

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 21017141
)	CDTFA Case ID 124-048
THE PARTNERSHIP OF M. SMITH AND)	
C. CHAVEZ)	
dba The Hookup)	

OPINION

Representing the Parties:

For Appellant:	M. Smith, Partner C. Chavez, Partner
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For Respondent:	Sunny Paley, Tax Counsel III
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For Office of Tax Appeals:	Steven Kim, Tax Counsel III
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T. STANLEY, Administrative Law Judge: Pursuant to the Cigarette and Tobacco Products Licensing Act of 2003 (Licensing Act),¹ the Partnership of M. Smith and C. Chavez, doing business as The Hookup, (appellant) appeals a decision issued by respondent, California Department of Tax and Fee Administration (CDTFA),² denying appellant’s appeal of a Notice of Decision (NOD) dated April 14, 2020. The NOD partially upheld a Notice of Violation (NOV) dated March 30, 2018, which imposed a 30-day license suspension and a \$1,000 fine.³

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

¹ The Cigarette and Tobacco Products Licensing Act of 2003 (Division 8.6 of the Business and Professions Code), which imposes the violation and fine at issue, does not specifically set forth appeal rights to the Office of Tax Appeals (OTA). 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), 35065(e)(2).)

² The Cigarette and Tobacco Products Licensing Act was formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE 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 BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

³ Effective March 29, 2019, California Code of Regulations, title 18, section 35057(k) provides that a taxpayer may appeal to OTA an Appeals Bureau’s decision concerning a warning notice or NOV.

ISSUE

Is relief of the \$1,000 fine for violation of Business & Professions Code (B&PC) section 22974 warranted?⁴

FACTUAL FINDINGS

1. Appellant is a partnership between M. Smith and C. Chavez, operating a bar doing business as The Hookup. Appellant holds a valid seller's permit and Cigarette and Tobacco Products Retailer License. Appellant sells cigarettes from a vending machine located inside the business.
2. On January 29, 2018, CDTFA conducted an inspection of appellant's business and requested appellant's cigarette and tobacco products purchase invoices for the preceding 12 months. Appellant's employee could not produce the purchase invoices. CDTFA called C. Chavez, who informed CDTFA that he had access to the records but was out of town.
3. CDTFA viewed the cigarettes through the vending machine glass and noted that the cigarettes appeared to have proper indicia indicating tax had been paid. CDTFA cited appellant for violating B&PC section 22974, for failure to retain one year of purchase invoices at the retail location, and to produce them upon request during business hours. Subsequently, CDTFA issued appellant the March 30, 2018 NOV for the violation.
4. Appellant was previously inspected on April 6, 2017, when it was issued a warning notice for a violation of B&PC section 22974.
5. CDTFA held a citation conference with appellant, and on April 14, 2020, issued a decision upholding the violation. Because it was appellant's second violation, CDTFA imposed a 30-day license suspension and a \$1,000 fine. However, due to mitigating circumstances that no cigarettes were seized during the inspection, CDTFA reduced the suspension from 30 days to zero.
6. Following an appeal to CDTFA, on December 30, 2020, CDTFA issued appellant a decision sustaining the violation and the \$1,000 fine.

⁴ As discussed, *post*, the 30-day license suspension was reduced by CDTFA to zero and is not at issue in this appeal.

7. Appellant filed this timely appeal.

DISCUSSION

A retailer must retain purchase invoices that meet the requirements set forth in B&PC section 22978.4 for all cigarettes or tobacco products the retailer purchased for a period of four years. (B&PC, § 22974.) The records must be kept at the retail location for at least one year after the purchase and must be made available upon request during normal business hours for review, inspection, and copying by CDTFA or law enforcement. (*Ibid.*) Any retailer found in violation of these requirements or any person who fails, refuses, or neglects to retain or make available invoices for inspection and copying shall be subject to penalties pursuant to B&PC section 22981. (*Ibid.*)

Appellant argues that it retained the required documents on the premises, inside the vending machine. However, there is no dispute that the vending machine was locked, and appellant could not provide the required purchase invoices during the inspection. Thus, even if the records were kept at the retail location, they were not made available for inspection by CDTFA, as required by statute. Therefore, we find that appellant violated B&PC section 22974.

A first offense for a violation of B&PC section 22974 shall result in the issuance of a warning notice to the licensee. (Cal. Code Regs., tit. 18, § 4603(a)(1).) A second violation shall result in both a 30-day suspension or revocation and a \$1,000 fine. (Cal. Code Regs., tit. 18, §§ 4603(c), 4607(b)(2)(A).) A reduction in the length of a 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 shall be zero days, five days, 10 days, or 20 days. (*Ibid.*) Neither California Code of Regulations, title 18, sections 4603 nor 4606 provide for mitigating circumstances under which CDTFA may reduce the fine.

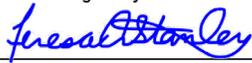
Appellant was previously inspected on April 6, 2017, during which it was issued a warning notice for violation of B&PC section 22974. The violation on January 29, 2018, was appellant's second. Therefore, the \$1,000 fine was properly imposed. CDTFA has no discretion to reduce the fine based on mitigating circumstances, nor do we.

HOLDING

Appellant violated B&PC section 22974, and the \$1,000 fine was properly imposed.

DISPOSITION

CDTFA’s action is sustained.

DocuSigned by:

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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:

67F043D83EF547C...
Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

Date Issued: 3/14/2022