

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 21057822  
J. XIAO ) CDTFA Case ID 1-489-966  
dba SHOP N GO MINI MART )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellant: J. Xiao  
For Respondent: Sunny Paley, Tax Counsel III  
For Office of Tax Appeals: Steven Kim, Tax Counsel

M. GEARY, Administrative Law Judge: Pursuant to California Code of Regulations, title 18, (Regulation) sections 30103(b)(1) and 35065(e)(2), J. Xiao, dba Shop N Go Mini Mart (appellant) appeals an April 22, 2021 Decision issued by the California Department of Tax and Fee Administration (respondent) denying appellant’s appeal of an October 15, 2020 Notice of Decision (NOD), which upheld a \$1,000 fine for a second violation of Business and Professions Code (B&PC) section 22974 and reduced a license suspension for that same violation from 30 days to 5 days.<sup>1</sup>

This matter is being decided on the basis of the written record because appellant waived the right to an oral hearing.

**ISSUES**

1. Did appellant violate B&PC section 22974?
2. If appellant violated B&PC section 22974, did respondent correctly impose a 5-day suspension and a \$1,000 fine for such violation?<sup>2</sup>

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<sup>1</sup> All references in this Opinion to appellant’s “license” will be to appellant’s cigarette and tobacco products retailer’s license and all references to a suspension will be to a suspension of that license.

<sup>2</sup> Although appellant has not specifically argued that the fine or suspension was excessive, we address the issue to be thorough.

### FACTUAL FINDINGS

1. Appellant, a sole proprietor, operates a mini mart doing business as Shop N Go Mini Mart located in Azusa, California. Appellant has held a valid seller's permit effective since September 1, 2004, and a valid cigarette and tobacco products retailer's license effective since September 23, 2004. Appellant is not a licensed cigarette and tobacco products distributor or wholesaler.
2. Respondent inspected appellant's business on several occasions. An inspection on March 7, 2012, resulted in the issuance to appellant of a citation for violations of B&PC sections 22974 (failing to retain 12 months of purchase invoices at the retail location) and 22974.3(b) (possession of unstamped cigarettes or untaxed tobacco products), respondent's seizure of unsupported tobacco products, and the suspension of appellant's license for 20 days. Respondent also conducted inspections of appellant's business on January 10, 2012, November 17, 2012, and April 25, 2016, none of which resulted in a citation.
3. On January 8, 2019, respondent conducted a cigarette and tobacco inspection of appellant's business. The following information is contained in respondent's report of the inspection:
  - Appellant stated that cigarette inventories were replenished monthly, other tobacco product inventories were replenished every other month, and that appellant made such inventory purchases at Costco and Sam's Club only.
  - After respondent asked appellant to provide invoices for all cigarette and other tobacco product purchases during the preceding 12 months, appellant provided invoices from Costco,<sup>3</sup> but these did not account for all cigarette and other tobacco product inventories at the time of the inspection. Appellant and respondent thoroughly searched the business premises for additional invoices, but they found none.
  - At one time during the inspection, appellant asserted that his accountant had his purchase invoices, but when respondent asked appellant to contact

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<sup>3</sup> The report states the invoices were dated in June 2017, March and September 2018, and January 8, 2019.

his accountant to obtain the invoices, appellant refused. At another time, appellant stated that he may have shredded some invoices.

- Appellant requested additional time to provide the missing purchase invoices. Respondent granted appellant additional time, until the next morning, to provide the missing invoices and avoid a possible seizure. Respondent informed appellant that even if he provided the invoices the next day, respondent could still issue a citation for violating B&PC section 22974 (failing to retain 12 months of purchase invoices at the retail location). Appellant stated that he would go to Sam's Club to obtain proof of his purchases.
  - Later on January 8, 2019, appellant faxed one or more purchase summaries from Sam's Club to respondent; however, these still did not support all of appellant's tobacco products inventory. Respondent contacted appellant to inform him of this, and appellant stated that he would fax additional proofs of purchase. Respondent informed appellant that he could do that, or he could provide the additional evidence when respondent returned to the business the following morning.
  - On the morning of January 9, 2019, respondent returned to appellant's business. Appellant provided at least one purchase summary from Sam's Club and a purchase invoice from A&A Cash & Carry. Respondent confirmed that these documents contained the missing information needed to support appellant's tobacco products inventory.
  - At the conclusion of the inspection, respondent issued the civil citation for violation of B&PC section 22974. Respondent did not seize any cigarettes or other tobacco products.
4. On November 8, 2019, respondent mailed a Notice of Violation (NOV) to appellant to confirm issuance of the citation. Appellant timely appealed the NOV.
  5. On August 13, 2020, respondent held a citation conference with appellant. Respondent asserted that appellant failed to retain the required 12 months of purchase invoices and failed to provide those invoices at the retail location during the January 8, 2019 inspection. Respondent further argued that it only allowed appellant an additional day for

appellant to provide invoices as a courtesy. Appellant argued that he should not have been cited because he provided all required purchase invoices. Appellant also complained that respondent's inspector did not explain which invoices were invalid or why he was being cited.

6. On October 15, 2020, respondent issued the NOD upholding the violation and \$1,000 fine but reducing the 30-day suspension to a five-day suspension based on the mitigating circumstance that respondent did not seize any cigarettes or other tobacco products.
7. Appellant appealed the NOD to respondent's Appeals Bureau, arguing that he provided the purchase invoices on January 9, 2019, and that he should not have received a citation. Respondent again upheld the citation and sustained the \$1,000 fine and five-day suspension.
8. This timely appeal followed.

### DISCUSSION

#### Issue 1: Did appellant violate B&PC section 22974?

A retailer must retain purchase invoices for all cigarettes and tobacco products the retailer purchased for a period of four years. (B&PC, § 22974.) Those invoices 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 respondent. (*Ibid.*)

Appellant contends that he provided the necessary purchase invoices to respondent during its inspection, and thus he should not have received a citation. However, the question is not whether appellant eventually provided invoices. The question is whether appellant violated B&PC section 22974 by not retaining, *at the retail location*, purchase invoices to show all cigarette and tobacco product purchases within the preceding 12 months. The evidence shows that after an exhaustive search of the premises during the January 8, 2019 inspection, appellant could not provide all invoices. Although appellant provided additional proof of purchases<sup>4</sup> after respondent's inspectors left appellant's business premises on January 8, 2019, the evidence does not establish that these had all been located on the business premises.<sup>5</sup>

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<sup>4</sup> Several of the proofs were not invoices.

<sup>5</sup> Although one could argue that the inspection on January 9 should be considered a continuation of the one that began on January 8 because both occurred within a 24-hour period, and the law allows only one inspection within 24 hours (B&PC, § 22980), we do not suggest that the disposition would be different if appellant had proved that all invoices were eventually found on the business premises. There are other variables at play, none of which we need to discuss here.

On the contrary, it appears from the evidence that several of the proofs were downloaded and printed from the Sam's Club website on January 8, 2019, after respondent's inspectors left.<sup>6</sup> We therefore find that appellant violated B&PC section 22974.

Issue 2: If appellant violated B&PC section 22974, did respondent correctly impose a 5-day suspension and a \$1,000 fine for such violation?

In addition to the criminal penalties authorized by B&PC section 22981 (fines up to \$5,000 and imprisonment for a period not exceeding one year) any retailer found in violation of B&PC section 22974, or any person who fails, refuses, or neglects to retain or make invoices available for inspection and copying shall be subject to license suspension or revocation. (B&PC, § 22980.3(a).) A second offense for a violation of B&PC section 22974 results in a 30-day suspension or revocation and a \$1,000 fine. (Regulation, §§ 4603(c), 4607(b)(2)(A).) However, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present.<sup>7</sup> (Regulation, § 4603(f).) If any license suspension period is reduced, the redetermined period shall be zero days, five days, 10 days, or 20 days. (*Ibid.*) An absence of prior seizures is a factor that may be considered for purposes of determining whether mitigating circumstances exist pursuant to Regulation 4603.

Because this is appellant's second offense for violation of B&PC section 22974, the 30-day suspension and \$1,000 fine were as prescribed by law. Respondent was also authorized to reduce the period of suspension for mitigating circumstance because respondent did not seize any products during the inspection.<sup>8</sup> Other than "zero days," the 5-day suspension was the minimum suspension available. Accordingly, we find that respondent correctly imposed the \$1,000 fine and the five-day suspension.

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<sup>6</sup> If appellant had downloaded and printed those proofs of purchase before the inspectors left, he would have given them to the inspectors.

<sup>7</sup> We are not aware of any authority that would have allowed respondent to reduce the mandatory fine.

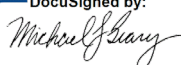
<sup>8</sup> We note that some of the proofs of purchase were not invoices and did not meet the requirements of B&PC section 22978.4. Respondent could have concluded the investigation on January 8, cited appellant for additional violations, and seized product. If it had done so, there would have been no mitigating circumstance to warrant a reduction to the 30-day suspension.

HOLDINGS


1. Appellant violated section 22974 of the B&PC.
2. Respondent correctly imposed a 5-day suspension and a \$1,000 fine for such violation.

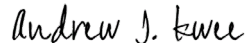
DISPOSITION

Respondent’s action upholding the \$1,000 fine and five-day license suspension is sustained.

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 Michael F. Geary  
 Administrative Law Judge

We concur:

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 Keith T. Long  
 Administrative Law Judge

DocuSigned by:  
  
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 Andrew J. Kwee  
 Administrative Law Judge

Date Issued: 12/21/2021