

Mailing Date: NOV 05 2009

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-0705
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-365146
v.	:	
	:	LID - 55910
DAVI, LLC	:	
T/A MIDDLE RIDGE TAVERN	:	
5111 MIDDLE RD.	:	
NEWPORT, PA 17074	:	
	:	
	:	
PERRY COUNTY	:	
LICENSE NO. R-AP-SS-20262	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL BALLARON
LICENSEE: NO APPEARANCE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 1, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against DAVI, LLC, License Number R-AP-SS-20262 (hereinafter "Licensee").

The citation contains three counts.

The first count charges Licensee with violation of Section 437 of the Liquor Code [47 P.S. §4-437] and Section 5.41 of the Liquor Control Board Regulations [40 Pa. Code §5.41] in that on divers occasions from November 1, 2007 through January 5, 2008, Licensee, by its servants, agents or employes, operated the licensed establishment without a valid health permit or license, which expired on October 31, 2007.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 7208 of the Cigarette Tax Act [72 P.S. §7208] in that on August 21, October 1, 2007, January 31, 2008, and divers occasions from March 31, 2007 through February 16, 2008, Licensee, by its servants, agents or employes, engaged in taxable sales or service without a valid license.

The third count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 7101 of the Tax Reform Code of 1971 [72 P.S. §7101] in that Licensee, Davi, LLC, violated the Tax Reform Code of 1971, in that you failed and/or refused to remit to the Commonwealth of Pennsylvania, Department of Revenue, sales tax due and owing for the period March 2007 through March 7, 2008, in the amount of \$6,571.95.

The investigation which gave rise to the citation began on November 20, 2007 and was completed on March 10, 2008; and notice of the violation was sent to Licensee by Certified Mail on March 18, 2008. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on December 10, 2008 at which time Licensee requested a continuance. The hearing was then scheduled for February 5, 2009 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. No one appeared at the hearing (February 5, 2009) on behalf of Licensee. A citation hearing notice was sent to Licensee(s) at its address of record, 5111 Middle Road, Newport, PA 17074 by certified mail, return receipt requested and by first class mail on December 19, 2008. The notice set forth the date and time of the hearing as February 5, 2009 at 2:30 p.m., and the place of hearing as Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNT 1

1. The Eating and Drinking license for the licensed premises, as issued by the Pennsylvania Department of Agriculture, expired on October 31, 2007. Licensee did not possess a current license from November 1, 2007 through January 7, 2008. The Eating and Drinking license was renewed on January 8, 2008 (N.T. 21 and Exhibit C-8).

2. The licensed premises continued to operate during the period from November 1, 2007 up until January 8, 2008, with the exception of November 23, 2007, December 26 and 27, 2007 and January 2 and 3, 2008. (N.T. 20-21 and Exhibit C-9).

COUNT 2

3. Licensee's sales tax license was revoked on August 6, 2007, and as of February 5, 2009 Licensee's sales tax license remained revoked (N.T. 31).

4. On August 21, 2007 Licensee made a taxable sale to an undercover agent of the PA Department of Revenue on the licensed premises (N.T. 43-55).

5. On October 1, 2007 Licensee was open for business and made taxable sales on the licensed premises (N.T. 45-46).

6. On January 31, 2008, Licensee made a taxable sale to an undercover agent of the Bureau on the licensed premises (N.T. 13-14 and Exhibit C-7).

COUNT 3

7. For the period from March of 2007 through March 7, 2008 Licensee owed \$6,571.95 in sales tax to the PA Department of Revenue which had not been paid with monthly returns as required. The amount due as of February of 2009 when penalties and interest are considered along with the tax owed was \$9,405.56 (N.T. 35).

CONCLUSIONS OF LAW:

COUNT 1

The record establishes that Licensee operated, selling alcoholic beverages during the period November 1, 2007 through January 5, 2008 when the licensed premises did not have a valid Eating and Drinking license issued by the PA Department of Agriculture (See Findings No. 1 and 2). Having done so, Licensee clearly violated the sections charged in Count No. 1 of the Amended Citation, and that count of the Amended Citation is, therefore, sustained.

COUNT 2

The record establishes that Licensee made taxable sales on August 21, 2007, October 1, 2007 and January 31, 2008 when Licensee did not possess a valid sales tax license due to the fact that Licensee's sales tax license had been revoked. Such conduct constitutes a summary offense under the Tax Reform Act of 1971, 72 P.S. §7208(c).

Since the aforementioned activity constituted a violation of the criminal laws of the Commonwealth, it is considered "other sufficient cause" as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471]. Licensee is, therefore, subject to the penalty provisions of that section, where the Licensee knew or should have known of the conduct and failed to take any affirmative measures to address the conduct. *PA Liquor Control Board v. TLK*, 544 A.2d 931 (Pa. 1988).

In this case Licensee clearly knew that his sale tax license had been revoked. Further, there is no indication that Licensee had taken any action to prevent the sales in question. Thus, the requirements of *TLK* (supra) have been met.

In light of the above, I conclude that Count No. 2 of the citation is sustained.

COUNT 3

The record establishes that Licensee had failed to pay sales tax with monthly returns as required during the period of March 2007 through March 7, 2008 in the amount of \$6,571.95. Portions of this amount were due with the monthly returns which Licensee was required to file.

Section 7268(b)(1) of the Tax Reform Code of 1971 [72 P.S. §7268(b)(1)] makes it a misdemeanor to fail to pay taxes when due.

I adopt herein by reference the discussion of “other sufficient cause” and “scienter” set forth in Count No. 2. I conclude that “other sufficient cause” applies to this count and that Licensee knew or should have known that sales taxes were not paid as required, and, further that Licensee had taken no steps to prevent this from happening.

Based upon the foregoing, I conclude that Count No. 3 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since March 1, 2006, and has had no prior violations. Licensee is, therefore, entitled to be treated as a first time offender.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

Under the circumstances of this case, the penalty imposed shall be as follows:

- Count 1 – one day suspension
- Count 2 – one day suspension
- Count 3 – two days suspension and continuing thereafter until Licensee submits written certification together with tax clearance establishing that all sales taxes through March 7, 2008 have been paid.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the restaurant liquor license (including all permits) of DAVI, LLC, License No. R-AP-SS-20262 be suspended for a period of four days and further that said license remain suspended until: (1) Licensee has forwarded written certification together with tax clearance establishing that all sales tax through March 7, 2008 has been paid; and (2) said certification has been approved and the suspension terminated by further Order. However, the suspension period is deferred pending reactivation of Licensee's license at which time the suspension period will be fixed by further Order.

IT IS FURTHER ORDERED that the Bureau of Licensing notify the Office of Administrative Law Judge of the reactivation of Licensee's license so an Order may be entered fixing the dates for suspension.

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 26TH day of October, 2009.

A handwritten signature in cursive script, reading "Daniel T. Flaherty, Jr.", written over a horizontal line.

Daniel T. Flaherty, Jr., J.

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MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

CERTIFICATION

_____ hereby certifies that he/she is the _____ of Licensee, DAVI, LLC, t/a Middle Ridge Tavern, 5111 Middle Rd., Newport, PA 17074; and

The attached tax clearance establishes that all sales tax through March 7, 2008 has been paid.

I/We, the above Licensee(s) [or authorized officer(s) thereof], under penalty of law [18 Pa.C.S. §4904], relating to unsworn falsification to authorities] acknowledge that I/We are signing and executing this document as the authorized act and deed of the Licensee. I/We certify that the foregoing is true and correct.

SIGNATURE

DATE

Original to be sent to: Office of Administrative Law Judge, Pennsylvania Liquor Control Board, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg PA 17110-9661.

One copy of certification to be sent to: Thomas Ballaron, Assistant Counsel, Bureau of Liquor Control Enforcement, Pennsylvania State Police, 3655 Vartan Way, Harrisburg, Pennsylvania 17110.