

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 05-3278
)
BEER: 30 GRILL AND PUB, INC.,)
d/b/a BEER: 30 GRILL AND PUB,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice and in accordance with Section 120.57, Florida Statutes (2005), a final hearing was held in this case on October 31, 2005, in Orlando, Florida, before Fred L. Buckine, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: John W. Aitcheson, pro se
1602 West Airport Boulevard
Sanford, Florida 32773

STATEMENT OF THE ISSUE

Whether Respondent has incurred and failed to pay Petitioner's surcharge tax in the amount of \$12,746.97, including statutory interest and statutory penalty, in violation of Section 561.501, Florida Statutes (2005), and Florida Administrative Code Rule 61A-4.063(8).

PRELIMINARY STATEMENT

By Administrative Compliant dated April 27, 2005, Petitioner alleged that from February 1, 2000, through February 28, 2003,¹ Respondent incurred and failed to pay surcharge tax in the amount of \$7,433.66, plus interest in the amount of \$1,693.85, and a statutory penalty in the amount of \$3,619.46 for total surcharge liability in the amount of \$12,746.97, in violation of Section 561.501, Florida Statutes (2005).

Respondent denied the allegation and requested a final hearing to contest the preliminary action. The cause was referred by Petitioner to the Division of Administrative Hearings on September 12, 2005, with a request that an Administrative Law Judge be assigned to conduct a final hearing.

By Notice of Hearing dated September 20, 2005, a final hearing was scheduled on October 31, 2005, in Orlando, Florida.

At the final hearing, Petitioner presented the testimony of Gerald Russo, Division of Alcoholic Beverages and Tobacco; John

Aitchenson, (transcript of deposition) owner of license number 69-02225, 4-COP; Ms. Cristin Dunbar of Southern Wine and Spirits (wholesale distributor); Alan Schlagter of Wayne Densch; Willie Hodges of National Distributing Company; and Ms. Beverly Hicks of the Schenk Company (wholesale distributor). Petitioner offered Exhibits 1 through 3, all of which were received in evidence. Respondent did not call any witnesses nor submit any exhibits into evidence.

On November 14, 2005, the one-volume Transcript was filed, and, on November 28, 2005, Petitioner filed a Proposed Recommended Order, which was considered in preparation of this Recommended Order. Respondent chose not to file a proposed recommended order.

FINDINGS OF FACTS

Based upon observation of the witnesses' demeanor while testifying, character of the testimony, internal consistency, and recall ability; documentary materials received in evidence; stipulations by the parties; and evidentiary rulings during the proceedings, the following relevant and material facts are determined:

1. Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division), is the state agency charged with the responsibility of administering and enforcing the beverage law in Florida.

Chapters 561 through 568, Florida Statutes (2005). In this disciplinary action, the Division seeks to impose sanctions on the license of Respondent, Beer: 30 Grill & Pub, Inc., d/b/a Beer: 30 Grill & Pub, on the grounds that Respondent failed to pay to the State of Florida the surcharge tax owed for on-premise sales of alcoholic beverages made during the period February 2000 through March 2003. Respondent denied the charge and requested a final hearing to contest this allegation.

2. Respondent is subject to the regulatory jurisdiction of the Division, having been issued beverage license number 69-02225, 4-COP, by the Division. That license allows Respondent to make sales of beer, wine, and liquor for consumption on premises at the restaurant located at 1602 West Airport Boulevard, Sanford, Florida 32771.

3. At all times material to this proceeding, Respondent, by its corporate officer John Aitcheson, applied for and was holding license number 69-02225, 4-COP.

4. In Florida, a licensee must keep records of all purchases and other acquisitions and sales of alcoholic beverages for a period of three years to comply with Section 561.501, Florida Statutes (2005). This requirement applies to any beverage license holder in Florida.

5. In addition to selling alcoholic beverages for on-premise consumption, Respondent also sells packaged alcoholic beverage for off-site consumption.

6. Surcharge tax in the amount of \$0.14 per gallon of beer, \$1.07 per gallon of wine, and \$4.28 per gallon of liquor is assessed for each and every drink sold by Respondent for on-premise consumption, but no such surcharge tax is owed for off-premise package sales.

7. The surcharge tax is paid by the on-premise consumers (patrons) to the state, and the vendor only collects and remits this surcharge to the state. As a reward for their effort to timely report and remit the surcharge to the state, the vendors are allowed to keep monthly, as an allowance, one percent of the total surcharge owed for the alcoholic beverages sold during that month.

8. Respondent testified that he has a very simple method of keeping sales records. He makes handwritten records of each and every off-premise sale and also collects and keeps the distributors' invoices for the purchase of his alcohol supplies.

9. Every month, Respondent subtracts the off-premise sold alcoholic beverages from the total quantity bought as reflected by the invoices from distributors, obtaining through this indirect method the total on-premise sales. Then Respondent multiplies the resulting quantity of alcohol sold on-premise

that month with the applicable tax rate, obtaining thus his surcharge liability for that particular month.

10. Respondent provided the Division with handwritten off-premise sales records. With the exception of the records mentioned above, the Division does not have in the file any other records submitted by Respondent. As well, Respondent did not offer any evidence to substantiate his claim that he indeed provided the Division with any additional records.

11. However, Respondent testified that he neither maintained on-premise sales records, as required by Section 561.501, Florida Statutes (2005), nor was he able at the hearing to offer any proof whatsoever that would corroborate his claim that during the audited period he actually made more off-premise sales than reflected in his handwritten records.

12. To enforce the surcharge tax provisions, the Division performs periodic audits of all licensees who sell alcoholic beverages for on-premise consumption. As part of the audit process, the Auditing Bureau of the Division requests and receives monthly reports from alcohol distributors detailing all the sales made by each distributor to each particular licensee. An exception to the automatic monthly distributor reporting procedure is made for the Schenk Company, a beer distributor, which reports its sales to different vendors only when expressly requested by the Division.

13. After receiving all the sales data concerning a particular vendor from the distributors, the Auditing Bureau uses a computer program to calculate the gross surcharge liability of that particular licensee. Special deductions are then allowed for off-premise sales, employee drinks, etc.

14. The burden is on the holder of the license to demonstrate that such person qualifies for a deduction by providing accurate records of off-premise sales, giving employee drinks, etc. Fla. Admin. Code R. 61A-4.063(4) - 61A-4.063(9).

15. It is each licensee's obligation to accurately report all on-premise monthly sales and to pay the tax collected from customers. There is a penalty and interest surcharge for late reporting and late paying. In addition to the penalty and interest mentioned above, the Division is statutorily required to assess interest and penalties for any underreporting and/or underpayment of the tax due for the period of the audit.

16. If underreporting/underpayment penalties and interest are assessed, they are applied only to the period of the audit. No penalty or interest is applied to any period over the end of the audit.

17. In the present case, the Auditing Bureau calculated Respondent's surcharge liability based on the data provided by the distributors. The audit allowed Respondent deductions for all off-premise sales recorded in Respondent's handwritten off-

premise sales records. At no material time did Respondent request any other deductions nor did he provide any evidence that he would be entitled to any other deductions.

18. It is incumbent to Respondent to carefully keep records of all sales that would entitle him to receive deductions. The Division cannot allow surcharge tax deductions that are not corroborated by any records. Fla. Admin. Code R. 61A-4.063(9). Moreover, Respondent did not even advance any amount of any additional deduction; his position being only that he should have been allowed more deductions because he made more off-premise sales. Absent evidence that more alcoholic beverages were sold off-premise than recorded in the records already taken into consideration by the audit, no additional deductions may be allowed to Respondent. Fla. Admin. Code R. 61A-4.063(9).

19. The audit found that Respondent understated his tax reports and underpaid \$7,433.66 in surcharge tax. For the failure to timely report and remit the entire surcharge tax due for the period February 1, 2000, through February 28, 2003, the Division assessed statutory interest of \$1,693.85 and a statutory penalty of \$3,619.46 for a total surcharge liability of \$12,746.97.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2005).

21. Subsection 561.501(1), Florida Statutes (2005), imposes a surcharge on the sale by licensed vendors of specified volumes of alcoholic beverages "sold at retail for consumption on premises." Subsection 561.501(2), Florida Statutes, requires that a vendor pay the surcharge in the following month to Petitioner and requires the imposition of a penalty for late payments. Subsection 561.501(2), Florida Statutes, requires Petitioner to "assess a late penalty in the amount of 10 percent of the amount due per month, not to exceed a total penalty of 50 percent, in the aggregate, of any unpaid surcharges."

22. Florida Administrative Code Rule 61A-4.063(8) provides:

Each vendor licensed in any manner for consumption on premises shall maintain complete and accurate records on the quantities of all alcoholic beverage purchases, inventories, and sales. Records include purchase invoices, inventory records, receiving records, cash register tapes, computer records generated from automatic dispensing devices, and any other records used in determining sales. In the event a licensee maintains an active consumption-on-premises license but has no surcharge sales for a specific period of

time, the licensee must file monthly surcharge report DBR Form 44-005, RETAIL SURCHARGE REPORT, showing no activity. Records may be maintained on optical or visual storage retrieval systems capable of being viewed, retrieved and reproduced upon request by the division. All records must be maintained for a period of 3 years.

23. Florida Administrative Code Rule 61A-4.063(9)

provides, in relevant part:

In order to determine whether the monthly reports submitted by the vendor are accurate, the division shall use the formula of beginning inventory plus purchases for the period, less ending inventory, less the spillage allowance, to ascertain sales for the period. Adjustments made to this formula in favor of the licensee will be based on factual, substantiated 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.

24. Florida Administrative Code Rule 61A-4.063(4)(c)

provides:

If the vendor chooses the sales method, the vendor will bear the burden of proof that the method used accurately reflects actual sales. If the vendor uses the purchases method, the vendor will bear the burden of proof that purchases are accurately recorded.

25. The Division relies on the independent data from non-interested third-party distributors to calculate the surcharge liability of Respondent for the audited period. Not only was Respondent not able to show in any manner that the data relied

upon by the Division was incorrect, but Respondent also did not even attempt to contact his distributors to verify the amounts of alcohol purchased by Respondent.

26. Respondent's theory that the results of the audit are flawed is based solely on his claim that he sold more alcohol off-premise and that there were more off-premise sales records. Respondent produced no evidence to back-up his claim that the Division did not return or even took his records. In its normal course of business, Respondent would have a receipt for his claimed lost records, as the Division's special agents are required and always issue a receipt for any property seized from licensees.

27. The only off-premise sales records of which the Division has any knowledge are contained in what was marked as Petitioner's Exhibit 2. Those records, broken down by month, are respondent's handwritten records of off-premise sales.²

28. Except for the records incorporated in the Petitioner's Exhibit 2 mentioned above, Respondent did not provide any evidence whatsoever of any his off-premise sales. It was his legal obligation under the beverage law to keep these records to support each claim of surcharge tax deductions.

29. The Division allowed Respondent tax deductions for the entire quantity of alcoholic beverages recorded by Respondent in the off-premise records Respondent provided to the Division.

The Division is without authority to grant additional deductions that are in an unspecified amount and, also, are not backed up by any records.

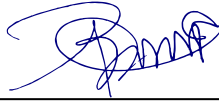
30. Petitioner has therefore shown by clear and convincing evidence the accuracy of its audit establishing that Respondent owes surcharge tax in the amount of \$7,433.66, plus interest of \$1,693.85 and a statutory penalty of \$3,619.46 for a total surcharge liability of \$12,746.97. Because the burden to demonstrate compliance with the surcharge tax reporting and payment requirements is on Respondent, his failure to provide additional off-premise sales records should result in Respondent being found to be liable for the entire surcharge tax as determined by the audit.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, enter a final order finding Respondent liable and ordering payment for the surcharge tax principal of \$7,433.66, plus interest of \$1,693.85 and a statutory penalty of \$3,619.46 for a total surcharge liability of \$12,746.97.

DONE AND ENTERED this 24th day of January, 2006, in
Tallahassee, Leon County, Florida.



FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of January, 2006.

ENDNOTES

1/ This references the specific time period for which Respondent's tax debt obligation was computed by Petitioner. References to Florida Statutes (2005) references the law at the time this action was brought forth for consideration and imposition of tax and interest obligations.

2/ Of note, during his testimony, Respondent alleged an inability to read, asserting, as an example, that he kept his off-premises records of beverages sold by (kegs of beer for instance) marks on a sheet of paper, 1/2 mark = half a keg of beer, 3/4= three-fourths of a keg of beer, etc.

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.