

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC)
BEVERAGES AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 02-1113
)
CRAIG D. KEMP AND ELSIE L.)
KEMP, d/b/a CEDAR FOOD MART,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A formal hearing was held pursuant to notice in the above style case by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, on May 21, 2002, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Sherrie Barnes, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

For Respondent: Did not appear and was not represented.

STATEMENT OF THE ISSUE

Whether the Respondents purchased cigarettes and alcoholic beverages from other than licensed distributors contrary to statute.

PRELIMINARY STATEMENT

The Division of Alcoholic Beverages and Tobacco, Petitioner, filed an administrative complaint against the Respondents, and advised them of their right to a formal hearing. The Respondents requested formal hearing, and the Petitioner forwarded the case to the Division of Administrative Hearings to conduct a formal hearing. The case was set for formal hearing on May 21, 2002, and notice was provided to the parties as required by law.

Prior to the commencement of the hearing, the Petitioner moved to have jurisdiction relinquished because the Respondents had failed to respond to requests for admissions setting forth the essential factual elements contained in the administrative complaint. This motion was filed within three working days of the date set for hearing. This motion was denied as untimely.

At the commencement of the hearing, the Petitioner was present and ready to proceed. The Respondents were neither present nor represented. The record reflected that the Respondents had not responded to the initial order. The Respondents' notice was not returned to the Division of Administrative Hearing as undeliverable. After approximately 30 minutes, when the Respondents did not appear, the Petitioner was permitted to proceed.

The Petitioner renewed its motion to relinquish jurisdiction, and it was denied as untimely. The Petitioner called Cynthia Britt and Sabrina Maxwell to testify. The Petitioner moved into evidence the records of the Respondents' licensure under seal of the document custodian as Petitioner's Exhibit A. The Petitioner attempted to introduce cigarettes seized by the investigators from the Respondents; however, they were examined and noted, and counsel was directed to have them remain in the possession of the Petitioner.

The Transcript was filed on June 5, 2002. Neither party filed proposed findings or post hearing briefs.

FINDINGS OF FACT

1. On August 21, 2002, Cynthia Britt and Sabrina Maxwell, agents of the Petitioner, conducted a routine inspection of the Respondents' convenience store. At the beginning of the inspection, Britt and Maxwell identified themselves as agents of the Petitioner and asked for access to the area behind the counter and to see Respondents' license.

2. When Agent Britt moved behind the counter, she saw several packages of cigarettes in the overhead storage display that did not bear the State of Florida tax stamp. Agent Britt seized these packages of cigarettes. Agent Britt identified 55 packages of cigarettes she seized as Petitioner's Composite Exhibit D. The trier of fact examined these cigarettes and

returned the exhibit to the Petitioner to secure them as part of the record.

3. Agent Britt asked Ms. Kemp for invoices for the purchase of their cigarettes. These receipts were produced and they were also seized. Agent Britt identified these receipts as Exhibit E, the receipts for purchases from unlicensed distributors, and Exhibit F, the receipts from licensed distributors.¹

4. The receipts reflected that the Respondents had purchased cigarettes for resale from other retailers and from the Navy Exchange. The cigarettes that did not have tax stamps were purchased from the Navy Exchange.

5. Ms. Kemp indicated to the agents that cigarettes were purchased from these retailers and the Navy Exchange because the wholesalers required that they purchase too many, or charged them so much for small quantities that they could buy them more cheaply at retail.

6. In the process of reviewing the receipts for the purchase of the cigarettes, the Agent Maxwell discovered six receipts for the purchase of alcoholic beverages. She conducted a search of the premises and found beverages corresponding to the brands purchased on the receipts; however, there was no way to ascertain whether these beverages were the actual ones purchased.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case.

8. The Petitioner is charged under statute to regulate the sale of alcoholic beverages and tobacco products in the State of Florida. Pursuant to that authority, it conducts inspections to determine if licensees are complying with the laws governing the sale of these products.

9. Section 210.18, Florida Statutes, provides:

(1) Any person who possesses or transports any unstamped packages of cigarettes upon the public highways, roads, or streets in the state for the purpose of sale; or who sells or offers for sale unstamped packages of cigarettes in violation of the provisions of this part; or who willfully attempts in any manner to evade or defeat any tax imposed by this part, or the payment thereof, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who has been convicted of a violation of any provision of the cigarette tax law and who is thereafter convicted of a further violation of the cigarette tax law is, upon conviction of such further offense, guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any wholesale or retail dealer who fails, neglects, or refuses to comply with, or violates the provisions of, this part or the rules and regulations promulgated by the division under this part is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Any wholesale or retail dealer who has been convicted of a violation of any provision of the cigarette tax law and who is thereafter convicted of a further violation of the cigarette tax law is, upon conviction of such further offense, guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

(4)(a) Any person or corporation that owns or is in possession of any cigarettes upon which a tax is imposed by the cigarette law, or would be imposed if such cigarettes were manufactured in or brought into this state in accordance with the regulatory provisions of the cigarette law, and upon which such tax has not been paid is, in addition to the fines and penalties otherwise provided in the cigarette law, personally liable for the amount of the tax imposed on such cigarettes; and the division may collect such tax from such person or corporation by suit or by restitution if the taxpayer is convicted, found guilty, or pleads nolo contendere or guilty to any crime under this chapter. This paragraph is applicable even if adjudication is withheld.

(b) This subsection does not apply to a manufacturer or distributor licensed under the cigarette law, to a state bonded warehouse, or to a person possessing not in excess of three cartons of such cigarettes, which cigarettes were purchased by such possessor outside the state in accordance with the laws of the place where purchased and brought into this state by such possessor. The burden of proof that such cigarettes were purchased outside the state and in accordance with the laws of the place where purchased shall in all cases be upon the possessor of such cigarettes.

(5)(a) All cigarettes on which taxes are imposed by the cigarette law, or would be imposed if such cigarettes were manufactured in or brought into this state in accordance with the regulatory provisions of such law, which are found in the possession or custody or within the control of any person for the purpose of being sold or removed by him or her in fraud of the cigarette law or with design to evade payment of such taxes may be seized by the division or any supervisor, sheriff, deputy sheriff, or other law enforcement agent and shall be forfeited to the state.

(b) This subsection does not apply to a person possessing not in excess of three cartons of cigarettes, which cigarettes were purchased by such possessor outside the state in accordance with the laws of the place where purchased and brought into this state by such possessor.

(6)(a) Every person, firm, or corporation, other than a licensee under the provisions of this part, who possesses, removes, deposits, or conceals, or aids in the possessing, removing, depositing, or concealing of, any unstamped cigarettes not in excess of 50 cartons is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. In lieu of the penalties provided in those sections, however, the person, firm, or corporation may pay the tax plus a penalty equal to the amount of the tax authorized under s. 210.02 on the unstamped cigarettes.

(b) Every person, firm, or corporation, other than a licensee under the provisions of this part, who possesses, removes, deposits, or conceals, or aids in the possessing, removing, depositing, or concealing of, any unstamped cigarettes in excess of 50 cartons is presumed to have knowledge that they have not been taxed and

is guilty of a felony of the third degree, punishable as provided in s. 755.082, 775.083, or 775.084.

(c) This section does not apply to a person possessing not in excess of three cartons of such cigarettes purchased by such possessor outside the state in accordance with the laws of the place where purchased and brought into this state by such possessor. The burden of proof that such cigarettes were purchased outside the state and in accordance with the laws of the place where purchased shall in all cases be upon the possessor of such cigarettes.

(7) Any sheriff, deputy sheriff, or police officer, upon the seizure of any unstamped cigarettes under this section, shall promptly report such seizure to the division or its representative, together with a description of all such unstamped cigarettes seized, so that the state may be kept informed as to the size and magnitude of the illicit cigarette business.

(8)(a) It is unlawful for any person to conspire with any other person or persons to do any act in violation of the provisions of this part, when any one or more of such persons does or commits any act to effect the object of the conspiracy.

(b) Any person who violates the provisions of this subsection:

1. If the act conspired to be done would constitute a misdemeanor, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

2. If the act conspired to be done would constitute a felony, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

10. The inspectors found packages of cigarettes that did not have the Florida Tax Stamp affixed and receipts for the purchase of cigarettes from the Navy Exchange. Cigarettes sold through the exchange do not bear the Florida Tax Stamp.

11. There were additional receipts for the purchase of cigarettes from other retailers whose cigarettes would have borne the Florida Tax Stamp. Those cigarettes could not be segregated from cigarettes purchased from a licensed wholesaler; however, the evidence supports the conclusion that cigarettes were purchased for resale from other than a distributor, a fact that Ms. Kemp admitted.

12. Section 210.15(1)(h), Florida Statutes, provides:

No retail sales of cigarettes may be made at a location for which a wholesale dealer, distributing agent, or exporter permit has been issued. The excise tax on sales made to any traveling location, such as an itinerant store or industrial caterer, shall be paid into the General Revenue Fund unallocated. Cigarettes may be purchased for retail purposes only from a person holding a wholesale dealer permit. The invoice for the purchase of cigarettes must show the place of business for which the purchase is made and the cigarettes cannot be transferred to any other place of business for the purpose of resale.

13. The Respondents violated Sections 210.15(1)(h) and 210.18, Florida Statutes.

14. Evidence was discovered of similar purchases of alcoholic beverages from retailers for resale.

15. Section 561.14(3), Florida Statutes, provides:

Vendors licensed to sell alcoholic beverages at retail only. No vendor shall purchase or acquire in any manner for the purpose of resale any alcoholic beverages from any person not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law. Purchases of alcoholic beverages by vendors from vendors shall be strictly limited to purchases between members of a pool buying group for which the initial purchase of the alcoholic beverages was ordered by a pool buying agent as a single transaction. No vendor shall be a member of more than one cooperative or pool buying group at any time. No vendor shall import, or engage in the importation of, any alcoholic beverages from places beyond the limits of the state.

16. The statute permits the purchase of beverages by a retailer from a retailer by a pool buying agent. The statute does not define pool buying agent. The Department did not show that Respondents were not "pool buying agents" or purchased the subject beverages through a pool buying agency.

17. There was no evidence that beverages for resale were purchased through the Navy Exchange. All of the beverages had the required tax stamps.

18. The Respondents having violated Sections 210.18 and Section 210.15(h), Florida Statutes, have violated Section 561.29(1)(a), Florida Statutes.

19. The evidence shows a violation of the letter of the law, but not an intent to principally avoid paying the taxes on

six cartons of cigarettes. The Respondents' motivation was to avoid the high costs of purchasing cigarettes and alcoholic beverages in quantity from a wholesale distributor. This is, moreover, a first offense.

RECOMMENDATION

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

RECOMMENDED:

That the Petitioner destroy the cigarettes seized and impose a fine of \$250 on the Respondents for violation of Section 210.18(1), Florida Statutes; and impose a fine of \$250 for violation of Section 210.15(1)(h), Florida Statutes.

It is also recommended that the alleged violations of Section 561.14(3), Florida Statutes, be dismissed.

DONE AND ENTERED this 2nd day of July, 2002, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of July, 2002.

ENDNOTE

1/ The transcript is not clear exactly which receipts were marked E and which were marked F; however, the finding above reflects the best reading of the transcript.

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.