

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF ALCOHOLIC BEVERAGES)	
AND TOBACCO,)	
)	
Petitioner,)	
)	Case No. 99-2609
vs.)	
)	
DEPAUL, INC., d/b/a COPPER PENNY)	
PUB,)	
)	
Respondent.)	
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RECOMMENDED ORDER

On September 23, 1999, a formal administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Miriam S. Wilkinson, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue in the case is whether the allegations set forth in the Department's Administrative Action dated January 21, 1999, are correct.

PRELIMINARY STATEMENT

By Administrative Action dated January 21, 1999, the Department of Business and Professional Responsibility, Division of Alcoholic Beverages and Tobacco, notified the Respondent, DePaul, Inc., d/b/a Copper Penny Pub, of tax liability of \$70,756.19, including penalty and interest for the period October 1, 1996 through September 30, 1998. The Respondent requested a formal administrative hearing to challenge the alleged liability. The request was forwarded to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits numbered 1-4 admitted into evidence. The Respondent did not appear at the hearing. No transcript of the hearing was filed. The Petitioner filed a Proposed Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, Respondent DePaul, Inc. operated the Copper Penny Pub, 10553 Spring Hill Drive, Spring Hill, Florida (the "licensed premises"). The Respondent held license number 37-00584, Series COP4.

2. In or before September 1998, the Petitioner selected the Respondent for audit based on the Respondent's failure to file required monthly sales reports.

3. By letter dated September 2, 1998, the Petitioner notified the Respondent of the audit. According to the letter, the audit would occur on September 24, 1998, at the licensed premises. The letter stated that the following items would be reviewed:

1. All alcoholic beverage purchase invoices.
2. Petty cash records.
3. Business checkbooks or check stubs.
4. Records of alcoholic beverages used in cooking (if any).
5. Any worksheets you might use to prepare the report.
6. The enclosed Pre-Audit Questionnaire completely filled out.

4. The Pre-Audit Questionnaire allows a licensee to identify package sales. Package sales are those in which alcoholic beverages are sold in the original sealed containers for consumption off the licensed premises. A COP4 series licensee can sell packaged alcoholic beverages for consumption off premises.

5. Package alcohol sales are deducted from total sales during the audit, and are not included in the surcharge tax liability. The Pre-Audit Questionnaire directs the licensee to identify documents that will be used to support the package sales deduction.

6. The Respondent did not complete or submit the Pre-Audit Questionnaire.

7. A licensee must establish entitlement to a package sales deduction. Generally a licensee is required to maintain a log of

package purchases, and support the logged transactions with daily cash register tapes, identified as "Z" tapes.

8. The Respondent produced no package sales records to the Petitioner during the audit. Even though the Respondent did not provide records supporting a package sales deduction, the auditor allowed a two-percent credit for package sales.

9. There are two audit methodologies used in conducting the tax audit, the "sales" method, and the "purchase" method. The choice of audit methodology is left to the licensee.

10. The Respondent selected the purchase method audit. In a purchase method audit, the licensee is required to pay surcharge taxes based on the gallons of alcoholic beverages purchased monthly.

11. Division Tax Auditor Maggie Herrera conducted the audit.

12. According to Ms. Herrera, the licensed premises is a bar located in a strip shopping center. The "package store" is located outside and about thirty feet away from the bar. The "package store" is about the size of a one-car garage.

13. In order to make a package sale, the bartender must leave the bar, walk to the package store, unlock it, retrieve the packaged goods, re-lock the door, and return to the bar.

14. According to Ms. Herrera, the package store contained one-liter bottles of liquor on shelves with prices marked with masking tape on the bottles. The store also contained two cases

of "hip flask" 375-ml size bottles, one case of 50-ml bottles, "a lot" of brandy and dust-covered bottles of mixers.

15. During the several hours Ms. Herrera's was present at the licensed premises, only one package sale (a flask size bottle) was made.

16. Ms. Herrera traveled to the licensed premises on two occasions to meet the Respondent.

17. On the date of the first scheduled meeting, the Respondent did not appear.

18. On the date of the second scheduled meeting, the Respondent presented approximately thirty distributor invoices to Ms. Herrera and told her he was leaving for his home to retrieve the remainder of the records. He left the licensed premises. She waited for several hours. The Respondent did not return and did not contact Ms. Herrera to explain his failure to return.

19. Ms. Herrera preformed an audit of the Respondent, using standard audit procedures. Ms. Herrera utilized monthly surcharge reports filed by the Respondent for the period between January 1995 and December 1997, the distributor sales records for the Respondent's purchases, and records of tax payments made by the Respondent.

20. According the audit, the Respondent owes remaining tax surcharge payments of \$47,695.85, a penalty of \$17,545.74 and interest of \$5,514.60, for a total liability of \$70,756.19.

21. There is no evidence that the audit was done inappropriately, or that the audited tax liability is incorrect.

22. The Respondent was notified of the tax liability by certified letter.

CONCLUSIONS OF LAW

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

24. The Department of Business and Professional Responsibility, Division of Alcoholic Beverages and Tobacco, is responsible for collection of alcoholic beverage surcharge taxes. The failure to accurately and timely remit surcharge taxes is a violation of beverage law. Section 561.501, Florida Statutes; Rule 61A-4.063, Florida Administrative Code.

25. The burden is on the licensee to establish actual sales records and entitlement to package sales deductions. Rule 61A-4.063(4)(c), Florida Administrative Code.

26. In this case, the licensee has failed to produce actual sales records or entitlement to package sales deductions.

27. The uncontroverted evidence establishes that the Petitioner's audit methodology and resulting tax surcharge liability are reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Business and

Professional Responsibility, Division of Alcoholic Beverages and Tobacco, enter a final order imposing a total liability of \$70,756.19, including unpaid tax liability, penalties, and interest.

DONE AND ENTERED this 26th day of October, 1999, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 1999.

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 must be filed with the agency that will issue the Final Order in this case.