

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF ALCOHOLIC BEVERAGES )  
AND TOBACCO, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-3099  
 )  
WACKOS, INC., d/b/a JAZZCO, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 16, 2002, via video teleconference with hearing sites located in Tallahassee, Florida, and Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sherrie Barnes, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Charles E. Scantling  
Corporate Representative  
Wackos, Inc., d/b/a Jazzco  
3484 Charmont Drive  
Jacksonville, Florida 32277

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent failed to file surcharge tax reports and to remit surcharge tax in the amount of \$55,478.84 for the audit period January 1, 1994, through July 28, 1999; (b) whether Respondent failed to file surcharge tax reports from August 1, 1999, and continuing to the present; (c) whether Respondent failed to pay penalties and interest in the amount of \$29,325.62 for the period beginning August 1, 1999, through December 31, 1999; and, if so, (d) whether Petitioner should revoke Respondent's alcoholic beverage license.

PRELIMINARY STATEMENT

On February 8, 2000, Petitioner Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Petitioner), issued an Administrative Action against Wackos, Inc., d/b/a Jazzco (Respondent). The Administrative Action stated that Petitioner intended to revoke, or otherwise take disciplinary action against Respondent's alcoholic beverage license and to impose authorized administrative fines, investigative costs, and/or late penalties against Respondent.

Count I of the Administrative Action alleged that Respondent had violated Section 561.501, Florida Statutes, by failing to pay \$55,478.84 in surcharge tax for the January 1994 through July 1999 audit period. Count II of the Administrative

Action alleged that Respondent had violated Section 561.501, Florida Statutes, by failing to submit surcharge reports and to pay penalties and interest from August 1999 to the present.

On or about September 5, 2001, Respondent requested an administrative hearing to contest the charges. Petitioner referred Respondent's request to the Division of Administrative Hearings on August 5, 2002.

The undersigned issued a Notice of Hearing by Video Teleconference on August 29, 2002. The notice scheduled the hearing for October 16, 2002.

During the hearing, Petitioner presented the testimony of one witness and offered six exhibits that were accepted into evidence. The undersigned requested Petitioner to file a copy of its exhibits after the hearing. Petitioner complied with that request by filing Petitioner's exhibits with the Division of Administrative Hearings on November 8, 2002.

Petitioner's Exhibit No. P1 was offered pursuant to an ore tenus Motion to Deem Admissions Admitted and to Relinquish Jurisdiction. The motion was based on Respondent's failure to answer Petitioner's First Request for Admissions dated September 16, 2002. The motion is hereby granted as to the request to deem facts admitted but denied as to the request to relinquish jurisdiction.

Respondent presented the testimony of its corporate representative and no other witnesses. Respondent offered no exhibits for admission into evidence.

A Transcript of the proceeding was filed on October 28, 2002.

Petitioner filed a Proposed Recommended Order on November 13, 2002. As of the date of issuance of this Recommended Order, Respondent has not filed proposed findings of fact or conclusions of law.

#### FINDINGS OF FACT

1. Petitioner is the state agency charged with enforcing regulations related to alcoholic beverage licenses in Florida.

2. At all times material to this proceeding, Respondent was licensed to sell alcoholic beverages for consumption on the premises of its establishment in Jacksonville, Florida. Respondent held License No. 26-0058.

3. Alcoholic beverage licensees may elect one of two ways to calculate and pay the required surcharge tax on alcoholic beverages for consumption on the premises. First, the licensee may calculate, report, and pay the tax using the "sales method" based on retail sales records. Second, the licensee may calculate, report, and pay the tax using the "purchase method" based on wholesale records such as invoices from wholesale

distributors. In this case, Respondent elected to calculate, report, and pay its surcharge tax using the "purchase method."

4. Licensees who are authorized to sell alcoholic beverages for consumption on the premises are required to submit surcharge tax reports and to pay the tax for each month by the 15th day of the following month. Respondent submitted reports and paid the tax for the months of January and February 1999. The next time that Respondent submitted a report and paid the tax was for the month of November 1999.

5. For a licensee who uses the "purchase method," Petitioner conducts an audit by comparing the licensee's sales history and payment history. The sales history is based on invoices for the purchase of alcoholic beverages from wholesale distributors who report their sales to each licensee every month. The payment history is based on the monthly surcharge tax reports filed by the licensee.

6. Petitioner conducted a surcharge tax audit of Respondent's business for the period beginning January 1, 1994, and ending July 28, 1999. The audit began on August 1, 1999, and ended on August 17, 1999.

7. The audit established that Respondent owed \$31,809.72 in surcharge tax, penalties, and interest for the audit period. The Final Surcharge Audit Report established that Respondent would owe \$55,478.84 in surcharge tax, penalties, and interest

if Respondent did not pay the former amount within 30 days.  
Respondent did not make the required payment.

8. Petitioner conducted a periodic surcharge tax audit for the period beginning on August 1, 1999, and ending on December 31, 2001. The audit was conducted on April 30, 2002, and ended on June 4, 2002. The second audit established that Respondent owed an additional statutory tax, penalties, and interest in the amount of \$29,325.62.

9. Respondent's corporate representative testified that Respondent stopped filing the surcharge tax reports after the initial audit because there was a discrepancy between Respondent's records (invoices for alcoholic beverages purchased and delivered) and the records that Petitioner relied upon to conduct the audit (wholesale distributors' invoices for alcoholic beverages sold to Respondent). Respondent did not present any documentation to support this testimony, which is not credited. Additionally, there is no competent evidence that Respondent's auditor advised Respondent to stop filing the reports until the discrepancy was resolved.

10. Respondent's corporate representative also testified that Respondent gave away some alcoholic beverages to customers. According to the corporate representative, this occurred when Respondent charged the customers one fee at the door and allowed

them to drink free of charge. Respondent did not present any documentation to support this testimony, which is not credited.

11. Finally, the corporate representative agreed that Respondent owed the assessed surcharge tax. However, he objected to paying the statutorily assessed penalties and interest because they were more than Respondent would have owed if it had paid the tax when it was due. Respondent's argument in this regard is without merit.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

13. Petitioner has the burden of proving by clear and convincing evidence that Respondent has failed to file surcharge tax reports and to pay its surcharge tax, together with penalties and interest, in the total amount of \$84,804.46; and that Respondent's alcoholic beverage license should be revoked. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1979).

14. Section 561.29(1), Florida Statutes, authorizes Petitioner to revoke or suspend an alcoholic beverage license when the licensee violates any laws of any state.

15. Section 561.501(1), Florida Statutes, establishes the surcharge tax on alcoholic beverages sold at retail for consumption on the premises. Section 561.501(2), Florida Statutes, requires vendors to report and remit the tax to Petitioner by the 15th of the month following the month in which the surcharges are imposed. Sections 561.501(2) and 561.501(4), Florida Statutes, set forth the penalties and interest that Petitioner must assess when reports and remittances are not made in a timely manner.

16. Section 561.501(3), Florida Statutes, gives Petitioner authority to compromise a taxpayer's liability for the surcharge tax if there is doubt as to liability for, or collectibility of, the tax. Petitioner may compromise a taxpayer's liability for penalties if the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. Section 561.501(3), Florida Statutes.

17. In this case, Petitioner presented clear and convincing evidence that Respondent had a surcharge tax liability in the amount of \$55,478.84 for the January through July 1999 audit period. Clear and convincing evidence also indicates that Respondent had an additional tax liability in the

amount of \$29,325.62 for the period beginning August 1, 1999, and ending December 31, 2001.

18. On the other hand, Respondent presented no persuasive evidence to cast any doubt as to his liability for the surcharge tax. He also failed to present any mitigating evidence that would compel a reduction of his tax liability. Respondent's noncompliance was not due to reasonable cause. Accordingly, Petitioner should revoke Respondent's license.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Petitioner enter a final order finding that Respondent owes \$84,804.46 in tax, interest, and penalties and revoking its license to sell alcoholic beverages for consumption on the premises.

DONE AND ENTERED this 20th day of November, 2002, in Tallahassee, Leon County, Florida.

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SUZANNE F. HOOD  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of November, 2002.

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.