

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Petitioner,

vs.

Case No. 14-3471

THOMPSON AND COMPANY OF TAMPA,
INC., d/b/a THOMPSON CIGARS,

Respondent.

_____ /

RECOMMENDED ORDER

On March 10, 2015, a hearing in this case was held by video teleconferencing at sites in Tampa and Tallahassee, Florida, before D.R. Alexander, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jason D. Borntreger, Esquire
Department of Business and
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For Respondent: Rex D. Ware, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's permit as a retail tobacco dealer should be disciplined for the reasons set forth in an Administrative Complaint issued on May 6, 2014, by the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division).

PRELIMINARY STATEMENT

The Administrative Complaint alleges that Respondent:

- (a) failed to produce records of tobacco products sold to persons or business entities in the State of Idaho, and
- (b) failed to submit a sworn application reflecting that two individuals, not previously disclosed, had a direct or indirect financial interest in the business. Respondent timely requested a formal hearing to contest the charges, and the matter was referred by Petitioner to DOAH for a hearing.

At the final hearing, the Division presented the testimony of two witnesses. Division Exhibits A through I (also referred to in the Transcript as Division Exhibits 1 through 9) were accepted in evidence. Respondent presented one witness. Respondent's Exhibits 1 through 14 were accepted in evidence.

A one-volume Transcript of the hearing has been prepared. The parties submitted proposed recommended orders (PROs) on May 18, 2015, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. Since 1998, Respondent has operated a business under the name of Thompson Cigars at 5401 Hangar Court, Tampa, Florida. It holds retail tobacco permit number 39-05470 Series RTPD (Permit), which authorizes the sale, at a retail level, of tobacco products, including cigarettes, cigars, and other tobacco products. See § 569.003(1)(a), Fla. Stat. It has no disciplinary history with the Division.

2. Although the Permit authorizes the sale of cigarettes, Respondent sells only cigars and other tobacco products. The Division concedes there is no statutory or rule requirement that Respondent maintain records for the sale of cigars and other tobacco products to customers in Florida or out-of-state. Also, unlike cigarettes, there are no taxes on the sale of cigars. Except for periodic audits of purchase records to ensure that Respondent is purchasing products from a licensed wholesaler and paying taxes on those purchases, the Division conducts no other audits of its records.

3. Cigars make up the bulk of Respondent's sales. Ninety-nine percent of sales are made through the internet, mail order catalogs, and telephone to customers in all 50 states. The remaining portion of its business consists of retail sales at two small retail locations in Tampa.

B. Count I

4. In September 2013, the Division was contacted by the Idaho State Tax Commission requesting that the Division obtain records of all sales by Respondent of tobacco products to Idaho residents from July 2008 through September 2013. Specifically, the Idaho State Tax Commission wanted the names, addresses, and permit numbers of all Idaho entities to whom Respondent sold or distributed tobacco products during that five-year time period, including copies of sales invoices for more than 70 individuals. According to a Division special agent, this was the first time the Tampa office had been asked to obtain records on behalf of another state.

5. Chapter 210, Florida Statutes (2014), consists of two parts. Part I relates to taxes on cigarettes while part II relates to taxes on tobacco products other than cigarettes or cigars. Section 210.161, found in part I, authorizes the Division to examine the "books, records, and accounts of any permittee."

6. Relying on section 210.161, and solely for the purpose of assisting the State of Idaho, on October 23, 2013, an agent presented Respondent's Director of Finance and Accounting, Darren Hurd, with a form entitled "Record of Inspection." The form directed Respondent to take the following action:

You are required to provide records of all sales of tobacco products made to persons or business entities in Idaho for the period of July 1, 2008 until the present. The records must be produced to the Division no later than November 1, 2013. Please produce the requested records to C/O Special Agent Robert Jones [at the Tampa District Office].

7. Besides presenting the written form to Mr. Hurd, the agent explained to him why the request was made and the records that he should produce.

8. The Record of Inspection is normally used by the Division in conjunction with a compliance audit. At hearing, the agent acknowledged this was not a compliance audit to determine if Respondent was operating pursuant to the law. Rather, the request was made to assist the State of Idaho.

9. Florida Administrative Code Rule 61A-2.019, entitled Approved Forms, lists more than 200 approved forms used by the Division. The Record of Inspection is not on the list. Respondent contends the form is an agency statement of general applicability that requires the production of records for inspection. Because the form is not listed as an approved form in rule 61A-2.019, Respondent argues that the document is an unadopted rule that cannot be used in this case to compel production of the records. See § 120.57(1)(e), Fla. Stat.

10. Assuming that the Division had authority to examine the records, the use of the form was unnecessary. This is

because there is no statute or rule that prohibits the Division from orally requesting that records be produced for inspection. Therefore, reliance on the form was unnecessary, as is the resolution of the issue of whether the form is an unadopted rule.

11. Upon advice of counsel, Mr. Hurd declined to produce any records citing privacy concerns for Respondent's out-of-state customers and the Division's lack of statutory authority to examine the records. Mr. Hurd noted that the sales records for customers contain personal information, including their name, address, birth date, telephone number, and credit card number.

12. Besides the privacy issue, Mr. Hurd explained that over the last 17 years, the firm has sold tobacco products to literally "millions" of customers throughout the United States. There is no Division requirement that Respondent maintain records of these sales for state auditing purposes, and records are kept on an antiquated tape system that is periodically purged. Mr. Hurd added that even assuming the relevant tapes exist, it would be an "overwhelming" burden and take countless man hours for the small firm to manually restore backup tapes and attempt to extract records of retail sales (out of millions of customers) for a particular time period for one state.

13. Respondent's bottom line is that the records do not exist, and even if they did, the Division lacks authority to request them. On the other hand, the Division maintains that if Respondent keeps records of sales for any purpose, even non-regulatory, it must make a search, no matter how extensive, to determine if the Idaho records exist. If they do, it must produce them; if they do not exist, the exercise in collegiality with Idaho ends.^{1/}

14. When the records were not produced, the Division issued an Administrative Complaint charging Respondent with violating section 210.161. A Division witness admitted that the statute "is kind of vague" on whether the Division can legally demand the records, and to that end, one of the purposes of this proceeding is "to try to determine if" it has that authority. Thus, Count I essentially poses the question of exactly how broad the Division's inspection authority is.

C. Count II

15. While pursuing the records, the agent took steps to verify whether there is an issue regarding "an undisclosed interest in the ownership [of Respondent]," that is, to ascertain whether there are owners of the corporation that have not been disclosed to the Division. This is a routine verification made during enforcement investigations. As

confirmed by the agent at hearing, the focus of this inquiry is on undisclosed corporate owners rather than corporate officers.

16. To make this determination, the agent compared the officers, but not owners, listed in Respondent's 2013 Annual Report filed with the Division of Corporations with those names shown on its 1998 permit application. The Annual Report lists a corporation's officers, directors, and registered agent, but not its owners or shareholders. It named Carlo Franzblau, Alix Franzblau, R.M. Franzblau, Jo Z. Franzblau, and Colm Conway in the Officer/Director Detail section of the report. On the other hand, the 1998 permit application listed as owners Carlo Franzblau, Jo Franzblau, Robert Franzblau, and Alix [D]orr. R.M. Franzblau (listed in the Annual Report) and Robert Franzblau (listed in the permit application) are the same individuals. Alix Franzblau, a female, was married when the 1998 application was filed and used her married name "Dorr." She is now single and uses her maiden name, Franzblau. Mr. Conway has no direct or indirect financial interest in the corporation and is not involved in the decision-making process. He was listed in the Annual Report only because he currently serves as Respondent's vice president-finance and chief financial officer. In sum, Respondent is and always has been a family-owned corporation that disclosed all persons having a direct or indirect financial interest in the business.

17. Count II alleges Respondent violated section 569.003(1) (b) by "fail[ing] to submit to the [Division] a sworn application" stating that Colm Conway and R.M. Franzblau had a direct or indirect financial interest in the corporation. Because it later learned that Robert Franzblau and R.M. Franzblau are the same individuals, the Division now contends that the omission of Mr. Conway's name is the only statutory violation.

18. Section 569.003(1) (b) requires that a corporation applying for a new permit file a sworn application "set[ting] forth the names and addresses of the principal officers of the corporation." Because a new application is not at issue here, and the statute requires disclosure of the principal officers only, section 569.003 cannot support the charge. Assuming arguendo that it does, there has been no change in corporate owners since the 1998 application was filed. Finally, the Division admits that there is no rule or statute that specifically requires a corporate licensee to file the updated information referred to in Count II.^{2/}

CONCLUSIONS OF LAW

19. The Administrative Complaint seeks to impose an administrative penalty on Respondent. In order to prevail, Petitioner has the burden of proof to show, by clear and convincing evidence, that Respondent committed the acts alleged

in the Administrative Complaint. See, e.g., Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

20. Respondent can only be found guilty of violations specifically charged in the Administrative Complaint. See, e.g., Trevisiani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). Although other statutes not cited in the Administrative Complaint may help interpret the offenses actually charged, Respondent cannot be found guilty of violations not specifically included in the charging document. See Dep't of Bus. & Prof'l Reg., DABT v. MJT Restaurant Grp., Case No. 07-4747 (Fla. DOAH Mar. 4, 2008; Fla. DBPR Mar. 31, 2008).

21. In this case, the Administrative Complaint cites only sections 210.161 and 569.003 as being contravened. If there is any doubt concerning the proper interpretation of those statutes, that doubt must be resolved in favor of the licensee. See, e.g., Djokic v. Dep't of Bus. and Prof'l Reg., 875 So. 2d 693, 695 (Fla. 4th DCA 2004). Also, because chapter 210 is a taxing statute, its provisions are strictly construed against the taxing authority. See, e.g., Fla. Hi-Lift v. Dep't of Rev., 571 So. 2d 1364, 1368 (Fla. 1st DCA 1990). This is so here even though the Division is not seeking to impose a tax; rather,

using a taxing statute, it seeks to impose a burden on Respondent to search its records and produce certain documents.

22. The Administrative Complaint consists of two charges: Respondent failed to produce certain records pursuant to a demand by the Division in violation of section 210.161; and Respondent failed to disclose that Colm Conway had a direct or indirect financial interest in the corporation in violation of section 569.003(1)(b).

23. Section 210.161 provides in relevant part as follows:

The division, or any employee designated by it, shall have the power and authority to examine into the business, books, records, and accounts of any permittee and to issue subpoenas to said permittee or any other person from whom information is desired and to take depositions of witnesses within or without the state.

24. Section 210.161 requires nothing of a retail tobacco licensee such as Respondent. It only states the power and authority of the Division, under certain circumstances, to examine records of licensees and to issue subpoenas. In short, there is nothing in section 210.161 which requires anything of Respondent so that a failure to comply would be a violation of the statute. The undersigned is not persuaded that the statute alone can form the basis of a violation against Respondent's permit. See Djokic; Fla. Hi-Lift.

25. Even if section 210.161 could form the basis for a violation, the Division stipulates that Respondent is not required by law to maintain records of retail sales to end consumers in the State of Idaho. If Respondent is not required to maintain records, there is no obligation to produce them. The statute cannot be used to penalize Respondent under the proven facts of this case.

26. The Division's reliance in its PRO on sections 210.09(3), 210.15(1)(g), and 569.004 as authority for inspecting Respondent's records is misplaced. Those sections authorize the Division to inspect the records of a permit holder to determine compliance with the law. Here, the Division admits that the inspection is only for the purpose of retrieving records for another state, and not to ensure Respondent's compliance with regulatory requirements.

27. Finally, the Division relies on section 20.165(9) as authority to inspect Respondent's records. Although not cited in the Administrative Complaint, the statute deals only with the organizational structure and general authority of the Department of Business and Professional Regulation and its various divisions. Among other things, paragraph (9)(a) authorizes the Division "to examine the books and records of licensees." Notably, the last sentence of the paragraph provides that an "authorized employee [of the Division] shall require strict

compliance with the laws of this state relating to the transaction of such business." When read in context with the right to examine records, the statute's purpose is to require licensees to produce records that relate only to the "laws of this state," and not records that Florida does not require nor records that concern dealings with other states.

28. Count II focuses on Respondent's alleged failure to update the names of persons having a direct or indirect financial interest in the corporation. The Division conceded at hearing that there is no statute or rule that requires this specific information. Aside from this lack of authority, the record shows that the ownership of the corporation has not changed since 1998. Therefore, no violation has occurred.

29. In its PRO, the Division argues that section 210.15(3) requires a licensee to update its corporate owners in order to maintain a valid permit. The statute states in part that "Cigarette permits . . . shall be valid only for the persons in whose names [the permit was] issued." While the undersigned accepts what the statute clearly says, Respondent is not charged with violating section 210.15(3), and Mr. Conway is not the permit holder. The persons having a direct or indirect financial interest in the corporation have not changed since the initial permit application was filed.

30. Lacking clear and convincing evidence to sustain them, the charges against Respondent should be dismissed. Given this resolution of the case, Respondent's Motion to Strike Portion of Petitioner's Proposed Recommended Order and Petitioner's Motion for Leave to File Amended Proposed Recommended Order are rendered moot.

RECOMMENDATION

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

RECOMMENDED that the Division of Alcoholic Beverages and Tobacco enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 29th day of May, 2015, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2015.

ENDNOTES

1/ The Idaho State Tax Commission is not without a means to secure the requested relief. In January 2014, or before the Administrative Complaint was issued, it notified the Division agent that it was referring the matter to the Idaho Attorney General for possible enforcement action against the Idaho residents. See Pet'r Ex. B, p. 2.

2/ Permit holders must renew their permits on an annual basis and pay a \$50.00 renewal fee to the Division. Respondent has renewed its permit each year since 1998 on the appropriate permit renewal form. There is no requirement on the one-page form that the licensee update the names of its owners if a change occurs during the preceding year.

In March 2014, Respondent filed an application with the Division for a second retail location in Tampa. The application form requires that the applicant list "all officers, directors, and stockholders." Pursuant to that requirement, Respondent listed the same individuals as are listed on the 2013 Annual Report. When the Administrative Complaint was issued, the Tampa office was unaware that an application for a new retail location had been filed listing the current principal officers.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.