

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 20066299
DSG & GURNAM ENTERPRISES, INC.)	CDTFA Case ID 058-393
dba PALM TREE LIQUOR)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Daler Ghotra, President
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For Respondent:	Courtney Daniels, Tax Counsel III
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For Office of Tax Appeals:	Steven Kim, Tax Counsel
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A. KWEE, Administrative Law Judge: Pursuant to the Cigarette and Tobacco Products Licensing Act of 2003 (Licensing Act)¹ DSG & Gurnam Enterprises, Inc. dba Palm Tree Liquor (appellant) appeals a Notice of Decision dated August 6, 2019 (first decision), as sustained by a second decision dated April 6, 2020 (collectively, decision) issued by respondent California Department of Tax and Fee Administration (CDTFA).² CDTFA’s first decision concluded that appellant violated Business and Professions Code (B&PC) sections 22972³ and 22974, upheld the issuance of a warning, and imposed a \$500 penalty pursuant to B&PC section 22974.5.

¹ The Licensing Act (Division 8.6 of the Business and Professions Code) does not specifically set forth the appeal rights for the violations or penalty at issue. CDTFA promulgated regulations establishing the appeals process and OTA has jurisdiction over an appeal of CDTFA Appeals Bureau’s decision on such a matter. (See Cal. Code Regs., tit. 18, §§ 30103(b)(1), 35057(k).)

² The Licensing Act was previously administered and enforced by the State Board of Equalization (board). On July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to the board; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

³ CDTFA’s second decision itemizes two violations and identifies the second as a violation of B&PC section 22974.5. On appeal, CDTFA clarified that the second violation alleged by CDTFA concerns a violation of B&PC section 22972, and the penalty for such a violation is set forth in section 22974.5.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant violated B&PC section 22972.
2. Whether appellant violated B&PC section 22974.
3. Whether relief of the \$500 penalty is warranted.

FACTUAL FINDINGS

1. Appellant, a California corporation, operates a liquor store in Culver City, California.
2. Appellant has sold cigarette and tobacco products at the liquor store since approximately February 2, 2010.
3. On March 7, 2017, CDTFA conducted an inspection at appellant's liquor store. CDTFA noted that appellant failed to renew its cigarette and tobacco products license for 2017, and that the license on display in appellant's retail store was no longer valid because it had been closed out due to non-renewal.
4. During the March 7, 2017 inspection, a peace officer asked appellant to produce 12 months of cigarette and tobacco product purchase invoices for review. Appellant informed the peace officer that it maintained purchase invoices at a different location and, as such, appellant did not provide the purchase invoices upon request. In response, CDTFA issued appellant a civil citation for violation of B&PC section 22972, which requires a retailer to display a license to engage in the sale of cigarette or tobacco products, and for violation of B&PC section 22974, which requires a retailer to maintain purchase invoices at the retail location for at least one year after the purchase and to make them available upon request.
5. On May 19, 2017, CDTFA issued a Notice of Violation (NOV) to appellant. The NOV gave appellant a warning and imposed a \$500 penalty pursuant to B&PC section 22974.5, for the violations disclosed in the civil citation.⁴

⁴ B&PC section 22974.7 provides that CDTFA may suspend or revoke the license of any retailer who violates any provision of the Licensing Act (which includes the two violations included in the civil citation). In lieu of suspending or revoking appellant's license, CDTFA issued a formal warning pursuant to California Code of Regulations, title 18, section 4603, which authorizes a warning for a first offense. The warning notified appellant that any future violations will result in more severe penalties.

6. On August 6, 2019, CDTFA issued a first decision, sustaining the NOV.
7. In a second decision dated April 6, 2020, CDTFA sustained the first decision and denied the appeal.
8. Appellant timely appealed CDTFA’s decision to the Office of Tax Appeals (OTA).

DISCUSSION

CDTFA is responsible for administering a statewide program to license manufacturers, importers, distributors, wholesalers, and retailers of cigarette and tobacco products pursuant to the Licensing Act. (B&PC, § 22970.2.) The board⁵ has authority to administer and enforce the provisions of the Licensing Act and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the Licensing Act. (B&PC, § 22971.2.) A peace officer, including a CDTFA employee granted limited peace officer status (collectively referred to herein as peace officer), is authorized to enter any place at which cigarette or tobacco products are sold, produced, or stored and to conduct inspections for compliance with the Licensing Act as set forth in B&PC section 22980.

Unless otherwise provided by law, the burden of proof in an appeal before OTA is upon the appellant as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219.) In the case of an appeal under the Sales and Use Tax Law, we have concluded that CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA’s determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) We find that the application of the burden of proof as set forth in *Appeal of Talavera, supra*, also applies to appeals involving notices and decisions issued by CDTFA pursuant to the Licensing Act. (See B&PC, § 22971.5; Cal. Code Regs., tit. 18, §§ 30103(b)(1), 35057(k).)

The record in the instant appeal contains scant evidence. Appellant, in support of its position, submitted an opening brief containing 13 lines of text and no other supporting documentation or other evidence. For CDTFA, the record contains its opening brief and copies of four supporting documents: (1) its first decision, (2) its second decision, (3) the NOV, and

⁵ Although the Licensing Act says “board,” Revenue and Taxation Code section 20 generally provides that “board” means CDTFA with respect to programs administered by CDTFA on and after July 1, 2017, and “board” means OTA with respect to an appeal involving such a matter on an after January 1, 2018.

(4) appellant's initial appeal of the NOV. While a copy of CDTFA's decision(s), by itself, would generally not be enough to satisfy CDTFA's initial burden, in this case, as will be discussed below, the pertinent facts are not disputed by either party. Instead, the appeal primarily involves questions of law. As such, we find that CDTFA met its initial burden.

Issue 1: Whether appellant violated B&PC section 22972.

B&PC section 22972(a) provides that, commencing June 30, 2004, a retailer must have in place and maintain a license to engage in the sale of cigarette or tobacco products. The license is valid for 12 months and must be renewed annually. (B&PC, § 22972(d).) Beginning January 1, 2017, retailers are required to pay an annual fee of \$265 per retail location to renew the license. (B&PC, § 22973(e).) The retailer must conspicuously display the license at the retail location in a manner visible to the public. (B&PC, § 22972(b).)

Here, appellant admits that it did not have a valid license at the time of the inspection. On appeal, appellant contends "this is the first and last time this will happen." Thus, it is undisputed that appellant failed to maintain a license as required by B&PC section 22972. Instead, appellant contends that CDTFA failed to provide "letter and email notices" reminding appellant of the need to renew its license for 2017. Appellant further contends that it renewed its license as soon as CDTFA informed it that the license was closed out for non-renewal. CDTFA does not dispute these contentions. Even if we accept these facts, there is no provision in the law which excuses a violation of B&PC section 22972 based on an inadvertent omission or oversight. Furthermore, appellant contends that it timely renewed its license in the past. Appellant had been in operation for many years prior to the citation and successfully renewed its license on an annual basis in prior years. Thus, appellant had actual knowledge of the annual renewal requirement. Based on the above, we find that appellant violated B&PC section 22972.

Issue 2: Whether appellant violated B&PC section 22974.

A retailer must retain purchase invoices for all cigarette and tobacco products the retailer purchased for a period of four years. (B&PC, § 22974.) The records must be stored at the retail location for at least one year and must be made available upon request during normal business hours for review, inspection, and copying by CDTFA. (*Id.*) Appellant does not dispute that, on the day of the inspection, it informed the peace officer who requested 12 months of appellant's records that appellant stored the records at a different location. On appeal, appellant contends

that it did, in fact, store the records at its retail location as required, but appellant's employee "got flustered and forgot that [appellant] had everything there." Here, B&PC section 22974 requires a retailer to both: (1) maintain the records at the retail location and (2) make the records available upon request for inspection. First, to date, appellant has submitted no documentation to support its contention that it did, in fact, maintain the records at the retail location. Furthermore, even if appellant had maintained the record at its retail location, it is undisputed that appellant failed to make the records available upon request and instead informed the peace officer that the requested records were stored at a different location. As such, we find that appellant violated B&PC section 22974 for failing to make the records available during the inspection.

Issue 3: Whether appellant established a basis for relief of the \$500 penalty.

Any retailer who fails to display a license as required in section 22972 shall be liable for a penalty of \$500. (B&PC, § 22974.5; Cal. Code Regs., tit. 18, § 4607(a).) Fees, fines, and penalties imposed pursuant to the Licensing Act are collected pursuant to Chapter 4 of the Fee Collection Procedures Law.⁶ (B&PC, § 22983.) Neither the Licensing Act, the applicable provisions of the Fee Collection Procedures Law, nor the applicable regulations authorize OTA to grant waivers of penalties, fines, or violations based on reasonable cause or financial hardship.

Here, it is undisputed that appellant failed to renew its license and, as such, did not have a valid license on display at the time of the inspection. Appellant contends that its business suffered "tremendous losses" during 2020 and requests a one-time abatement of the \$500 penalty. Nevertheless, existing law and regulations grant OTA no authority relieve the \$500 penalty for reasonable cause or financial hardship, or to waive the violation of B&PC section 22974 on such a basis. As such, we find that appellant is liable for the \$500 penalty.

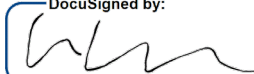
⁶ Part 30 of Division 2 of the Revenue and Taxation Code.

HOLDINGS

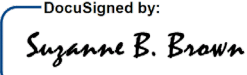
1. Appellant violated B&PC section 22972.
2. Appellant violated B&PC section 22974.
3. Appellant failed to establish a basis for relief of the \$500 penalty.


DISPOSITION

CDTFA’s action is sustained.

DocuSigned by:

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 Andrew J. Kwee
 Administrative Law Judge

We concur:

DocuSigned by:

 47F45ABE89E34D0...
 Suzanne B. Brown
 Administrative Law Judge

DocuSigned by:

 DC88A60D8C3E442...
 Keith T. Long
 Administrative Law Judge

Date Issued: 2/24/2021