

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011995
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MUTIE ALNAKOUD) Date Issued: July 16, 2018
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OPINION

Representing the Parties:

For Appellant: Mutie Alnakoud
For Respondent: Pam Bergin, Tax Counsel III
Josh Aldrich, Tax Counsel
Jay Keffelew, Business Taxes Specialist II

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 30438, Mutie Alnakoud (appellant) requests the release of tobacco products seized by the Investigations Division of the California Department of Tax and Fee Administration (CDTFA or respondent). Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUE

Whether the tobacco products should be forfeited in accordance with Business and Professions Code section 22974.3(b).¹

FACTUAL FINDINGS

1. Appellant, a sole proprietor, owns and operates Silverwood Gas Mart (Silverwood), located at 12077 State Highway 138, Hesperia, California. The business is a gas station with sales of cigarettes and tobacco products, among other items. Appellant holds a license for retailers of cigarettes and tobacco products for this location. Appellant does not hold a license for wholesalers and distributors of cigarettes and tobacco products. Appellant’s sole proprietorship also operates a business at another location, Victorville

¹ Unless otherwise indicated, all statutory references are to sections of the Business and Professions Code.

Mini Mart (Victorville), located at 15356 La Paz Dr., Suite E, Victorville, California.

Appellant holds a separate license for retailers of cigarettes and tobacco products for this location.

2. On July 28, 2017, inspectors from CDTFA conducted a cigarette and tobacco products inspection at Silverwood. Upon the inspectors' request for invoices covering the past 12 months, appellant's employee, Mann Alsammour, provided all of the invoices that were available at the retail location. CDTFA reconciled the invoices that were dated within the last 12 months of the inspection date with the inventory that was available for sale. Based on the reconciliation, CDTFA determined that the invoices did not support all of the inventory that was available for sale.
3. Mr. Alsammour informed CDTFA that appellant occasionally transfers tobacco products from Victorville to Silverwood; however, appellant concedes that he did not prepare any transfer documents for transfers of tobacco products between the Victorville and Silverwood stores, including the transfer documentation for the product at issue.
4. CDTFA informed appellant that unsupported tobacco products would be considered untaxed and subject to seizure and forfeiture. Appellant subsequently provided additional invoices supporting some of the inventory, and CDTFA seized the remaining unsupported inventory, pursuant to Section 22974.3(b).
5. On July 29, 2017, appellant provided eight additional sales invoices issued by Desert Star Wholesale (Desert Star). CDTFA verified that Desert Star in fact issued the invoices, and that they established the tax-paid status of all but two boxes of Backwood (eight each), and two boxes of Backwood (12 each). On August 2, 2017, CDTFA returned the tax-paid products to appellant and issued an amended receipt reflecting the seizure of the aforementioned four boxes.
6. On September 14, 2017, appellant timely appealed CDTFA's action and requested the release of the seized product. With his appeal, appellant included a new sales receipt, invoice number 70324, issued on June 27, 2017, by Desert Star to Victorville, reflecting the tax-paid purchase of multiple tobacco products, including two boxes of Backwood

(eight each), valued at \$49.98, and two boxes of Backwood (12 each), valued at \$104.97, totaling \$154.95. These seized products remain in dispute in this appeal.

DISCUSSION

Section 22974.3(b) provides that, where a person holds tobacco products for which tax is due but such tax has not been paid, the untaxed tobacco products are subject to seizure and forfeiture. That section further provides that the person bears the burden of proving the applicable taxes have been paid to the Board, or by a purchase invoice that shows that the retailer paid the tax-included purchase price to a licensed distributor, wholesaler, manufacturer, or importer, as described in Section 22978.4. Section 22978.4 defines the information required to be shown on the invoice, and subdivision (a)(4) specifically requires the name, address, and license number of the retailer to whom cigarettes or tobacco products are sold. Section 22972(a) requires a cigarette and tobacco products retailer to have a separate license for each retail location.

Ostensibly, no statute or regulation expressly bans the transfer of cigarette and tobacco products between retail stores owned by the same legal entity. However, by requiring that each retail location possess its own license and that a purchase invoice bear the license number of the retail location to which the product is sold, the statutory scheme effectively precludes an invoice issued for sales to one location from satisfying the substantiation requirement as described in Section 22978.4(a)(4). Nevertheless, CDTFA's written policy creates a safe harbor allowing the transfer of cigarettes and tobacco products between stores if the retailer owns more than one store and the licenses are held by the same legal entity. This policy requires the retailer to maintain legible transfer records and copies of the original purchase invoice at *each location* involved in the transfer. Such transfer records, which must be prepared at the time of transfer, must include the address of each store, the purchase invoice date, the purchase invoice number, the supplier's name and license number on the invoice, a detailed description of the items transferred including type of packaging, flavor and/or style, and the quantity transferred. (California Department of Tax & Fee Administration, Publication 78, "Sales of Cigarettes and Tobacco Products in California," Sept. 2017.)²

² Publication 78 was formerly published by the Board of Equalization and was provided to appellant during the July 28, 2017 inspection.

Here, at the time of the inspection, appellant lacked any purchase invoices for Silverwood showing that appellant paid tax in connection with the four seized boxes of tobacco products, and therefore CDTFB properly seized these products. On appeal, appellant provided invoice number 70324 in support of his assertion that the products were tax paid; however, that invoice was issued by Desert Star to Victorville, reflecting Victorville's separate tobacco retailer's license and address. In other words, invoice 70324 does not pertain to a sale of tobacco products to Silverwood. Therefore, the invoice does not meet the criteria of Section 22978.4(a)(4) to establish that the inventory seized from Silverwood was tax-paid.

Appellant asserts that the invoice establishes that he paid tax in connection with the seized products when he purchased it for his Victorville location, and that he was unaware of any restrictions on transfers between stores belonging to the same entity. However, there is inadequate evidence provided that ties the seized product to the product noted on the invoice. Specifically, there are no contemporaneous transfer logs nor an invoice meeting the criteria of section 22978.4(a)(4), and the invoice provided, standing alone, is inadequate documentation to prove tax paid on the seized product because it may equally likely apply to other similar products purchased at one of the retailer's other locations. Accordingly, appellant has failed to rebut the presumption imposed by section 22974.3(b) that the products at issue should be forfeited.

HOLDING


Appellant has failed to rebut the presumption that the tobacco products at issue should be forfeited in accordance with section 22974.3(b).


DISPOSITION

Respondent's action is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:

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Linda C. Cheng
Administrative Law Judge

DocuSigned by:

CA2E033C0906484...
Douglas Bramhall
Administrative Law Judge