STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 96-2625
FUNTANA VILLAGE, INC., d/b/a SPINNAKER,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 30, 1997, in Panama City, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Miguel Oxamendi, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Albert C. Penson, Esquire
Penson and Padgett
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Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent owes additional alcohol consumption tax.

PRELIMINARY STATEMENT

On April 17, 1996, Petitioner issued a Notice to Show Cause to Respondent. The Notice to Show Cause alleged that Respondent had failed to remit, pursuant to Section 561.501, Florida Statutes, the correct amount of additional alcohol consumption tax for the period of July 1, 1994, through March 31, 1995. The Petitioner also sought to revoke, suspend, annul, impose administrative fines, investigate cost, and late penalties or any combination thereof, based on Petitioner's allegations.

At the hearing Petitioner offered the testimony of two (2) witnesses and offered eleven (11) exhibits into evidence. Respondent offered the testimony of two (2) witnesses and offered four (4) exhibits into evidence.

At the end of the hearing, Petitioner moved to amend the Notice to reflect a reduced amount of surcharge liability in the amount of $16,761.04 additional surcharge tax, $2,549.77 in penalties and $308.45 in interest. The Respondent did not object to the motion. The motion is now granted.

After the hearing, Petitioner and Respondent filed proposed recommended orders on December 12 and December 16, 1997, respectively. The parties' proposed findings of fact have been considered and utilized in the preparation of this recommended order except where the proposed findings of fact were cumulative, immaterial, irrelevant, or not shown by the evidence.

FINDINGS OF FACT

1. Respondent, Funtana Village, Inc., is the holder of a valid alcoholic beverage license number 13-00155, Series 4-COP. The license is for its premises known as the "Spinnaker" located at 8795 Thomas Drive, Panama City Beach, Florida.

2. The Spinnaker is an entertainment facility that serves alcoholic beverages. The availability of alcoholic beverages is part of the entertainment experience at the Spinnaker. The facility has five live stages and provides other sources of entertainment. It budgets and spends $500,000 to $600,000 per year for entertainment, such as musical shows, acts and bands.

3. During the period of May 4, 1995, through December 18, 1995, the Division performed a surcharge tax audit of the Respondent. The surcharge tax is levied on ounces (volume) of beer, wine and liquor sold for consumption on the vendor's premises. See Rule 61A-4.063, Florida Administrative Code.

4. The Division audits vendors' monthly surcharge reports in order to confirm their accuracy and ensure compliance with statutory and rule requirements, as well as ensure that the proper amount of surcharge tax is paid.

5. In general licensed vendors may select from two methods for reporting the surcharge, the sales method and the purchase method. Under the sales method, vendors pay the surcharge on the volume amount of alcoholic beverages sold for consumption on the licensed premises. Under the purchase method, vendors pay the

surcharge on the volume amount of alcoholic beverages purchased from that vendor's alcohol distributor.

6. In this case, the audit covered the reporting period of July 1, 1994, through March 31,1995. Respondent elected the sales method of payment. The audit was conducted by Marie Carpenter, an auditor employed by the Petitioner.

7. Prior to the audit involved in this case, the Division performed an audit of Respondent covering the period of July 1, 1990, through November 30, 1992. Another auditor from the Division performed the audit. Pursuant to negotiation and agreement with Petitioner, Respondent performed a self-audit for the period from December 1, 1992, through June 30, 1994. The results of the self-audit were accepted by Petitioner. A settlement was entered into by both parties. The audit in issue in this action starts with the day immediately following the end of the self-audit period, July 1, 1994.

8. Importantly, in preparing the reports for the audit involved in this case, Respondent followed the exact methodology and percentages used in calculating the tax due under the previous audit which had resulted in a settlement agreement between Respondent and Petitioner and was approved by Petitioner.

9. In performing the July 1, 1994, through March 31, 1995, audit, the auditor did not review the prior self-audit because each audit should stand on its own merits. She also used

slightly different mathematical methods and percentages to arrive at the amounts the Division has alleged are due.

10. The purpose of the current audit was to determine whether accurate records were being kept by the Respondent and whether accurate deductions of non-surchargeable (or free) drinks were being calculated by the Respondent.

11. In the December 22, 1995, report on the audit, the auditor found that the Spinnaker's records as kept were accurate and traced correctly throughout the audit trail.

12. In the audit the Division calculated the amount of the surcharge owed by Respondent using the "sales depletion method." This formula is provided for in the Division's rules.

13. Under the formula, the Division first determined the Respondent's beginning inventory by volume for July 1, 1994. The figure used by Respondent was gleaned from the records Respondent provided to the Division's auditor. However, the evidence showed that the figures the auditor used for the beginning inventory were too low. The more accurate figures for the beginning inventory were the ending inventory figures from the previous self-audit period, which the Division had accepted and approved in the earlier settlement agreement. The more accurate figures should have been used by the Division. Second, the purchases by volume of alcoholic beverages made by the Respondent during the audit period were added to the beginning inventory figures to yield total inventory figures. Third, the ending inventory of

alcoholic beverages on March 31, 1995, was determined. Again, the purchase information and ending inventory information was obtained from the records of the Respondent and independently confirmed from the records of the Respondent's distributor. Fourth, the inventory figures were subtracted from the total inventory figures to yield the gross gallonage available for sale during the audit period. Fifth, adjustments or deductions were made to the gross gallonage figures to yield the net gallonage figures to which the surcharge is applied. Some of the deductions to the gross gallonage figures were deductions for spillage, cooking and "free" drinks. Finally, the total surcharge amount was calculated and compared to the amount already reported and paid to determine if any surcharge was under-reported or over-reported. In this case, it was found the Respondent under-reported the surcharge due.

14. The under-reporting was due to the Respondent's interpretation of the deduction allowed for free drinks. In essence, the issue was whether drinks given away by Respondent to customers, who have paid a cover charge to enter the premises or who have bought a membership in the Spinnaker, are free or sold because some consideration has been given by the customer for the drink. The Respondent based its interpretation on the way free drinks were handled in the settlement agreement it had entered into earlier. The witnesses confirmed that if cover charges were

not treated as consideration for alcoholic beverages, the amount claimed by Petitioner to be due would be zero.

15. The Petitioner has had a long-standing policy that a "cover charge" constitutes consideration for alcoholic beverages. This policy is contained in the Division's audit manual. The manual does not provide any leeway to auditors to apply or not to apply the policy, depending on the facts of the case. This policy has never been promulgated as a rule. Based on the policy, Petitioner determined that free drinks served by Respondent to those paying a cover charge for admission to Spinnaker were considered "sold" and therefore subject to the surcharge.

16. The evidence showed that Respondent does not always charge a cover charge for admission to its facility. Respondent, during the course of the audit, provided the auditor with a schedule of its free drink offers for the audit period. The schedule demonstrated:

- Cover charges were collected even when there were no free drink specials.
- Respondent provided free drinks without requiring payment of a cover charge.
- Cover charges were imposed even after free drink specials ended.
- Cover charges fluctuated with the type of entertainment and the volume of business.
- Respondent never charged a cover charge where there was no entertainment.

17. The evidence demonstrated that Respondent tracks the amount of cover charge needed to be generated to pay for the live entertainment and has never considered the cover charge as

payment for any alcoholic beverages it sells. In fact, whether admission to Respondent's premises is charged appears to depend on two factors, live entertainment and seasonal customer volume. Cover charges were unrelated to any normal drink sales.

18. Petitioner also disallowed deductions for membership cards purchased by patrons. Information provided by Respondent demonstrated that 77.5 percent of all membership cards were given away and that 22.5 percent were sold. Petitioner projected this ratio through the audit period and disallowed 22.5 percent of all alcoholic beverages given away to members because purchase of the membership cards was construed to be consideration for the drinks served.

19. The membership cards were provided to patrons to gain free admission to the facility (exceptions exist for certain entertainment) and, at the time of the audit, for free parking, discounts on clothing, one-third discounted drinks and, on occasion, free drinks. Admittedly, the benefit value of member "free drinks," when compared with the value of other member benefits, is little. However, there is some value exchanged for the price of the membership card and some consideration has passed. Therefore, the surcharge is appropriately applied by the Division to the free drinks served to members.

20. In September 1997, the Division at Respondent's request reviewed the audit and made certain adjustments to its earlier findings. The audit was adjusted based on a better explanation

from Respondent of its draft beer giveaways and an error in the original audit. The re-audit performed by the auditor in September 1997 reduced the amount of the surcharge reported to be due in December 1995 from a total of $45,673.93 to a total of $19,619.26 of which $16,761.04 was the surcharge due; $2,549.77 was for penalties and $308.45 was for interest.

21. However, the auditor in the re-audit adjusted for the draft beer giveaways by applying 20 percent to the free drinks rung up on the cash register to determine the deduction for free drinks. The earlier audit used in the settlement agreement applied the percentage to the total purchases to determine the deduction for free drinks. The method and procedures for establishing the percent of inventory which constituted free drinks in the earlier audit were standard auditing processes. The evidence did not support a change in that process. Therefore, the giveaway percentage should have been applied as it was in the audit for the settlement agreement. That method was approved by the Division and should have been followed for the purpose of consistency in the audit at issue here.

22. The penalty was predicated on a prior action involving these two parties; however, the Consent Order entered in that prior action provided that the initial action would not be considered as a basis for imposing a penalty in any subsequent proceeding involving these issues. Therefore, the prior action cannot be used to increase the penalty, if any, imposed on

Petitioner. Moreover, the under-reporting of the surcharge by Respondent was due to its legitimate reliance on the methodology and percentages used in the settlement agreement between it and Petitioner. Reliance on those provisions was reasonable and should not cause them to be penalized. Therefore, no penalty should be imposed on Respondent.

23. Other than as noted above, the Division's procedures and methodologies used in the audit at issue here were reasonable.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

25. Section 561.501, Florida Statutes, imposes a surcharge on beer, wine and liquor ". . . sold at retail for consumption on premises licensed by the division as an alcoholic beverage vendor."

26. Section 561.01(9), Florida Statutes, defines the term "sale" as follows:

> Any transfer of an alcoholic beverage for consideration, any gift of an alcoholic beverage in connection with, or as a part of, a transfer of property other than an alcoholic beverage for a consideration, or the serving of an alcoholic beverage by a club licensed under the Beverage Law.

27. Chapter 61A-4, Florida Administrative Code, provides the auditing criteria which govern audits such as

the one at issue here. Rule 61A-4.063(4)(c), Florida Administrative Code, provides in part as follows:

> If the vendor chooses the sales method, the vendor will bear the burden of proof that the method used accurately reflects actual sales. . . .

28. Rule 61A-4.063, Florida Administrative Code, sets forth the sales depletion formula used by the Division in this audit. Rule 61A-4.063(4)(c), Florida Administrative Code, further states, in part, as follows:

> Adjustments made to this formula in favor of the licensee will be based on factual, substantial evidence. The results of the formula will represent sales transactions as defined herein and in Section 561.01(9), Florida Statutes, for the period under review.

29. The Division does not provide any further definition of the term “sale” by rule. However, Petitioner has implemented the statute through a standard in its auditing practices which is contained in its auditing manual. This audit standard defines a cover charge as consideration for alcoholic beverages, thereby constituting a "sale" within the meaning of Section 561.01(9), Florida Statutes. The standard is generally applied and the auditor has no discretion to not follow the standard based on the individual facts of a business. The Division’s audit manual was not introduced into evidence.

30. This standard auditing procedure of Petitioner clearly constitutes an agency statement of general applicability which implements a statute.

31. In Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 552 (Fla. 5th DCA 1996), the court found that the effect of the agency's tax assessment procedure was a rule, in that it was a statement of general applicability that implements or interprets law or policy, creating an entitlement for the agency to collect taxes and adversely impacting the taxpayer. The court also found that the auditors were not entitled to exercise any discretion outside the prescribed standard. Id. At 255. See also Department of Transportation v. Blackhawk Quarry Co., 528 So. 2d 447, 450 (Fla. 5th DCA 1988) reh'g denied 536 So. 2d 243.

32. As stated by the court in Vanjaria, citing Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 196 (Fla. 1st DCA 1991):

> A rule is defined in section 120.52(16), Florida Statutes (1987), as a "statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement." An unpromulgated agency rule constitutes an invalid exercise of delegated legislative authority and, therefore, is unenforceable. Wingfield, 581 So. 2d at 196.

33. Not all agency implementations of a statute are required to be promulgated as rules. In this case, the statute defines the term “sale.” Statutes do dictate agency policy and govern agency action with or without implementing rules. See Department of Corrections v. McCain Sales of Florida, Inc., 400

So. 2d 1301 (Fla. 1st DCA 1981); Home Health Professional Services, Inc. v. Department of Health and Rehabilitative Services, 463 So. 2d 345 (Fla. 1st DCA 1985); Hill v. State Department of Natural Resources, 7 F.A.L.R. 5236 (Fla. Div. Of Admin. Hearings 1985); and Joshua Water Control District v. Department of Natural Resources, 11 Fla. Supp. 2d 182 (Fla. Div. of Admin. Hearings 1985). In this case, any further definition by the agency would only constitute a listing of various factual examples which the Division considers to be a sale. Such a listing of examples is not required under Chapter 120, Florida Statutes. However, absent a rule, the agency's implementation of a statute is subject to challenge based on the facts of each case and may not be applied where the facts do not fall within the language of the statute being implemented.

34. In this case, there is no rule implementing the statute. Therefore, whether the Respondent owes additional surcharge tax depends on the application of the statutory definition of the term "sale" in Section 561.01(9), Florida Statutes, to the imposition of a cover charge or sale of a membership by Respondent.

35. In Florida, there is little case law directly on the construction of the term "sale" in relation to the dispensing of alcoholic beverages. In Department of Business Regulation v. Cost Plus Imports of Tampa Bay, Inc., 513 So. 2d 764 (Fla. 2d DCA 1987), the Second District Court of Appeal held that a

transaction in which alcoholic beverages were given to persons renting a limousine without additional charge was a sale of alcoholic beverages under Section 561.01(9), Florida Statutes. The patrons of the limousine company had to pay to receive the limousine service which in turn entitled them to receive an alcoholic beverage. In this case, the patrons of the Spinnaker must, at certain times, pay to enter the premises for membership or for entertainment, which in turn entitles them to receive an alcoholic beverage. However, the Spinnaker's patrons did not always have to a pay cover charge to receive free alcoholic beverages.

36. In making its decision, the court in Cost Plus Imports cited Commonwealth v. Backa, 310 A.2d 355 (Penn. 1973), New York State Liquor Authority v. Fluffy's Pancake House, 409 N.Y.S.2d 20 (N.Y. 1978) and Winter v. Pratt, 189 S.E.2d 7 (S.C. 1972) as persuasive authority for the court's application of Section 561.01(9), Florida Statutes.

37. In Commonwealth v. Backa, the defendants were charged with selling alcoholic beverages without a valid license as required under Pennsylvania law. The Defendants owned and operated a business known as Alpine Ice Chalet. A sign outside the entrance stated, "Swimming, dancing and free beer, $3.00." Patrons of the Chalet, upon tendering the $3.00 admission fee, were entitled to swim, dance and receive beer dispensed from a make-shift bar. The lower court concluded that such activity did

not constitute evidence of a sale of alcoholic beverages. The Pennsylvania Supreme Court rejected the ruling of the lower court and stated:

> The reasoning by the trial court assumes that the beer was in fact free because the sign said so. The court thus begged the very question which was before it for consideration, that question being: though no specific consideration is set forth and though the beer was stated to be free, was there in fact included in the admission price a payment for the beer and was the method here employed of supplying beer to patrons for their consumption on the premises a sham and subterfuge for which was in fact a sale? . . .
>
> If inducement is the basis of the lower court's reasoning, then free beer or free liquor of any kind for that matter, under the same circumstances, can be dispensed without a license by any bar, lounge, hotel or restaurant as an inducement to a patron's availing himself of its facilities. To allow this situation to flourish would be to invite other confusion and contradiction of the legislative purpose of the license requirement.

38. In New York State Liquor Authority v. Fluffy's Pancake House, a restaurant which was not licensed to sell alcoholic beverages featured complimentary wine with its meals. The court held that a patron who receives complimentary wine with dinner is, by the purchase of the meal, giving consideration for the complimentary beverage served. Id. at 21. The Court concluded that the patron who receives such complimentary wine with a meal was giving consideration in the form of payment for the meal.

39. Similarly in New York State Liquor Authority v. Sutton, 403 N.Y.S.2d 443 (N.Y. 1978), the question before the court was whether an incorporated not-for-profit social club could charge nightly dues to its members and distribute free liquor to its members without a license to sell alcoholic beverages. For the nightly dues fee ranging from $6.00 to $10.00 per person, the club provided dancing, backgammon, and free alcoholic beverages. The position of the social club was that the alcoholic beverages were not sold but were part of the nightly entertainment. The court concluded that the Respondent was engaging in the unlicensed sale of alcoholic beverages on its premises. The court reasoned:

> Corporate respondent is engaged in the sale of liquor on the premises as if money was being exchanged for liquor at the bar instead of the liquor and entertainment at the door. A "sale" by any other name would still smell from the alcoholic beverages involved. It must be held that law, logic and as a matter of practicality that alcoholic beverages are being sold to all who desire them for monetary consideration as part of the price of admission to the club. If any contrary interpretation were adopted and if this obvious subterfuge were afforded legitimacy there would be little need for alcoholic

> beverage licensing provisions of any type since such provisions and attendant controls could readily be bypassed.

40. In both Fluffy's Pancake House and Sutton, the New York courts applied the definition of sale under New York's Alcoholic Beverage Control Law. The Control Law defines sale as "any transfer, exchange or barter in any manner or by any means whatsoever for a consideration." While the New York definition is not the same as Florida's definition of the term sale, it is comparable.

41. In Winter v. Pratt, a lounge known as the Pirate Cove was licensed to sell beer and wine only. The lounge offered its patrons alcoholic beverages that it was not licensed to sell. The unlicensed drinks were free, but the patron had to pay a charge for the set-up. The drinks were served in appreciation for the customer's patronage. The lounge argued that the free drinks were a gift and not a sale. The court rejected the lounge's argument holding the transaction to be a sale for which the consideration was the set-up fee paid to the waitress.

42. Finally, the meaning of the term "sale" as used in connection with Florida's alcoholic beverages law was addressed by the Florida Supreme Court in State v. Livingston, 30 So. 2d 740 (Fla. 1947). In Livingston, the Florida Supreme Court addressed the issue of the constitutionality of Section 561.34(11), Florida Statutes (1947), under Article XIX, Section I, of the Florida Constitution. The Court was dealing with the

construction of the term "sale" as it related to Section I, which provided that each County had the right to decide whether intoxicating liquors could be sold in that County.

43. In Livingston, the Court was concerned with the part of Section 561.34(11), Florida Statutes (1947), which permitted bona fide social clubs to serve or distribute to members or non-resident guests alcoholic beverages. Such activity was not to be deemed a sale under the statute. In construing the term “sale,” the Supreme Court considered the Webster Dictionary definition of "sale" which is “the contract whereby the absolute or general ownership of property is transferred from one person to another for a price or sum of money, or loosely, for any consideration." In addressing the transactions by a social club, the Supreme Court stated:

> Regardless of how the statute may describe the transaction, the serving of liquor by a bona fide social club is a ‘sale’ within the meaning and definition of the Constitution, and the manner of serving, paying for or other ways to cloak its true meaning cannot in anywise change or alter the transaction.

44. In this case, the provisions of Section 561.01(9), Florida Statutes, define the transfer of any alcoholic beverage or the gift of any alcoholic beverages when given with the transfer of other property as a sale. The transfer or giving of alcoholic beverages by Petitioner to its patrons when it charges a cover charge or has charged for a membership clearly falls within that statutory definition. The serving of free alcohol

after payment of a cover charge or for a membership is either a specific transfer for consideration, albeit small, or the serving of free alcohol is a gift in connection with the transfer of Petitioner’s property, admission to its facility, a membership or entertainment. Under either view, the transaction is a sale and subject to the surcharge.

45. Any penalty associated with underpayment may be waived or compromised if the non-compliance with payment was due to “reasonable cause and not to willful negligence, willful neglect or fraud.” Section 561.501(3)(a), Florida Statutes. In this case, Petitioner relied on the prior settlement agreement in preparing its surcharge reports. That reliance was reasonable.

46. Additionally, Petitioner's auditor confirmed that Respondent accurately reported and remitted the surcharge and that the accuracy was only impacted as a result of Petitioner's unpublished interpretation of a cover charge as consideration for alcoholic beverages.

47. The record clearly reflects that Petitioner is not entitled to use prior actions involving the settlement agreement and Respondent as a basis for imposing a penalty in this proceeding. However, the settlement agreement provides that the underpayment which it addresses could not be used against Respondent in any future actions by the division. Therefore, the earlier under-payment cannot form the basis for imposition of a penalty against Respondent.

48. In this case, any non-compliance by Respondent in this case was based on reasonable cause and in part was due to the earlier settlement agreement. Given these facts, the penalty should be waived.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That the assessment of surcharge principal and interest by Petitioner against Respondent be re-calculated as outlined above and any penalty be waived.

DONE AND ENTERED this 4th day of March, 1998, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.