

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 20086479
K. BATECH AND W. BATECH)	CDTFA Case ID: 203-103
dba MIKE’S MARKET AND LIQUOR)	
)	
)	

OPINION

Representing the Parties:

For Appellant: K. Batech, appellant-husband

For Respondent: Sunny Paley, Tax Counsel III

For Office of Tax Appeals: Steven Kim, Tax Counsel

A. KWEE, Administrative Law Judge: Pursuant to the Cigarette and Tobacco Products Licensing Act of 2003 (Licensing Act),¹ K. Batech and W. Batech, a husband and wife co-ownership account (appellant) appeals a Notice of Decision dated January 8, 2020 (first decision) as sustained by a decision dated July 13, 2020 (second decision) issued by respondent California Department of Tax and Fee Administration (CDTFA).² The first decision concluded that appellant violated Business and Professions Code (B&PC) sections 22974 and 22974.3, and upheld a 30-day license suspension and imposition of a \$2,000 civil penalty, pursuant to B&PC section 22974.7.

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

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.

ISSUES

1. Whether appellant violated B&PC section 22974.
2. Whether appellant violated B&PC section 22974.3.
3. Whether appellant established a basis to abate the \$2,000 civil penalty.
4. Whether appellant established a basis to reduce the 30-day license suspension.

FACTUAL FINDINGS

1. Appellant, a husband-and-wife co-ownership,³ operate a convenience store doing business as Mike's Market and Liquor in San Bernardino, California.
2. The effective start date of appellant's seller's permit is May 1, 1998.
3. Appellant has sold cigarette and tobacco products at the liquor store since approximately June 30, 2004, the effective start date of its Cigarette and Tobacco Retailer license.

Inspection involving appellant-husband on August 12, 2004

4. On August 12, 2004, CDTFA inspected the premises of J&K Tobacco, Inc., a corporation of which K. Batech (appellant-husband) was president. During the inspection, CDTFA noted that the corporation was a licensed distributor of cigarette and tobacco products and was in possession of 6,240 cartons of unstamped Kenny's brand cigarettes, which are non-MSA⁴ cigarettes. CDTFA informed appellant-husband, in his capacity as president of the corporation, that selling the Kenny's brand cigarettes in California is illegal and punishable by a fine, imprisonment, or both.

³ The business was reported to CDTFA as a husband-and-wife co-ownership. Under certain circumstances, a partnership for income tax purposes does not include a qualified joint venture conducted by a husband and wife who file a joint income tax return (more commonly referred to as a husband-and-wife co-ownership). (See Internal Revenue Code, § 761(f).) For sales and use tax purposes, irrespective of income tax treatment, both a "partnership" and a "joint venture" are considered a separate person. (Revenue and Taxation Code (R&TC), §§ 6005, 6015.)

⁴ The Master Settlement Agreement (MSA) was reached between states and tobacco companies regarding liability for medical costs for smoking-related illnesses. As used here, "non-MSA cigarettes" refers to cigarettes that are not listed in the California Tobacco Directory (CTD). The California Attorney General is required by law to maintain and publish on its website a list of the CTD-approved cigarette and tobacco products made by manufacturers who are in compliance with the MSA or California law, as applicable. (R&TC, § 30165.1(c).) It is illegal to put a state tax stamp on cigarettes unless the manufacturer and the brand family of those products are listed in the CTD. (R&TC, § 30165.1(e)(1).) It is also illegal to sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a manufacturer or brand family not included in the CTD. (R&TC, § 30165.1(e)(2).)

Inspection of appellant on October 11, 2006

5. On October 11, 2006, CDTFA conducted an inspection at appellant's convenience store. During the inspection, a peace officer asked appellant to produce 12 months of cigarette and tobacco products purchase invoices for review. Appellant informed the peace officer that it did not maintain any purchase invoices at the store and, as such, appellant did not provide the purchase invoices upon request.
6. During the October 11, 2006 inspection, CDTFA found 56 cartons of unstamped cigarettes behind the cash register and elsewhere in the store, including 21 cartons of unstamped Kenny's brand cigarettes.
7. CDTFA seized the unstamped cigarettes and issued a criminal citation to appellant-husband for violations of B&PC sections 22974 (failure to maintain purchase invoices), and 22974.3(a)(3) (first seizure of more than 20 packages of unstamped cigarettes).
8. During the criminal proceeding appellant-husband was found guilty of violating B&PC section 22974.3(a)(3).

Inspection of appellant on April 25, 2007

9. On April 25, 2007, CDTFA conducted an inspection of appellant at its business location.
10. During the 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 did not have invoices for tobacco products, and appellant was only able to provide partial invoices for cigarettes. Appellant declined an opportunity to contact its vendors to obtain invoices while the peace officer waited at the retail store.
11. CDTFA issued appellant a civil citation 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.

Inspection involving appellant-husband on April 25, 2007.

12. Later that same day, April 25, 2007, CDTFA conducted an inspection of appellant-husband's corporation, J&K Tobacco, Inc. In connection with this inspection, CDTFA seized 5,996 unstamped cartons of Kenny's brand cigarettes, and 242 stamped cartons of Kenny's brand cigarettes, because Kenny's brand cigarettes are non-MSA cigarettes.

13. In connection with the inspection of his corporation, appellant-husband was charged with six crimes, and the matter was heard in San Bernardino Superior Court. Pursuant to a plea bargain, appellant-husband pleaded guilty to the unlawful possession or sale of unstamped cigarettes.

Inspection of appellant on March 4, 2010

14. On March 4, 2010, CDTFA conducted an inspection of appellant at its business location.
15. During the inspection, a peace officer asked appellant-husband to produce 12 months of cigarette and tobacco product purchase invoices for review. Appellant-husband provided partial records and refused to provide additional records.⁵
16. In connection with this inspection, CDTFA seized 97 packs of cigars, 3 boxes of tobacco products, and 39 pouches of Bugler Tobacco.
17. During the inspection, CDTFA issued a criminal citation to appellant-husband for violations disclosed during the inspection.
18. On March 16, 2010, appellant-husband visited a CDTFA office to provide purchase invoices and requested the return of the seized property. The purchase invoices contained typographical errors, and CDTFA informed appellant that it would need to investigate the documents.
19. On March 18, 2010, CDTFA met with the alleged issuer of the purchase invoices, who denied issuing the purchase invoices. Thereafter, CDTFA determined that the purchase invoices provided by appellant were forged.
20. The criminal matter was heard in San Bernardino Superior Court. Pursuant to a plea bargain, appellant-husband pleaded guilty to unlawfully failing to retain purchase invoices as required by B&PC section 22974.

Inspection of appellant on May 26, 2017

21. On May 26, 2017, the San Bernardino County Sheriff's Office, CDTFA, and the California Department of Alcoholic Beverage Control conducted a multi-agency inspection of appellant at its business location.

⁵ Appellant-husband recognized the CDTFA peace officer from a prior inspection. Thereafter, the San Bernardino Police Department dispatched a uniformed peace officer to assist with the inspection.

22. During the inspection, a peace officer asked appellant-husband to produce 12 months of cigarette and tobacco product purchase invoices for review. Some of the alleged purchase invoices that appellant provided were handwritten and did not contain the buyer's contact information, the seller's contact information, or cigarette and tobacco product license information, as required by law.
23. CDTFA asked the employee at appellant's retail location to identify whose signature appeared on the handwritten purchase invoices that were allegedly issued to appellant. Appellant's store employee identified the signature as belonging to appellant-husband.
24. In connection with the inspection, CDTFA seized four cartons, each containing 10 unstamped packages of cigarettes.
25. During the inspection, CDTFA issued a criminal citation to appellant-husband 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, and for violation of B&PC section 22974.3(a)(3), which makes the possession of unstamped cigarette or tobacco products by a retailer unlawful.
26. On July 25, 2017, the San Bernardino District Attorney's office informed CDTFA that it was declining to pursue criminal charges against appellant-husband, and the matter was referred to CDTFA to pursue as a civil matter.
27. On October 27, 2017, CDTFA converted the case to a civil citation matter.
28. On December 1, 2017, CDTFA issued a Notice of Violation (NOV) to appellant for the two violations, imposed a 30-day license suspension pursuant to B&PC section 22974.7 for possession of unstamped packages of cigarettes, and imposed a \$2,000 fine pursuant to B&PC section 22974.7 for failing to maintain purchase invoices.
29. Appellant timely appealed the NOV in its entirety.
30. On January 8, 2020, CDTFA issued its first decision, sustaining the NOV.
31. On July 13, 2020, CDTFA issued its second decision, which sustained its first decision.
32. 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.) CDTFA 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.) During an appeal before CDTFA involving a Licensing Act violation or penalty, the taxpayer has the burden of proof as to the grounds for dismissal of any violation or the reduction of any penalties. (See Cal. Code Regs., tit. 18, § 35057(d).) We find that this standard also applies in an appeal before OTA. (See B&PC, § 22971.5; Cal. Code Regs., tit. 18, §§ 30103(b)(1), 30219, 35057(k).)

We note that appellant, in support of its position, submitted a one-page opening brief dated August 4, 2020, a copy of CDTFA's second decision, and no other documentation. In absence of documentary evidence from appellant, our findings are based on the evidence submitted by CDTFA.

Issue 1: 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. (*Ibid.*) CDTFA submitted photographs of the handwritten "purchase invoices" at issue. The invoices do not contain the required information set forth in B&PC section 22978.4, which lists the specific invoice requirements, and, for that matter, do not even appear to be purchase invoices.⁶

Appellant does not contend that it maintained or provided valid purchase invoices for the products that CDTFA seized. Furthermore, appellant produced no evidence or argument to rebut

⁶ B&PC section 22978.4(a) requires a distributor or wholesaler to include, among other items, the following information on each purchase invoice: the name, address, and telephone number of the distributor or wholesaler, the license number of the wholesaler, the amount of excise taxes due on the sale of the cigarette and tobacco products, the name, address, and license number of the retailer to whom the products are sold, and the date of sale. None of these items are included. Instead, appellant's alleged "purchase invoices" are merely summaries containing four handwritten items: (1) the name of the product; (2) a number for each product; (3) a price; and (4) the total after multiplying the number of products times the price.

the photographs of unstamped cigarette packages submitted by CDTFA. Finally, even if appellant had maintained valid purchase invoices at its retail location, it is undisputed that appellant failed to make the records available upon request and instead produced handwritten summary documents. As such, we find that appellant violated B&PC section 22974 for failing to provide valid purchase invoices upon request during the May 26, 2017 inspection.

Issue 2: Whether appellant violated B&PC section 22974.3(a)(3).

The Licensing Act makes it unlawful for a retailer to possess, store, own, or make a retail sale of an unstamped package of cigarettes and authorizes CDTFA or any law enforcement agency to seize any unstamped packages of cigarettes that it discovers at a retailer's location, or any other location. (B&PC, § 22974.3(a).) A first violation (within 5 years) involving seizure of a total quantity of 20 packages of unstamped cigarettes or more is a misdemeanor punishable by a fine of \$2,000, or imprisonment not to exceed one year, or both. (B&PC, § 22974.3(a)(3).)

Here, CDTFA contends that appellant violated B&PC section 22974.3(a)(3). Thus, we must determine whether this was appellant's first seizure of 20 or more packages of unstamped cigarettes within the last five years. CDTFA submitted photographs of the cigarette products that it seized. The seized cigarette packages were all unstamped. CDTFA's photographs demonstrate that CDTFA seized more than 20 packages of unstamped cigarettes and, on appeal, appellant offers no argument or evidence to refute this evidence. To the contrary, CDTFA's first decision included a statement from appellant's representative on behalf of appellant, made during the citation conference, wherein appellant-husband admitted that he purchased these unstamped cigarettes from his neighbor. Appellant has two violations involving the seizure of more than 20 packages of unstamped cigarettes. First, following the criminal citation issued during the October 11, 2006 inspection, appellant pleaded guilty to violating B&PC section 22974.3(a)(3): a first seizure of more than 20 packages of unstamped cigarettes within 5 years. Second, in the instant appeal, CDTFA seized 20 or more packages of unstamped cigarettes on May 26, 2017. The prior seizure involving more than 20 packages of cigarettes was more than 5 years prior to May 26, 2017. Thus, this was appellant's first seizure within the prior five years. Therefore, we find appellant violated B&PC section 22974.3(a)(3).

Issue 3: Whether appellant established a basis to abate the \$2,000 civil penalty.

The Licensing Act authorizes the imposition of a civil penalty in an amount not to exceed the greater of \$5,000 or five times the retail value of the seized cigarettes in the case of a second or subsequent offense of the Licensing Act. (B&PC, § 22974.7(b).) A first violation of B&PC section 22974 shall result in the issuance of a warning notice. (Cal. Code Regs., tit. 18, § 4603(a)(1).) A second or subsequent violation of that section shall result in both a 30-day suspension or revocation and a fine. (Cal. Code Regs., tit. 18, § 4603(c).) The amount of the fine is \$1,000 for a second violation, and each subsequent offense shall increase the fine by an increment of \$1,000, up to a maximum fine of \$5,000. (Cal. Code Regs., tit. 18, § 4607(a)(2).) In the case of multiple violations, the violation punishable by the most severe penalty is used for purposes of calculating the amount of the penalty. (Cal. Code Regs., tit. 18, § 4603(e).)

Here, appellant has three violations of B&PC section 22974. First, during the inspection on April 25, 2007, CDTFA issued appellant-husband a civil citation for violating B&PC section 22974. Second, for the criminal citation issued during the inspection on March 4, 2010, appellant pleaded guilty to violating B&PC section 22974. Third, for the May 26, 2017 inspection, we found that appellant violated B&PC section 22974. As such, the amount of the penalty is \$2,000. (Cal. Code Regs., tit. 18, § 4607(b)(2)(A).) It is undisputed that, in light of the violations that occurred, this is the most severe penalty.⁷ Aside from contending that CDTFA's conclusions are too stringent, appellant does not specifically contend error with the penalty amount. The law provides OTA no authority to make discretionary adjustments to the penalty for violating B&PC section 22974. As such, we find that appellant failed to establish a basis to reduce the \$2,000 civil penalty.

Issue 4: Whether appellant established a basis to reduce the 30-day license suspension.

CDTFA may revoke or suspend the license of a retailer who violates any provision of the Licensing Act. (B&PC, § 22974.7.) The Licensing Act does not set forth minimum or maximum suspension periods for a violation of B&PC section 22974. CDTFA has promulgated

⁷ CDTFA's regulations provide that the fine for violating B&PC section 22974.3 is determined in accordance with California Code of Regulations, title 18, (Regulation) section 4607. (Cal. Code Regs., tit. 18, § 4603(d)(4).) It is undisputed that Regulation section 4607 does not specify a fine for violating B&PC section 22974.3(a)(3) [involving a first violation]. A second violation (within 5 years) is punishable by a fine of not less than \$5,000 and not more than \$50,000, imprisonment not to exceed one year, or both. (B&PC, § 22974.3(a)(4).)

regulations which generally use a two-prong approach to determine the suspension period to impose for certain violations of the Licensing Act. First, certain violations trigger a specified suspension period. (See Cal. Code Regs., tit. 18, § 4603.) Second, the specified suspension period may be adjusted based on mitigating circumstances. (See Cal. Code Regs., tit. 18, §§ 4603(f), 4606.) The suspension imposed is the specified suspension period, as reduced for mitigating circumstances (if any). (*Ibid.*)

Specified Suspension Period

A second or subsequent violation of B&PC section 22974 shall result in both a 30-day suspension or revocation and a fine. (Cal. Code Regs., tit. 18, § 4603(c).) The penalty for a violation of B&PC section 22974.3(d)(3), a first seizure of 20 packages of cigarettes or more, shall result in a 20-day suspension. (Cal. Code Regs., tit. 18, § 4603(d)(3).) In the case of multiple violations, the violation punishable by the most severe penalty is used. (Cal. Code Regs., tit. 18, § 4603(e).)

Appellant contends that CDTFA’s decision to impose a 30-day suspension “is in error and too stringent.” CDTFA contends that this is appellant’s second or later offense involving B&PC section 22974 and, as such, the penalty is a 30-day suspension and a fine. (Cal. Code Regs., tit. 18, § 4603(c).)

CDTFA is required by law to follow its own duly promulgated regulations and “must be faithful to its own announced regulations.” (*Newco Leasing, Inc. v. State Bd. of Equalization* (1983) 143 Cal.App.3d 120, 124.) CDTFA’s regulations set forth a 30-day suspension for a second or subsequent violation of B&PC section 22974, which is the most severe penalty in the case of multiple violations. Thus, we find that imposition of the 30-day suspension is not in error.

Mitigating Circumstances

A reduction in the length of a specified suspension period may be warranted if mitigating circumstances are present. (Cal. Code Regs., tit. 18, § 4603(f).) If any suspension period is reduced, the redetermined period of suspension shall be zero days, five days, 10 days, or 20 days. (*Ibid.*) OTA may consider any mitigating factors for purposes of reducing the suspension period including, but not limited: (1) how recently the licensee purchased the business or began operations and acquired inventory of cigarettes and/or tobacco products; (2) the amount of

cigarettes without proper stamps in relation to the size of licensee's overall inventory; (3) the size of the licensee's cigarette and/or tobacco product business; (4) the retail value of any cigarettes or tobacco products seized; and (5) an absence of prior seizures. (Cal. Code Regs., tit. 18, § 4606.)

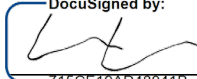
On appeal to OTA, appellant only raises one mitigating circumstance for our consideration: that appellant would suffer a severe financial impact if the business were unable to sell cigarette or tobacco products for 30 days. However, we do not find financial impacts to be a mitigating circumstance for purposes of reducing the suspension period. License suspensions are inherently punitive in nature. It is a privilege to be able to sell cigarette and tobacco products in this state. The license grants a retailer this privilege. When a retailer violates the law, this privilege may be suspended or revoked. For OTA to find that the punishment is also a mitigating circumstance would defeat the purpose of the punishment. Furthermore, although the retail value of the products seized is small (identified as \$279.60 in the Notice of Seizure of Forfeiture), appellant must have had actual knowledge that it was illegal to purchase and resell untaxed cigarettes from appellant-husband's neighbor because appellant has been in business operations a long time and has a history of criminal and civil violations for this and similar offenses involving cigarette and tobacco products, and for a related business operated by appellant-husband. Accordingly, we find no basis to reduce the length of the 30-day suspension period.

HOLDINGS


1. Appellant violated B&PC section 22974.
2. Appellant violated B&PC section 22974.3(a)(3).
3. Appellant failed to establish a basis to abate the \$2,000 civil penalty.
4. Appellant failed to establish a basis to reduce the 30-day license suspension.


DISPOSITION

CDTFA’s action is sustained.

DocuSigned by:

 715CE19AD48041B...
 Andrew J. Kwee
 Administrative Law Judge

We concur:

DocuSigned by:

 CB1F7DA37831416...
 Josh Lambert
 Administrative Law Judge

DocuSigned by:

 0CC6C6ACCC6A44D...
 Teresa A. Stanley
 Administrative Law Judge

Date Issued: 4/7/2021