

SOAH DOCKET NO. 458-07-0816

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,

Petitioner

V.

JP INVESTMENTS, LLC
d/b/a THE DRINK
PERMIT/LICENSE NO. MB539198
TRAVIS COUNTY, TEXAS
(TABC CASE NO. 546605),

Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (Staff, TABC) brought this enforcement action against JP Investments, LLC d/b/a The Drink (Respondent)¹, alleging that Respondent is shown on the records of the Comptroller of Public Accounts as being delinquent and/or subject to a final determination of taxes, plus penalties and interest, for the limited sales, excise and use tax, the mixed beverage gross receipts tax, and the franchise tax, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(c)(2) and 11.61(b)(5). Staff recommended that Respondent's permit or license be canceled. The Administrative Law Judge (ALJ) agrees with this recommendation.

I. PROCEDURAL HISTORY

The hearing in this matter convened before ALJ Sharon Cloninger on December 4, 2006, at the State Office of Administrative Hearings, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. W. Michael Cady, Staff Attorney, represented TABC. Respondent did not appear and was not represented at the hearing.

¹ JP Investments LLC, was forfeited or its certificate of authority was revoked by the Office of the Secretary of State on February 11, 2005, for failure to file a franchise tax return and/or pay state franchise tax. On April 28, 2005, Jason Marshall, President of JP Investments LLC, applied for reinstatement and requested that the revocation or forfeiture be set aside. On that same date, Mr. Marshall filed Articles of Amendment with the Secretary of State, changing the name of JP Investments LLC to 325 6th Street LLC. The taxpayer identification number for both entities is 3-20057-8576-4. See Staff Exhibits 6, 7, 8, and 9.

On November 14, 2006, TABC issued its notice of hearing, directed to JP Investments, LLC, d/b/a The Drink, at 325 E. 6th St., Austin, TX 78701-3627, via certified mail, return receipt requested. A copy of the notice was also sent via facsimile to Sandra Ritz, who was Respondent's attorney at the time.² After the taking of evidence – including the testimony of Stephen Hughes, a program specialist for the Enforcement Division of the Comptroller of Public Accounts – Staff moved for a default judgment pursuant to 1 TEX. ADMIN. CODE § 155.55. Because the hearing proceeded on a default basis, Staff's factual allegations contained in the Notice of Hearing are deemed admitted as true; therefore, the ALJ has incorporated those allegations into the findings of fact without further discussion of the evidence. The facts, as deemed admitted, support the revocation.

II. FINDINGS OF FACT

1. JP Investments LLC d/b/a The Drink (Respondent), located at 325 E. 6th St., Austin, Travis County, Texas, is the holder of Mixed Beverage Permit, Mixed Beverage Late Hours License MB-539198.
2. Respondent's taxpayer identification number is 3-20057-8576-4.
3. Respondent was notified by the Texas Secretary of State on February 11, 2005, that the charter was subject to forfeiture for nonpayment of taxes.
4. On April 28, 2005, Respondent brought its franchise tax account current and the charter was reinstated.
5. On April 28, 2005, Respondent filed Articles of Amendment with the Secretary of State changing the entity name to 325 6th Street LLC.
6. 325 6th Street LLC holds the same taxpayer identification number as JP Investments LLC.

² Staff submitted a letter which Ms. Ritz had sent to TABC on November 30, 2006, indicating Mr. Marshall would not be retaining her services in this matter. Staff confirmed that Mr. Marshall is associated with Respondent. Ms. Ritz also stated she had forwarded all the paperwork she had received from TABC to Mr. Marshall. Staff stated the paperwork included the Notice of Hearing. The ALJ found Mr. Marshall to have notice of the hearing. See Staff Exhibits 4, 6, and 7.

7. Respondent filed tax returns with the Comptroller of Public Accounts, but an audit of returns for July 1, 2003 through March 31, 2006, resulted in an adjustment .
8. As of December 4, 2006, Respondent owed in excess of \$15,591.62 in delinquent limited sales, excise, and use tax, including penalty and interest; and in excess of \$1,007,050.97 in delinquent mixed beverage gross receipts tax, including penalty and interest.
9. As of December 4, 2006, Respondent had not paid the taxes, penalties, and interest set out in Finding of Fact No. 8.
10. On July 19, 2006, and thereafter, Respondent has been delinquent, and has been shown on the records of the Comptroller of Public Accounts as being delinquent and/or subject to a final determination of taxes, plus penalties and interest, for the limited sales, excise and use tax, the mixed beverages gross receipts tax, and the franchise tax.
11. On November 14, 2006, TABC timely sent a Notice of Hearing by certified mail, return receipt requested, to Respondent's last known address at 325 E. 6th St., Austin, Texas 78701-3627, and faxed a copy of the notice to Sandra Ritz, attorney, who was representing Respondent at the time.
12. Upon her withdrawal from the case, Ms. Ritz sent Respondent notice of the hearing.
13. Notice of the hearing contained information regarding the date, time, and place of the hearing; the statutes and rules involved; the legal authorities under which the hearing would be held; and a statement of the matters asserted.
14. Notice of the hearing also contained language in 12-point, bold-face type informing Respondent that failure to appear at the hearing could result in the factual allegations being deemed admitted as true, and the relief sought as set out in the hearing notice might be granted by default.
15. The hearing on the merits convened December 4, 2006, before Administrative Law Judge Sharon Cloninger at the State Office of Administrative Hearings, William P. Clements State Office Building, 300 West 15th St., Fourth Floor, Austin, Texas. W. Michael Cady, Staff Attorney, represented TABC. Respondent did not appear in person or through counsel. After the taking of evidence, the hearing concluded and the record closed that same day.
16. The hearing proceeded on a default basis, and the allegations contained in the Notice of Hearing were deemed admitted as true.

III. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5, § 11.61 of the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN. §1.01 *et seq.*
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051, 2001.052 and 2001.054(c); 1 TEX. ADMIN. CODE (TAC) § 155.55; and TEX. ALCO. BEV. CODE ANN. § 11.63.
4. Notice of the hearing was sufficient to allow entry of default judgment pursuant to 1 TAC § 155.55.
5. Based on the above Findings of Fact, Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 11.61 (b)(5) and 11.61(c)(2).
6. Based on the above Findings of Fact and Conclusions of Law, Staff is entitled to a default judgment against Respondent pursuant to 1 TAC § 155.55.
7. Based on the foregoing Findings of Fact and Conclusions of Law, the cancellation of Respondent's permit or license is warranted.

SIGNED January 8, 2007.


SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS