator of the Office of Business Development of the U.S. Small Business Administration (SBA) issued to General Moving Company, Inc. (Petitioner), a Notice of Termination (Termination Notice) from the section 8(a) Business Development (BD) program. The alleged grounds for said termination were “[f] ailure by the concern to pay or repay significant financial obligations to the Federal Government,” pursuant to 13 C.F.R. § 124.303(a)(1). Petitioner received said Notice on May 16, 2011. According to 13 C.F.R. § 124.304(e), the termination would become effective 45 days after Petitioner received the Notice, unless Petitioner filed an appeal by that date, i.e., June 30, 2011.

On June 20, 2011, Petitioner appealed the SBA's termination of its participation in the 8(a) BD program (Petition). In its Petition, Petitioner admits that it fell behind on paying taxes, because the “business has suffered severe hardship” and during these years made “no profit.” Petitioner stated that “[m]y intent is and always [has] been to repay the taxes ...” Petitioner also stated that it has been making payments since 2007 and has paid the taxes owed for 2007. However, the Petition states that “[t]he balance owed to the Federal Government is \$36,997.47 dating back to 2008.”

On June 22, 2011, the undersigned Administrative Law Judge was designated to preside over this matter.

On August 8, 2011, the SBA filed a Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, for Summary Decision (Motion). SBA's Motion requests that the undersigned dismiss the appeal for lack of jurisdiction (per 13 C.F.R. §§ 134.211(e) and 134.405) or, in the alternative, award “summary decision” to the SBA (per 13 C.F.R. §§ 134.212).

In its Motion to Dismiss, SBA asserts that, because Petitioner admitted in the Petition that it failed to pay or repay significant financial obligations owed to the Federal Government, the

Petition did not allege facts that, if proven to be true, would warrant reversal of the SBA's termination decision. SBA further asserts that the Petition is not responsive to the grounds for termination and does not overcome those grounds. The Motion contends that Petitioner's allegations as to repayment of its overdue federal taxes are undocumented, incomplete and insufficient to resolve Petitioner's obligations.

In its Motion for Summary Decision, SBA argues “in the Petition, Petitioner admits that it has failed to pay its taxes for 2008 and 2009 and has not entered into a repayment plan for these obligations with the IRS [U.S. Internal Revenue Service].”¹ Motion at 9. SBA also argues that, even if Petitioner has repaid its 2007 taxes as the Petition alleges (but without providing any proof), “these claims do not constitute a denial that Petitioner has failed to pay or repay at least its 2008 and 2009 taxes to the Federal Government.” *Id.* Further, SBA contends that “[a]s demonstrated in multiple communications to SBA, Petitioner stopped paying its taxes when it encountered financial difficulties and decided that it would pay those obligations only when it wished to, deeming that the Federal Government's collection efforts through withholding of payments was sufficient repayment of taxes owed.” Motion at 10.

Petitioner did not file a response to SBA's Motion.

II. Standard of Review

A Motion for Summary Decision involving an 8(a) appeal petition should be granted “if the Judge finds that there is no genuine issue of material fact as to whether SBA acted arbitrarily, capriciously, or contrary to law . . . and that the SBA is entitled to a decision in its favor as a matter of law.” 13 C.F.R. § 134.408(b)(1). The standard for summary decision in an 8(a) termination appeal is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Matter of Dolphin Industries, Inc.*, SBA No. BDP-135 at 2 (2000).

III. Allegations as to “Repayment” Issue

Petitioner has repeatedly admitted its delinquency in paying federal taxes, including in its Petition. Petitioner's one potential counter-argument is its alleged intent to repay these financial obligations.

A December 21, 2010, email message from Petitioner to SBA states that Petitioner does “not have a payment plan set up [with] the IRS.” Motion Ex. 1. However, a January 6, 2011, memorandum to SBA from Petitioner's President, Sidney E. Montgomery, explains that “I am making payments to the IRS. Everytime [sic] that I do a federal job, 15% is being withheld to pay toward the taxes that I owe.” Motion Ex. 3. See also Motion at 2-3, 10 and Exs. 6, 7, 8 and 10. A January 26, 2011, letter from Mr. Montgomery to SBA says that the IRS has not given

¹ The undersigned fails to see anywhere in the Petition where Petitioner actually states that it has not entered into a repayment plan with the IRS. The undersigned also does not see anywhere in the Petition where “Petitioner claims that ... SBA did not provide Petitioner with enough time to enter into a repayment plan with the IRS.” Motion at 9.

Petitioner any documentation of this agreement. Motion Ex. 7. In Petitioner's March 18, 2011, letter responding to SBA's letter of intent to terminate (sent per 13 C.F.R. § 124.304(b)), Petitioner stated "I have made arrangements with the IRS to have this tax debt paid off by June 15, 2012." Motion Ex. 10. "However, Petitioner did not enclose any documentary evidence of any such arrangements made with the IRS." Motion at 3. Further, Petitioner does not elaborate on the details of this alleged arrangement, nor explain how the June 15, 2012 date is to be achieved.

The Petition states that Petitioner has been making payments on these past debts since 2007 and has paid the taxes owed for 2007. "However, the Petition contains no support or evidence for this assertion." Motion at 5. Further, SBA argues, Petitioner does not assert that the taxes owed for 2008-2009 (\$36,997.47 according to Petitioner) are not "significant financial obligations." SBA asserts that what Petitioner attempts to characterize as "payments" actually "refer[s] to the 15% of contract payments to Petitioner withheld by the Federal Government." Motion at 6. The Petition appears to refer to these federal offsets as "voluntary" payments to the IRS. However, SBA argues that these payments are not "voluntary," since they are intended to pay off a legally mandated financial obligation. Motion at 6. Further, SBA asserts that these deductions "do not constitute a repayment of petitioner's obligation for purposes of SBA regulations, as Petitioner can cease such collections by simply obtaining no further Federal Government work from which the Federal Government can withhold partial payment." *Id.*

Although denying that any duty to do so exists, SBA asserts that it gave Petitioner "more than a sufficient amount of time in which to enter into a repayment plan. Petitioner failed to enter into a repayment plan from the time of filing its 2007 taxes through the time it filed the appeal petition, a period of approximately three years, which is well beyond the time necessary for any taxpayer to arrange such a plan with the IRS." Motion at 6-7.

IV. Discussion

To begin with, the undersigned notes that Petitioner did not file a response to SBA's Motion. According to SBA's Rules of Practice, "all non-moving parties must serve and file a response [to a motion] or be deemed to have consented to the relief sought." 13 C.F.R. § 134.211(c). Thus, by its failure to respond to the Motion, Petitioner consents to the relief sought, which is termination of Petitioner from the 8(a) BD Program.

Presently, Petitioner has certainly not "repaid" its overdue taxes. As to whether Petitioner will ever "repay" its overdue taxes, Petitioner has stated that "I have made arrangements with the IRS to have this tax debt paid off by June 15, 2012." Motion Ex. 10. However, despite numerous requests from SBA to provide substantiating documentation, Petitioner has repeatedly failed to provide any affidavits or documentary evidence demonstrating the existence of a repayment plan officially sanctioned by the IRS to repay Petitioner's overdue federal taxes.

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth"

by affidavit or other evidence “specific facts,” Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal citation omitted). Thus, Petitioner has failed to establish that repayment of its overdue taxes is a genuine factual issue.

Further, with respect to the alleged 15% offset deductions from payments to Petitioner for work performed on federal contracts, SBA asserts that these deductions “do not constitute a repayment of petitioner's obligation for purposes of SBA regulations, as Petitioner can cease such collections by simply obtaining no further Federal Government work from which the Federal Government can withhold partial payment.” Motion at 6. SBA also contends that it gave Petitioner “more than a sufficient amount of time in which to enter into a repayment plan. Petitioner failed to enter into a repayment plan from the time of filing its 2007 taxes through the time it filed the appeal petition, a period of approximately three years, which is well beyond the time necessary for any taxpayer to arrange such a plan with the IRS.” Motion at 6-7.

The U.S Supreme Court has held that, “unless it is plainly erroneous or inconsistent with the regulation,” an Agency's interpretation of its own regulations asserted in litigation is controlling. *Auer v. Robbins*, 519 US 452 (1997); *Talk America v. Michigan Bell Telephone Co.*, 131 S.Ct. 2254 (2011). SBA's interpretation of the clause “failure to ... repay” in 13 C.F.R. § 124.303(a)(11) - i.e., that the repayment period cannot extend for an excessive number of years and the repayment agreement must be one which the debtor cannot unilaterally terminate - is reasonable and does not contradict the rule language. Thus, SBA's interpretation of its own rule is due controlling deference. See also, *Matter of Dolphin Industries, Inc.*, SBA No. BDP-146, 2001 SBA8A LEXIS 13, at *25 (2001) (Appeal of 8(a) BD termination per 13 C.F.R. § 124.303(a)(11) in which Petitioner who made negotiation offer to repay federal taxes, but offer was not yet accepted, “cited no authority for its argument that efforts to repay or negotiate financial obligations excuse such failure, and I am unaware of any such authority.”)

V. Conclusion

The SBA terminated Petitioner from the 8(a) BD program on the basis of Petitioner's failure to pay or repay significant financial obligations (taxes) owed to the Federal Government, in accordance with 13 C.F.R. § 124.303(a)(11). Petitioner's Petition admits that it failed to pay federal taxes for 2007-2009 and that it currently owes federal taxes dating back to 2008 in the substantial sum of \$36,997.47. By not providing SBA any documentary evidence of a repayment plan officially sanctioned by the IRS and not responding to SBA's Motion, Petitioner has failed to establish the existence of a genuine issue of material fact as to “repayment” of this debt, within the meaning of 13 C.F.R. § 124.303(a)(11), as reasonably interpreted by SBA.

Accordingly, I find that there is no genuine issue of material fact as to whether SBA acted arbitrarily, capriciously, or contrary to law and that the SBA is entitled to a decision in its favor as a matter of law. Therefore, SBA's Motion for Summary Decision is hereby **GRANTED** and this appeal is **DISMISSED**.

This is the final decision of the Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

SPENCER T. NISSEN
Administrative Law Judge
U.S. Environmental Protection Agency²

² The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Small Business Administration, pursuant to an Interagency Agreement effective for a period beginning February 11, 2011.