BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9504
File: 20-412086 Reg: 14080817

JAMES G. BARRETT,
Appellant

v.

SELNEKIS TEMAL CORPORATION,
dba Torres Martinez Travel Center
3095 West Highway 86, Salton Sea Beach, CA 92274,
Respondent/Licensee

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 3, 2015
San Diego, CA

ISSUED DECEMBER 7, 2015

Appearances: *Appellant:* James G. Barrett, appearing in propria persona.
Respondent/Licensee: James K. Kawahara as counsel for Selnekis Temal Corporation, doing business as Torres Martinez Travel Center.
Respondent: Heather Cline Hoganson as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from the Department of Alcoholic Beverage Control's[1] dismissal of appellant's accusation against respondent Selnekis Temal Corporation ("Selnekis"). Appellant (also "Barrett") filed an accusation seeking revocation by the Department of Selnekis' license for alleged tax delinquencies and possession on its premises of a slot

[1]The corrected decision of the Department, dated March 13, 2015, is set forth in the appendix, as well as the original decision dated December 30, 2014.

machine.

FACTS AND PROCEDURAL HISTORY

Selnekis has held an off-sale beer and wine license since January 31, 2006, and there is no record of discipline against it since then. Selnekis' stock is owned entirely by the Agua Caliente Band of Cahuilla Indians ("Agua Caliente"), a federally recognized sovereign Indian tribe.[2]

On June 30, 2014, Barrett filed his accusation with the Department alleging that Selnekis was delinquent in sales and use taxes owed to the State of California, which he claimed put its license under an automatic suspension pursuant to Business and Professions Code section 24205. Barrett further claimed this "suspension" made any sales of alcoholic beverages at Selnekis' premises illegal. Additionally, appellant charged that Selnekis violated certain tribal gaming compacts (Exhibit 1.) On July 18, 2014, the accusation was served on Selnekis, who filed in response a notice of defense on or about August 7, 2014. An amendment to the accusation was received by the Department on August 18, 2014 and served on Selnekis on September 5, 2014. A second amendment to the accusation was filed on October 24, 2014. (Exhibits 1 and 4.)

On September 29, 2014, appellant filed a motion to compel discovery. (Exhibit 2.) On or about October 9, 2014, Selnekis submitted its opposition to the motion, as well as a motion to dismiss and a declaration in support of each document. (Exhibits A through C.)

A telephonic hearing was held by the Department to address both motions. Appellant's motion to compel was denied on the basis that it sought information which was not among the categories of discoverable information set forth in Government Code section 11507.6 and, further, sought information that was not relevant. Selnekis' motion to dismiss

[2]Title 18 U.S.C. § 1161 authorizes state regulation of Indian liquor transactions. (*Rice v. Rehner* (1983) 463 U.S. 713, 726 [103 S.Ct. 3291, 77 L.Ed.2d 961].)

was also denied.

In the days leading up to the hearing, Selnekis submitted a motion, along with a supporting declaration, to quash two subpoenas on the ground that appellant failed to tender the requisite witness fees in conjunction with the subpoenas. (Exhibits D through E.) The motion was granted.

An administrative hearing was held on October 28, 2014. At the hearing, documentary evidence was presented and oral testimony was given by appellant James G. Barrett and by Thomas Denham, Chairman of the Gaming Commission. Oral and documentary evidence established that on May 10, 2014, appellant purchased some fuel from the respondent. According to the receipt, no taxes were imposed on this purchase. (Exhibits 3B-3 and 3E-4.) Barrett did not personally pay any taxes in connection with this purchase.

On May 20, 2014, appellant sent a letter to the Board of Equalization asking for copies of any seller permits or certificates of registration issued to the respondent. (Exhibit 3C-5.) On June 10, 2014, the Board of Equalization replied that they were unable to locate any such permits or certificates. (Exhibit 3C-6.) In later conversations with representatives of the Board of Equalization, they reiterated that they were unable to locate any such permits or certificates.

On June 26, 2014, appellant again purchased fuel from Selnekis. The receipt from this purchase does not show whether any taxes were imposed on it. (Exhibits 3B-4 and 3E-5.) Appellant did not personally pay any taxes in connection with this purchase. That same day, appellant purchased some beer inside the licensed premises. The receipt showed that sales tax was imposed on this purchase. (Exhibit 3E-5.)

On October 3, 2014, appellant played two video machines inside the licensed

premises. He placed $1 into each machine, played each machine three times (at $0.25 per play), then cashed out his remaining $0.25. In appellant's opinion, both machines operated in the same manner as traditional slot machines.[3] (Exhibits 3N-1 and 5.)

Thomas Denham, Chairman of the Tribal Gaming Commission for the Agua Caliente, testified that the Commission had approved the installation of class II gaming machines in the licensed premises. Class II machines can colloquially be described as electronic bingo devices. Regardless of the manner of operation, such machines only permit play against other players. A class III machine, in contrast, involves playing against the machine itself. Class III machines require a tribe that has them to do so pursuant to a compact ("agreement") between the State of California and the tribe. Class II machines do not requires a Tribal-State compact. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 592-594 [88 Cal.Rptr.2d 56]; *Flynt v. Cal. Gambling Control Com.* (2002) 104 Cal.App.4th 1125, 1134 [129 Cal.Rptr.2d 167].) The National Indian Gaming Commission (NIGC) maintains lists of class II and class III machines.

Neither Denham nor Barrett compared the machines inside the licensed premises against the NIGC lists, but this Board takes notice that the Agua Caliente tribe has a legislatively ratified compact with the State of California to operate class III gaming devices on its tribal land. (See Tribal State Compact between the State of California and the Agua Caliente Band of Cahuilla Indians, Sept. 14, 1999, §§ 3-4 <http://www.cgcc.ca.gov/documents/compacts/original_compacts/Agua_Caliente.pdf> [as of Nov. 23, 2015], amended Aug. 8, 2006 <http://www.cgcc.ca.gov/documents/

[3]In response to questions from this Board during oral argument, appellant represented that, thought not a member of the California bar, he did graduate from law school.

compacts/amended_compacts/augascanned.pdf> [as of November 23, 2015].)

After the hearing, the Department issued its decision that section 24205 could not, by its own terms, serve as the basis for an accusation, because

> [t]he Department's role under this section is to automatically suspend a taxpayer's license when notified by the agency responsible for collecting such taxes that a taxpayer-licensee is three months delinquent or more. Phrased another way, the Department's role is ministerial — suspend the license when notified by the agency responsible for collecting such taxes that such a delinquency exists. No hearing is held unless the taxpayer-licensee requests one following the imposition of the suspension.

(Conclusions of Law ¶ 6.) The decision further noted that the Board of Equalization alone is qualified to determine tax liability:

> There is nothing in section 24205 which permits the Department to determine whether any tax is owed or calculate the amount of the tax, much less determine that a taxpayer-licensee is delinquent in its obligations. Barrett did not cite any authority permitting him, the Department, or any other individual or entity from making such a determination, and the undersigned has failed to find any. The authority to make such a determination rests solely with the agency responsible for collecting such taxes.

(Conclusions of Law ¶ 7.) Additionally, the decision observed that the automatic suspension provisions of 24205 do not take effect until after the agency responsible for collecting the delinquent taxes notifies the Department, and appellant cited no authority allowing him or any other individual to provide such notice on behalf of the appropriate taxing authority. There was no evidence that the Board of Equalization had made any such determination.

Finally, the decision concluded that the difference between class II and class III gaming machines is complex, and requires an analysis of a machine's programming. Appellant's testimony alone was insufficient to show that respondent had illegally maintained class III machines on its premises.

Barrett then filed this appeal contending, *inter alia*, that (1) the Department does

indeed have the jurisdiction and ability to determine the existence and approximate extent of any tax delinquency; (2) section 24205 does not require notice to either the Department or the licensee of a tax delinquency, but rather mandates *automatic* suspension of a license due to tax delinquency, indicating that respondent has been selling alcohol without a license, and (3) Department Director Gorsuch and other Department employees have committed a misdemeanor under section 25619 by failing to take action against respondent. These issues will be discussed together.

DISCUSSION

The crux of Barrett's case is that Selnekis is more than three months delinquent in payment of its state-mandated use tax; that in light of this delinquency, its license is under an automatic suspension pursuant to Business and Professions Code section 24205; that Selnekis has therefore been selling alcohol without a license; and that Department staff, including Director Timothy Gorsuch, are guilty of a criminal misdemeanor in failing to take action against Selnekis' license.

Barrett filed his accusation against respondent licensee pursuant to Business & Professions Code section 24201, which states:

> Accusations may be made to the Department by any person against any licensee. Accusations shall be in writing and shall state one or more grounds which would authorize the department to suspend or revoke the license or licenses of the licensee against whom the accusation is made.

The burden of proving an accusation lies with the accusing party. (*Daniels v. Dept. of Motor Vehicles* (1983) 33 Cal.3d 532, 536 [189 Cal.Rptr. 512] [suspension of driver's license]; *Ettinger v. Bd. of Med. Quality Assurance* (1982) 135 Cal.App.3d 853, 856 [185 Cal.Rptr. 601] [suspension of doctor's license]; *Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212-213 [108 Cal.Rptr. 71] [revocation of real estate license]; *De Rasmo v. Smith* (1971) 15 Cal.App.3d 601, 610 [93 Cal.Rptr. 289] [revocation of real estate license].)

In its decision, the Department held that it did not have the authority to determine the existence of a tax delinquency:

> 14. The Department is not a master regulatory agency responsible for overseeing other agencies. [Appellant's] case-in-chief included an analysis of the state's authority to collect taxes from the Respondent or, alternately, to have the Respondent collect and remit taxes from its patrons. The extent of the state's taxing authority is an issue to be determined by the agencies responsible for collecting such taxes. Similarly, it is within the purview of those agencies to determine whether any given taxpayer has obtained the permits and certificates required by those agencies.

(Conclusions of Law ¶ 14.) The Board agrees with the Department that it has neither the authority nor the expertise to determine respondent's — or any other licensee's — tax liability.

Barrett counters that the Department regularly makes determinations regarding violations of law outside its area of peculiar expertise:

> In fact this occurs regularly whenever the Department has a hearing on an accusation that alleges that a licensee has allowed prostitution to occur on his premises (Cal. Pen. Code §647); allowed his premises to become a bawdy house (Cal. Pen. Code §316); permitted illegal gambling to occur on his premises (Cal. Pen. Code §330); permitted the illegal sale of controlled substances on his premises (Cal. Health & Safety Code §11000 et seq.); or has behaved in a manner that demonstrates that his moral turpitude precludes him from possessing a license.

(App.Br. at p. 2.)

Barrett's proffered analogies are inapt for two reasons. First and foremost, none of the violations appellant lists require access to confidential tax information. While appellant is correct that the Department can request that information where the taxpayer is a licensee, appellant forgets that *he* is the accusing party, not the Department. Appellant does not have the right to review Selnekis' confidential tax information, nor does he have the authority to force the Department to request it or to provide it to him.

Second, the violations appellant contends are analogous are all relatively simple

determinations of fact, while the California Revenue and Taxation Code is a complex — even, at times, opaque — law that requires application here to nuanced and complicated facts. Navigating it typically requires both an understanding of law *and* a full mastery of business accounting principles — a task that becomes even more complex where, as here, tax law intersects with tribal sovereignty. Determining an actionable tax delinquency against an entity controlled by a sovereign tribe is far beyond the authority and capacity of the Department of Alcoholic Beverage Control; instead, it must defer to an agency with the necessary expertise and jurisdiction.[4]

Moreover, appellant has produced evidence so scant that his case amounts to little more than a nuisance suit. As noted above, appellant bears the burden of proving his accusation. To call his supporting evidence meager is an understatement. Based on the evidence Barrett has supplied, even the most skilled tax attorney would be unable to determine respondent's tax liability, let alone whether respondent is currently delinquent.

Appellant rests his case entirely on two scraps of evidence. The first is three receipts — two for fuel and one for alcohol — none of which show an itemized use tax. The first receipt, dated May 10, 2014, shows a prepaid purchase of $5.00 worth of fuel at a rate of $4.099 per gallon. (Exhibit 3B-4.) The second, dated June 26, 2014, shows a prepaid purchase of $0.76 worth of fuel at a rate of $3.899 per gallon.[5] Neither fuel

[4]Indeed, the Department regularly relies on experts where necessary, even in the hypothetical cases appellant provides. A determination of whether a white powdery substance is cocaine, for example, will ordinarily be left in the hands of an outside law enforcement laboratory with the necessary background in chemical analysis. (See, e.g. *Hussainmaswara* (2014) AB-9402 [chemical analysis of "green leafy substance" conducted by Department of Justice Bureau of Forensic Services].)

[5]The fact that appellant purchased only seventy-six cents of gasoline tends to suggest that he had no legitimate desire to purchase gasoline at all, but was merely

receipts shows any itemized taxes. (Exhibit 3E-5.) The third receipt, also dated June 26, 2014, shows a cash payment of $2.00 for a 24-ounce can of Miller High Life costing $1.69, with an itemized sales tax of $0.17. (*Ibid.*)

Even if we assume for the sake of argument that these receipts evince a total failure on respondent's part to collect use tax for these particular transactions, it does not follow that appellant has proven his case. The receipts alone do not show that respondent failed to *remit* use tax to the state, only that it failed to *itemize* use tax on three isolated receipts.[6] It is entirely possible that use tax was calculated and paid later, or even paid in advance. Moreover, even the most skilled accountant, armed with a ironclad understanding of tribal law, would be unable to determine respondent's tax liability based on these three minimal, isolated transactions. Without calculating respondent's *actual* tax liability and deducting any payments *actually* made, it is impossible to determine a tax delinquency. Mere consumer-end receipts totaling less than $10 simply cannot carry the burden of proof on this point.

Second, appellant argues that respondent has failed to acquire the necessary Certificate of Registration, and therefore could not possibly have remitted use tax to the state. (App.Cl.Br. at p. 8.) His evidence for this is that on May 20, 2014, he sent a letter to the Board of Equalization requesting "a copy of any documents, such as a Sellers Permit or Certificate of Registration" for four entities, including, inter alia, "Torres Martinez Travel attempting to collect evidence, however weak, in preparation for litigation.

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[6]Appellant also contends that the third receipt proves respondent was selling alcoholic beverages while its license was under an automatic suspension, pursuant to section 24205, for alleged tax delinquencies. As discussed *infra*, appellant's two fuel receipts are woefully insufficient to prove the existence or magnitude of a tax delinquency, let alone trigger an automatic license suspension.

Center" and "Selnek-Is Tem-Al Corporation, Torres Martinez Desert Cahuilla Indians." (Exhibit 3C-5.) On June 10, 2014, the Board of Equalization responded with a letter, the final paragraph of which reads:

> In regards to the second portion of your request, based on a search of our electronic database using the information you provided above, we were unable to locate any Seller's Permit or Certificates of Registration issued to any of the businesses listed above.

(Exhibit 3C-6.)

Again, appellant makes an unjustified leap from this supposed evidence to a grand and ominous conclusion. The Board of Equalization's inability to locate a permit in its electronic database does not, however, prove a tax delinquency sufficient to trigger section 24205's conditions for automatic suspension. Appellant does not establish how thorough the search was; depending on the breadth of the database[7] and the attention given to the research task, "unable to locate" does not necessarily mean or imply the same as "does not exist." Indeed, this one sentence from the Board of Equalization staff — drafted, no doubt, without the understanding that appellant intended to base extensive, costly litigation on a single sentence therein — certainly does not prove that Selnekis is or was at any time more than three months delinquent in paying its taxes. Even if we assume, for the sake of argument, that appellant is correct and no permit existed, respondent's tax information is confidential; appellant would not be entitled to know what remedial actions the Board of Equalization has taken and whether respondent complied, and therefore could not prove a delinquency.

Appellant ultimately admits to the woeful deficiency of his offer of proof, and

[7]We do not know, for instance, whether the database includes organizations incorporated outside California — such as corporations owned by sovereign tribes.

addresses it by attempting to shift the burden of proving his accusation onto the Department:

> 82. Appellant argues that because of the statutory restrictions put on agencies such as the Board [of Equalization] and the Department, a substantial amount of confidential tax information concerning the delinquency status of Respondent could not have been produced at the hearing on the Accusation, by Appellant, using any amount of diligence.
>
> 83. However, this does not, and never has, precluded the Department from requesting such information from the Board [of Equalization], or from preventing the Board [of Equalization] from providing them as such.

(App.Br. at p. 18.) Appellant thoroughly misunderstands the significance of his burden of proof. He alone, as accuser, bears the burden of proving the charges. He cannot fulfill that burden by demanding the Department and the Board of Equalization fill the gaps in his case; he cannot simply produce a few crumbs and order the government to construct a cake. If appellant cannot carry his burden of proof, his case must fail.

In a final attempt to excuse his lack of evidence, appellant contends in his closing brief and at hearing that he recently discovered an executive order signed in 1968 by Governor Reagan that, according to appellant, entitles him to subpoena respondent's confidential tax information. Appellant therefore requests a remand so that he can request and present additional evidence.

Appellant misreads both the literal and literate import of the executive order. The order reads:

> EXCHANGE OF INFORMATION
>
> The State Board of Equalization is hereby authorized to exchange information pursuant to a reciprocal agreement with the Department of Alcoholic Beverage Control dated March 4, 1968. Any information, including information of a confidential nature, contained in the files and records of the State Board of Equalization pursuant to Sections 7056, 9355, 10406 and 30455 of the Revenue and Taxation Code and Section 15619 of the Government Code shall be open to inspection, recordation and reproduction

> *by the Department of Alcoholic Beverage Control*. All information and data exchanged *shall be used exclusively for the purpose of the administration of those laws of this state which each agency is charged with administering.* Such information may be made public *to the extent that it is required* in any administrative action or proceeding under the Alcoholic Beverage Control Act and the laws administered by the State Board of Equalization.

(App.Cl.Br., Exhibit 1, at p. 1, emphasis added.) Nothing in this executive order grants appellant access to respondent's confidential tax information. Access is *only* granted between the Department and the Board of Equalization for the sole purpose of administering relevant laws. While that information may be made public in the course of an administrative proceeding, the order limits that disclosure "to the extent that it is required." (*Ibid.*) The order most certainly does not grant a member of the general public the right to demand confidential tax information in order to bolster an accusation against a licensee.

In essence, appellant attempts to construct a skyscraper on a foundation of toothpicks and hot air. He has failed to carry his burden of proving his accusation — and, ironically, wasted taxpayer funds in the process. All other contentions appellant raises on appeal — including the assertion that Director Gorsuch and his staff have committed a criminal act by failing to accept appellant's fuel receipts as proof of a tax delinquency meriting license suspension — are devoid of merit.

ORDER

The decision of the Department is affirmed.[8]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[8]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.