

Mailing Date: FEB 18 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-1511
LIQUOR CONTROL ENFORCEMENT	:	08-1573X
	:	(as consolidated)
	:	
	:	Incident No. W03-365134
v.	:	W03-372983
	:	
	:	LID - 50909
PENN HOTEL & SPORTS BAR	:	
OF HERSHEY, PA, INC.	:	
600 W. CHOCOLATE AVE.	:	
HERSHEY, PA 17033-1940	:	
	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. H-AP-3769	:	

BEFORE: JUDGE FLAHERTY

APPEARANCES:

For Bureau of Enforcement
Andrew Lovette, Esquire

For Licensee
NO APPEARANCE

ADJUDICATION

BACKGROUND:

Citation No. 08-1511

This proceeding arises out of a citation that was issued on July 31, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against PENN HOTEL & SPORTS BAR OF HERSHEY, PA, INC., License Number H-AP-3769 (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 November 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 28, 29, 30, December 1, 2 and 5, 2007, 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 7101 of the Tax Reform Code of 1971 [72 P.S. §7101] in that Licensee failed and/or refused to remit to the Commonwealth of Pennsylvania, Department of Revenue, sales tax due and owing for the period July 30, 2007 through February 28, 2008, in the amount of \$3,796.10.

The third count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 7208(c) of the Tax Reform Code of 1971 [72 P.S. §7208(c)] in that Licensee, by its servants, agents or employes, engaged in taxable sales or service without a valid license on September 12, October 17 and December 24, 2007.

The investigation which gave rise to the citation began on November 20, 2007 and was completed on May 19, 2008; and notice of the violation was sent to Licensee by Certified Mail on June 18, 2008. The notice of violation was received by Licensee.

Citation No. 08-1573X

This proceeding arises out of a citation that was issued on July 31, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against PENN HOTEL & SPORTS BAR OF HERSHEY, PA, INC., License Number H-AP-3769 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 493(26) of the Liquor Code [47 P.S. §4-493(26)] in that Licensee, by its servants, agents or employes, issued checks or drafts dated April 1, 2008, in payment for purchases of malt or brewed beverages, when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

The investigation which gave rise to the citation began on April 15, 2008 and was completed on May 22, 2008; and notice of the violation was sent to Licensee by Certified Mail on June 18, 2008. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on November 12, 2008 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. No one appeared at the hearing on behalf of Licensee. A citation hearing notice was sent to Licensee(s) at its address of record, 600 W. Chocolate Avenue, Hershey, PA 17033-1940 by certified mail, return receipt requested and by first class mail on September 25, 2008. The notice set forth the date and time of the hearing as November 12, 2008 at 9:30 a.m., and the place of hearing as Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661.

At the hearing in this matter, counsel for the Bureau of Enforcement moved to withdraw the date of December 24, 2007 from the charge in Count No. 3 of the citation. The motion was granted (N.T. 6).

Similarly, at hearing, counsel for the Bureau moved to reduce the amount charged in Count No. 2 of the citation from \$3,796.10 to \$1,777.65. The motion was granted (N.T. 6).

In addition, at the hearing, counsel for the Bureau moved to consolidate Citations 08-1511 and 08-1573X under Citation No. 08-1511. This motion was also granted (N.T. 7).

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 NO. 1 (CITATION NO. 08-1511 COUNT 1)

1. The Eating and Drinking license issued by the Pennsylvania Department of Agriculture for the licensed premises expired on October 31, 2007, and was not renewed until December 5, 2007. Licensee did not possess a valid Eating and Drinking license from November 1, 2007 through December 5, 2007 (N.T. 13-14 and Exhibit C-5).

2. On the dates listed in Count No. 1 of Citation No. 08-1511, Licensee was open and operating (N.T. 15-17 and Exhibit C-6 and C-7).

COUNT NO. 2 (CITATION NO. 08-1511 COUNT 2)

3. Licensee submitted returns for Pennsylvania sales tax for sales made each month from July 2007 through January 2008 by the 20th day of the month following the date in which the sales were made as required. However, the sales tax due was not submitted with the returns as required. The total amount due during this period was \$3,600.46. Of this amount \$1,777.65 was remitted by Licensee incorrectly or late (N.T. 30-44 and Exhibits C-9, C-10 and C-11).

COUNT NO. 3 (CITATION NO. 08-1511 COUNT 3)

4. The Sales Tax License held by Licensee was revoked on July 30, 2007 (N.T. 2).
5. On August 1, 2007 an agent of the Pennsylvania Department of Revenue met with the president of Licensee corporation and advised him that the sales tax license for Licensee was revoked and that in order to get it reinstated the sales tax matters at hand needed to be closed (N.T. 24).
6. On August 30, 2007 the sales tax matters had still not been cleared, and the agent made another visit to the licensed premises. At that time, he presented the president of Licensee corporation with a letter ordering that Licensee surrender its sales tax license, which had been revoked (N.T. 24-25 and Exhibit C-9).
7. On September 12, 2007, the sales tax delinquencies had not been resolved. An agent of the Department of Revenue went to the licensed premises and found it open and operating. The kitchen was open and operating and there were patrons at the bar (N.T. 25-26).
8. On October 17, 2007 the agent from the Department of Revenue made another visit to the licensed premises. He found the business open and operating, and at that time, the sales tax delinquencies had still not been resolved (N.T. 26-27).

COUNT NO. 4 (CITATION NO. 08-1573X COUNT 1)

9. On April 1, 2008, Licensee purchased malt or brewed beverages from Wilsbach Distributors, Inc. In payment therefore, Licensee issued its check in the amount of \$257.10. The check was returned by Licensee's bank for insufficient funds (N.T. 50 and Exhibit C-17).
10. On April 1, 2008 Licensee purchased malt or brewed beverages from W & L Sales Co., Inc. In payment therefore, Licensee issued its check in the amount of \$256.52. The check was returned by Licensee's bank for insufficient funds (N.T. 51 and Exhibit C-18).
11. Neither Wilsbach Distributors, Inc. nor W & L Sales Co., Inc. received payment making the aforementioned NSF checks good within ten days (N.T. 53-54).

CONCLUSIONS OF LAW:

Counts 1, 2, 3 and 4 of the citation are **sustained**.

DISCUSSION:

COUNT NO. 1 (CITATION NO. 08-1511 COUNT 1)

The record establishes that during the period from November 1, 2007 through December 5, 2007, Licensee did not have a valid eating and drinking license and that on the dates set forth in Count No. 1, which fell within that period, Licensee was open and operating. It is clear, therefore, that Licensee was in 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].

This count is, therefore, sustained.

COUNT NO. 2 (CITATION NO. 08-1511 COUNT 2)

Licensee's failure to remit sales tax due and owing to the Commonwealth on a timely basis constitutes "other sufficient cause" as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471], thus making Licensee subject to the penalty provisions of that section.

The Supreme Court of Pennsylvania has established that, where the appropriate scienter is present, violation of the criminal laws of the Commonwealth constitute "other sufficient cause" as that term is used in Section 471 of the Liquor Code (supra), and a liquor licensee who has committed such a violation is subject to the penalty provisions of that section. *Pennsylvania Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

The Pennsylvania Tax Reform Code of 1971 provides that sales tax is due and payable on the date the sales tax return is required to be filed [72 P.S. §7221].

Section 217 of the aforementioned Tax Code provides that sales tax returns for tax payers such as Licensee are due on the 20th day of the month for sales tax collected during the preceding month [72 P.S. §7217].

Additionally, Section 268 of the Tax Reform Code [72 P.S. §7268] makes it a misdemeanor to willfully fail to make timely payment of sales tax due.

It is, therefore, clear that failure to remit the amount of sales tax due for a particular month by the 20th day of succeeding month by a taxpayer such as Licensee is a misdemeanor, and therefore constitutes other sufficient cause under Section 471 of the Liquor Code (supra).

In this case the record establishes that, for the period from July 2007 through January of 2008, although Licensee submitted the sales tax returns on time, the tax due was not submitted with the returns (See Finding No. 3). Such failure constitutes a misdemeanor under Section 268 of the Tax Reform Code of 1972 (supra).

There is no doubt that the necessary scienter required by *TLK* (supra) is present since Licensee was obviously aware that tax was due, and did not pay it on time.

On the basis of the foregoing, I conclude that Count No. 2 of the consolidated citation is sustained.

COUNT NO. 3 (CITATION NO. 08-1511 COUNT 3)

Licensee's operation of its business on the dates charged in this count constituted "other sufficient cause" as that term is used in Section 471 of the Liquor Code subjecting Licensee to the penalty provisions of that section.

As indicated in Count 2 above, a violation of a criminal statute by a Pennsylvania liquor licensee subjects that licensee to the penalty provisions of Section 471 of the Liquor Code where the necessary scienter is present (*TLK*, supra).

Section 208(c) of the Tax Reform Code of 1971 [72 P.S. §7208(c)] makes it a summary offense to conduct business subject to sales tax without having the required sales tax license.

The record in this case establishes that Licensee's Sales Tax license was revoked in July of 2007, and Licensee was informed orally and by letter on August 30, 2007 (See Findings 5-6). The record further establishes that despite having been so informed, Licensee continued to engage in taxable business without such a license on the dates charged (See Findings 7-8).

The necessary scienter is also present with respect to this count since Licensee had clearly been informed that it did not have the required license.

Therefore, I conclude that Count No. 3 of the consolidated citation is sustained.

COUNT NO. 4 (CITATION NO. 08-1573X COUNT 1)

The record establishes that on the date charged Licensee purchased malt or brewed beverages from two beer distributors and paid for the purchases with checks which were dishonored by Licensee's bank for insufficient funds. The checks were not made good within ten days (See Findings 9-11).

The record establishes the violation charged and Count No. 4 of the consolidated citation is sustained.

PRIOR RECORD:

Licensee has been licensed since March 26, 2003, and has had two prior violations:

Citation No. 04-0980. Fine \$800.00 and 1 day suspension with thereafter conditions.

1. Not a bona fide hotel in that bedrooms maintained for the accommodation of guests are insufficient in number and/or inadequately equipped. April 29, 2004.
2. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises (machines). April 29, 2004.

Citation No. 06-0564. Fine \$1,100.00 and 1 day suspension.

1. Not a bona fide hotel in that bedrooms maintained for the accommodation of guests are insufficient in number and inadequately equipped. December 27, 2005, January 12 and 19, 2006.
2. Possessed or operated gambling devices or permitted gambling on the licensed premises (sports pools and sports bets). December 27, 2005.

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:

Citation No. 08-1511:

- Count 1 - \$350.00 fine
- Count 2 - \$350.00 fine
- Count 3 - \$500.00 fine

Citation No. 08-1573X

- Count 4 - \$150.00 fine

ORDER

THEREFORE, it is hereby ordered that Licensee PENN HOTEL & SPORTS BAR OF HERSHEY, PA, INC., pay a fine of \$1,350.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

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

Dated this 12th day of February, 2009.



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.

Detach here and submit stub with payment

The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable.** Make check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Citation No. 08-1511 & 08-1573X (cons)
Penn Hotel & Sports Bar of Hershey PA, Inc.