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Azam Mani Khwaga dba Hickory Hollow Wine and Liquor vs. Alcoholic Beverage Commission

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BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

**TENNESSEE ALCOHOLIC BEVERAGE
COMMISSION,**

Petitioner,

v.

**AZAM MANI KHWAGA
d/b/a Hickory Hollow Wine and Liquor
5306 Hickory Hollow Parkway
Antioch, TN 37013-3153
Permit No. 3727,**

Respondent.

DOCKET NO: 33.02123557J

INITIAL ORDER

This contested case was heard in Nashville, Tennessee on January 9, 2014, before Administrative Judge Kim Summers, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Tennessee Alcoholic Beverage Commission (ABC). Joshua Stepp, Staff Attorney, represented the TABC in this matter. The Respondent participated in the hearing on her own behalf.

The issue in this matter is the Respondent's alleged violation of Tenn. Code Ann. § 57-3-404(b) and Tenn. Comp R. & Regs. 0100-03-.13. After consideration of the entire record, it is determined that only the violation of Tenn. Comp R. & Regs. 0100-03-.13 has been proven by a preponderance of the evidence. This determination is based upon the following Findings of Fact and Conclusions of Law.

SUMMARY OF EVIDENCE

Six witnesses testified at the hearing: Mark Hutchens, Chief Law Enforcement Officer for the ABC; Juan Gomez, Special Agent for the ABC; Keith Bell, Director of the ABC; Ginna Winfree, Assistant Director; the Respondent; and the Respondent's husband, Kali Khwaga Sidiqi.

The testimony presented on behalf of the Petitioner included the following – when a business is sold, compliance with Tenn. Code Ann. § 57-3-404(b) requires a paper sale of the existing inventory from the current owner of the retail business back to a wholesaler which will then resell the inventory to the new owner of the business.

The testimony presented on behalf of the Respondent included the following – they were not aware of the paper-sale requirement when they purchased the liquor store and assumed ownership of the existing inventory.

The following seven exhibits were entered into evidence: EXHIBIT 1, Citation Narrative; EXHIBIT 2, picture of items for sale; EXHIBIT 3, Forfeiture Warrant; EXHIBIT 4, Affidavit in Support of Forfeiture Warrant; EXHIBIT 5, Inventory of Search; EXHIBIT 6, Citation; EXHIBIT 7, Invoices.

FINDINGS OF FACT

1. Hickory Hollow Wine and Liquor is a retail business that purchased its inventory from a wholesaler.
2. Kali Khwaga Sidiqi and Azam Mani Khwaga are husband and wife. Together they purchased Hickory Hollow Wine and Liquor in July 2010 for \$140,000, which included the existing inventory.

3. Azam Mani Khwaga is the registered owner of the business, and Kali Khwaga Sidiqi manages the daily operations.

4. A renewal inspection of the business was conducted on June 4, 2013, by Special Agent Juan Gomez of the Tennessee Alcoholic Beverage Commission (TABC).

5. At the time of the inspection, the business was offering for sale 17 bottles of wine at a discount of twenty percent – 12 bottles of Highland Manor and 5 bottles of Glen Ellen Reserve.

6. After Special Agent Juan Gomez asked to review the invoices for these items, Kali Khwaga Sidiqi informed him that the invoices were not available because the items had been included with the purchase of the retail business.

7. These 17 bottles of wine were seized pursuant to a Forfeiture Warrant that was issued on June 5, 2013.

8. The invoices had still not been provided to the TABC at the time Special Agent Gomez wrote his report, which is not dated.

9. The TABC issued a citation on August 22, 2013, for seventeen counts of failure to purchase alcoholic beverages from a licensed wholesaler in violation of Tenn. Code Ann. § 57-3-404(b), at a fine of \$300 per count, for a total fine of \$5100; and one count of failure to maintain three years of records on licensed premises in violation of Tenn. Comp. R. & Regs. 0100-03-.13(2), at \$100 per count.

10. The Respondent made a timely request for a hearing on this citation.

11. It is the practice of the ABC to meet with the Parties to the sale of an existing retail liquor store to explain the paper-sale requirement – that any inventory included in the sale of a retail business must be transferred to the new owner via a wholesaler.

12. The TABC requires the Parties to affirm compliance with the paper-sale requirement to obtain approval of the sale by the TABC and the new owner's license to operate.

13. The paper-sale requirement has not been formalized in a policy document or rule.

14. Based on the invoices produced by the Respondents at the hearing, the 12 bottles of Highland Manor were purchased by the prior owner of Hickory Hollow Wine and Liquor at least three years prior to the inspection, and the 5 bottles of Glen Ellen Reserve were purchased by the Respondents from a wholesaler in April 2013.

APPLICABLE LAW

1. RULE 1360-4-1-.02(3) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies states, in pertinent part:

The "petitioner" in a contested case proceeding is the "moving" party, i.e., the party who has initiated the proceedings. The petitioner usually bears the ultimate burden of proof.

2. Tenn. Code Ann. § 57-3-404(b) provides the following requirements for the purchase of alcoholic beverages –

No retailer shall purchase any alcoholic beverages from anyone other than a licensed wholesaler, nor shall any wholesaler sell any alcoholic beverages to anyone other than a licensed retailer, or a licensed wholesaler; provided, that such alcoholic beverages sold by one (1) wholesaler to another wholesaler shall be transported by common carrier or by vehicle owned or leased and operated by either the consignor wholesaler or the consignee wholesaler.

3. Tenn. Comp. R. & Regs. 0100-03-.13(2) provides the following requirements for the maintenance of business records –

All Licensees Must Keep Records Available Three Years. Each licensee shall keep, for at least three years, all purchase orders, invoices and all other records of all purchases and sales of alcoholic beverages made by such licensee. All such orders, invoices, and all other books and records pertaining to the licensee's operation shall be open for inspection to any authorized representative of the Alcoholic Beverage Commission or Department of Revenue during business hours and failure to make such available shall be deemed cause for revocation of his license.

4. Tenn. Comp. R. & Regs. 0100-05-.04(1)(b) & (2)(e) provides the following with respect to the imposition of fines –

SCHEDULE OF RANGE OF FINES FOR VIOLATIONS BY RETAILERS LICENSED UNDER T.C.A. § 57-3-204.

(1) The following violations may result in fines from a minimum of one hundred dollars (\$100.00) to a maximum seven hundred and fifty dollars.

(b) Failure to maintain proper records as required by Rule 0100-03-.14(2).

(2) The following violations may result in fines from a minimum of two hundred dollars (\$200.00) to a maximum of seven hundred and fifty dollars (\$750.00).

(e) Purchasing alcoholic beverages from other than a licensed wholesaler contrary to T.C.A. §57-3-404(b).

ANALYSIS and CONCLUSIONS OF LAW

1. The TABC does not contend that the inventory of Hickory Hollow Wine and Liquor was not initially purchased directly from a wholesaler as expressly required by Tenn. Code Ann. § 57-3-404(b), but that the paper-sale process was not used to transfer the inventory when the Respondents purchased and became the new owners of the retail business.

2. The paper-sale process is not specified in Tenn. Code Ann. § 57-3-404(b), and the requirement has not been formalized in either a rule or policy document that has been made available to the public.

3. Tenn. Code Ann. § 57-3-404(b) does not expressly require any party, including a wholesaler, to participate in the paper-sale process.

4. Although it is the practice of the TABC to inform business owners of this paper-sale requirement at the time of the sales transaction and obtain a vow of compliance, there is no evidence in the record that the Respondents were made aware of this requirement when they purchased Hickory Hollow Wine and Liquor.

5. In any case, the paper-sale requirement would not apply to the 5 bottles of Glen Ellen Reserve that were purchased by the Respondents from a wholesaler in April 2013

6. The Department **HAS NOT** shown by a preponderance of the evidence that Respondent's actions constituted a violation of Tenn. Code Ann. § 57-3-404(b). The citation for this alleged violation and the resulting \$5100 fine are hereby **OVERTURNED**.

7. Tenn. Comp. R. & Regs. 0100-03-.13(2) requires that invoices be retained for three years and be made available for inspection. No invoice was produced prior to the hearing for the 5 bottles of Glen Ellen Reserve that were purchased by the Respondents in April 2013.

8. The Department **HAS** shown by a preponderance of the evidence that Respondent's actions constituted a violation of Tenn. Comp. R. & Regs. 0100-03-.13(2). The citation for this violation and the resulting \$100 fine are hereby **AFFIRMED**.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the _____ day of _____ 2014.

JKSummers

KIM SUMMERS
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the _____ day of _____ 2014.

J. Richard Collier

J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE