

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
SMOKE OUTLET, INC.,) OTA NO. 22029618
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, March 23, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 3:08 p.m. and concluding at 3:34 p.m. on
Thursday, March 23, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ TERESA STANLEY

Panel Members: ALJ JOSHUA ALDRICH
ALJ SARA HOSEY

For the Appellant: SADIE SALEH
CRYSTAL SPRATLEY

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION

SUNNY PALEY
STEVE SMITH

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received at page 6.)
(Department's Exhibits A-F were received at page 7.)

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1 California; Thursday, March 23, 2023

2 3:08 p.m.

3
4 JUDGE STANLEY: Let's go ahead and go on the
5 record.

6 And again, this is Judge Stanley speaking. This
7 is the Appeal of Smoke Outlet, Incorporated, Case Number
8 22029618. The date is March 23rd, and it's approximately
9 3:08 p.m. The location is virtual.

10 The Judges are myself, Teresa Stanley and Judges
11 Josh Aldrich and Sara Hosey. And again, for the record, I
12 will conduct the hearing, but the Panel will equally
13 deliberate and issue a written opinion within 100 days
14 after the record closes.

15 As a reminder the Office of Tax Appeals is
16 independent of CDTFA and any other tax agency. The Office
17 of Tax Appeals is not a court but is an independent
18 appeals agency staffed with its own tax experts. The only
19 evidence the Office of Tax Appeals has is what was
20 submitted throughout this appeal by the parties.

21 The proceedings are being live streamed on
22 YouTube, and so we're going to ask the parties to be
23 careful not to share any personal information because it
24 can be viewed by the public. Our stenographer is
25 recording the proceedings and will prepare a transcript

1 when the hearing is complete.

2 First of all, I want to go over the issue. And
3 the issue that we discussed at the prehearing conference
4 was whether a five-day suspension of Appellant's cigarette
5 and tobacco products license was properly imposed and if
6 so, should the suspension be further reduced.

7 Ms. Saleh, do you agree that's the issue?

8 MS. SALEH: Yes.

9 JUDGE STANLEY: And Ms. Paley, do you also agree
10 that's the issue today?

11 Did you say yes?

12 MS. PALEY: Yes.

13 JUDGE STANLEY: Okay. Thank you.

14 Okay. At the prehearing conference there is no
15 objection to Appellant's Exhibits 1 through 3. So those
16 will be admitted without objection.

17 (Appellant's Exhibits 1-3 were received
18 in evidence by the Administrative Law Judge.)
19 And no further evidence was received following
20 the prehearing conference from Appellant.

21 So is that accurate, Ms. Saleh?

22 MS. SALEH: Yes.

23 JUDGE STANLEY: Okay. And the Department
24 submitted an exhibit index identifying Exhibits A through
25 F. Appellant did not object to those exhibits at the

1 prehearing conference, and so those will be admitted
2 without objection.

3 (Department's Exhibits A-F were received in
4 evidence by the Administrative Law Judge.)

5 We did not receive any additional exhibits from
6 CDTFA.

7 Is that correct, Ms. Paley.

8 MS. PALEY: It is correct.

9 JUDGE STANLEY: Okay. So Ms. Saleh, I'm going to
10 turn to your presentation. And I'm going to swear you in,
11 if you don't mind, and we can then have -- we can take
12 your testimony as potential evidence.

13 MS. SALEH: Okay.

14 JUDGE STANLEY: So I can't see you, but if you
15 would please raise your right hand.

16

17 S. SALEH,

18 produced as a witness, and having been first duly sworn by
19 the Administrative Law Judge, was examined and testified
20 as follows:

21

22 JUDGE STANLEY: Okay. Thank you. We talked
23 about giving you 20 minutes to present to the Panel, and
24 let the Panel know everything that you think we need to
25 know to decide your case. So you may proceed when you're

1 ready.

2 MS. SALEH: Okay.

3 PRESENTATION

4 MS. SALEH: Hello. I want to start off with my
5 name. I'm Sadie Saleh. I am the owner of Smoke Outlet,
6 Inc., my sole business. I'm the only owner, and that's my
7 only business since 2016. I also have six children that I
8 care for. And on 10/19 -- on 10/9/2019, the day of the
9 investigation, I was at home caring for my children, and
10 my employee had called and said that Eve, the CDTFA
11 investigator, was there at my store to check the invoices
12 for tobacco products.

13 At that time, my employee gave Eve a large stack
14 of invoices, and she went through these invoices, and they
15 were for cigarette, cigars, et cetera. And she found
16 everything was correct. Nothing was seized out of those
17 products. She then went on to the OTAs, which is
18 including e-juice, which is something that's new and --
19 something that was new to us. It was a new product for us
20 as well.

21 And she went on and asked me for those invoices.
22 And at that time we did not have all the invoices that she
23 was requesting, so we were able to go home and retrieve
24 some of them. And we could not -- we live about 30
25 minutes away from home. So those 30 minutes she had to --

1 she had to wait while we were -- she was still conducting
2 her investigation and going through other invoices for the
3 e-juice.

4 And then I spoke with Eve and asked her if I can
5 email her some other invoices while she was packing things
6 up. She said that she was taking everything, and that I
7 would have to appeal. She's not here today to testify or
8 to -- or any -- any other witnesses are here to testify
9 from the Department that's involved in the appeal.

10 She seized 1,148 e-juice products. They returned
11 271 items back to me expired and unable to sell. I was
12 not compensated for those items that I paid for and that I
13 paid tax on, and I can no longer sell those. Also, my
14 family and I have undergone traumatic stress from the
15 investigation, the hearings, the appeals.

16 And I have provided invoices for the remaining
17 products except the Puff Pods and the Naked Disposables.
18 They were given to me as samples, and they were not
19 selling. And we did not sell those to customers, so I had
20 no invoices for those products. And I could not obtain
21 any invoices for those products as they were samples. I
22 did not pay taxes on them, and I did not pay for them, and
23 I did not sell them. And there on their labels they are
24 stated as "Not For Resale". They're stated "As For
25 Samples Only".

1 I have not been -- and also my business was
2 closed for three weeks, and we suffered income loss
3 because of the Covid pandemic. Therefore, I'm asking the
4 five-day suspension be revoked to a zero-day suspension
5 and a warning on my account. And also, some of the --
6 also, I had a sales order of S00862 I submitted to the
7 CDTFA. They did not return items on that receipt as well.

8 I'm not asking for any of the juice be returned
9 to me because they're all expired, and I cannot sell
10 those. I am out. I cannot sell those in my business
11 anymore. So anything that I paid for that they took, I
12 cannot sell that anymore, and I have not been compensated
13 for that. And now they want me to close my business for
14 five days, and I already had an income loss because of the
15 items that they took. And because of the Covid pandemic I
16 was -- my business was closed for three weeks.

17 So that's why I'm asking for a zero-day
18 suspension and a warning on my account. And thank you for
19 your time.

20 JUDGE STANLEY: This is Judge Stanley. Thank
21 you, Ms. Saleh.

22 Ms. Paley, does CDTFA have any questions for
23 Ms. Saleh?

24 MS. PALEY: No, thank you.

25 JUDGE STANLEY: Okay. And moving to my

1 co-panelist Judge Aldrich, do you have any questions?

2 JUDGE ALDRICH: Hi. This is Judge Aldrich. I
3 did have a couple of brief questions for Appellant.

4 So Ms. Saleh, you referred to some products as
5 e-juice.

6 MS. SALEH: Yeah.

7 JUDGE ALDRICH: And for clarification, those
8 e-juice products did contain nicotine?

9 MS. SALEH: Yes. Some of them did. They did
10 confiscate some that had zero nicotine in them, and they
11 did return those to me too.

12 JUDGE ALDRICH: Okay. And you had referenced the
13 products also as OTA, I think. But did you mean they were
14 OTP as in "Other Tobacco Products"?

15 MS. SALEH: Yeah. Other tobacco products, yes.

16 JUDGE ALDRICH: Okay. Thank you. That's all the
17 questions that I had at this moment. I'm going to return
18 it back to Judge Stanley. Thanks.

19 JUDGE STANLEY: This is Judge Stanley speaking.

20 Judge Hosey, do you have any questions for the
21 witness?

22 JUDGE HOSEY: This is Judge Hosey. I do not.
23 Thank you.

24 JUDGE STANLEY: Okay. Thank you, Ms. Saleh.
25 We're going to turn to the Department for their

1 presentation.

2 Ms. Paley, you can proceed when you're ready.

3

4 PRESENTATION

5 MS. PALEY: Thank you. This is Sunny Paley
6 attorney with CDTFA.

7 Smoke Outlet, Inc, Appellant operates a smoke
8 shop located on Kansas Street in Modesto, California.
9 Sadie Saleh is the president, chief executive officer, and
10 owner.

11 Following an inspection on October 9th, 2019,
12 Appellant received a citation for two violations of the
13 Business and Professions Code Section 22974, failure to
14 retain purchase invoices and Section 22974.3 paren (b),
15 possession of untaxed other tobacco products; Exhibit E,
16 the investigation citation package. On December 17th,
17 2020, a Notice of Violation was issued by the Business Tax
18 and Fee Division or BTFD, imposing a 20-day license
19 suspension for the violations; Exhibit C.

20 Appellant appealed the Notice of Violation and
21 the BTFD held a conference resulting in the issuance of
22 the June 21st, 2021, Notice of Decision, Exhibit B,
23 upholding the violations but reducing the 20-day
24 suspension to a five-day suspension since this was
25 Appellant's first seizure. Initially, at the time of

1 inspection, over a thousand items were seized with a
2 retail value of \$20,095.

3 During a separate and completed appeal for
4 release of the seized tobacco products found at Exhibit D,
5 271 tobacco products were returned leaving 877 items with
6 a retail cost of approximately \$14,480 remaining in
7 Department's custody.

8 At issue for today's hearing is whether the
9 five-day suspension of Appellant cigarette and tobacco
10 products license was properly imposed and if the
11 suspension should be further reduced. Section 22974
12 states that a retailer must retain purchase invoices
13 meeting the requirements of Section 22974.4 for all
14 cigarette and tobacco products for four years, and that
15 the invoices must be kept at the retail location for at
16 least one year.

17 22974 also requires that the invoices must be
18 made available for review and inspection by CDTFA or other
19 law enforcement upon request during normal business hours.
20 At the time of inspection, no invoices for the seized
21 products were provided to the inspectors. Appellant
22 violated Section 22974. Section 22974.3 paren (b)
23 provides that the possession by a retailer or other person
24 of untaxed tobacco products on which tax is due but has
25 not been paid is a violation.

1 It is presumed that tax has not been paid to
2 CDTFA on all tobacco products in the possession of
3 retailer until the contrary is established by a proof of
4 payment or purchase invoice. The burden of proving that
5 tax has been paid is on the person in possession and upon
6 discovery by CDTFA that a retailer possesses tobacco
7 products on which tax is due but had not been paid. CDTFA
8 is authorized to seize such product.

9 Possession of untaxed tobacco products on which
10 tax is due but has not been paid is a misdemeanor crime
11 punishable by a fine and/or imprisonment up to one year in
12 jail. During the OTA appeals process, Appellant provided
13 additional invoices, Exhibits 1 through 3, with its reply
14 brief. Exhibit F details the seized and invoiced
15 products. After accounting for the recently provided
16 invoices in Exhibits 2 and 3, there are over 500 items
17 remaining for which no valid invoice has been provided to
18 show that tax has been paid.

19 It is un-refuted that Appellant did not have
20 purchase invoices for all of its tobacco product inventory
21 at the retail location at the time of inspection.
22 Therefore, Appellant violated Section 22974. And it is
23 undisputed that there remains over 500 items for which no
24 valid purchase invoice has been provided. Therefore,
25 Appellant violated Section 22974.3.

1 As for the penalty that should be imposed,
2 Section 22974.7 paren (a) provides that in addition to any
3 other civil or criminal penalties when the CDTFA finds
4 that a retailer has violated any provision of the act, in
5 the case of a first offense, CDTFA may revoke or suspend
6 the retailer's license.

7 Regulation 4603(a)(1) states that a first offense
8 of section 22974 will result in the issuance of a warning
9 notice. Regulation 4603 paren (d)(3) provides that for
10 violations of Section 22974.3 paren (b), a first offense
11 seizure of tobacco products that is equivalent or more
12 than the wholesale cost of 20 packs of cigarettes or
13 \$113.72 will result in a 20-day license suspension.
14 Regulation 4603 paren (e) provides that in cases involving
15 multiple violations, the violation punishable by the most
16 severe penalty will be used for purposes of determining
17 the penalty assessed.

18 The 20-day suspension is thereby and was the
19 prescribed penalty. However, per Regulations 4603 paren
20 (f) and 4606, a reduction in suspension length may be
21 warranted if mitigating circumstances are present,
22 including for example, one, how recently the licensee
23 purchased the business or began operations and acquired
24 its inventory; two, the amount of product at issue in
25 relation to the size of the licensee's overall inventory;

1 three, the size of the licensee's tobacco products
2 business; four, the retail value of the product seized;
3 and five, the absence of prior seizures.

4 If any suspension period is reduced, the
5 redetermined period of suspension must be zero, 5, 10 or
6 20 days. A licensee has the burden of proving the grounds
7 for the reduction of penalties. Ms. Saleh operated the
8 business as a sole proprietor from December 1st, 2015, to
9 June 30th, 2019. On July 19th, 2019, her sole proprietor
10 license was closed and license issued to the Appellant
11 corporation from the same retail location.

12 Technically Appellant was a relatively new
13 licensee at the time of the October 2019 inspection, but
14 its owner had been operating the same business for four
15 years prior to inspection. The value of the remaining
16 items -- excuse me. The value of the remaining seized
17 items in the thousands far exceeds the 20-pack \$113
18 threshold. The seizure was substantial no de minimis in
19 comparison to the size of Appellant's cigarette and
20 tobacco product business.

21 And Appellant's mitigating factors have already
22 been taken into account during the Department's appeal
23 process reducing the suspension from 20 days to 5 days as
24 this was their first seizure. Further, mitigation is not
25 warranted. And based on the evidence and the law, we ask

1 the panel to uphold the violations and maintain the
2 five-day suspension as the appropriate penalty.

3 Thank you.

4 JUDGE STANLEY: This is Judge Stanley speaking.
5 Thank you, Ms. Paley.

6 Judge Aldrich, do you have any questions for
7 CDTFA?

8 JUDGE ALDRICH: I don't have any questions for
9 CDTFA, but I do have a couple of follow ups for Ms. Saleh
10 I can hold off on that or proceed.

11 JUDGE STANLEY: No. Go ahead.

12 JUDGE ALDRICH: Okay. So Ms. Saleh, just a
13 couple of quick follow-up questions. At the time of the
14 seizure, did you possess any other kinds of licenses, for
15 example, a distributor's license or a wholesaler's
16 license?

17 MS. SALEH: I didn't. No.

18 JUDGE ALDRICH: Okay.

19 MS. SALEH: Just my tobacco license and my resale
20 license.

21 JUDGE ALDRICH: Okay. And then you had mentioned
22 that some of the products were labeled not for resale as
23 samples?

24 MS. SALEH: Yes. And that was for 221 Puff Pods
25 and the 27 Naked Disposables.

1 JUDGE ALDRICH: Okay. And I guess I'm wondering,
2 if they weren't for resale, what were they doing at a
3 retail location?

4 MS. SALEH: They were samples. So we were giving
5 them to our customers as samples to see how well they
6 would -- to see if the customers liked them. If they
7 liked them, then we would place an order for them.

8 JUDGE ALDRICH: Okay. Thank you. That's all the
9 questions that I had.

10 I'm going to refer it back to Judge Stanley.
11 Thanks.

12 JUDGE STANLEY: This is Judge Stanley.
13 Judge Hosey, do you have any questions at this time?

14 JUDGE HOSEY: This is Judge Hosey. No questions
15 at this time. Thank you.

16 JUDGE STANLEY: Okay. This is Judge Stanley. As
17 we discussed, Ms. Saleh, I'm going to give you the last
18 word. So you can rebut what the Department has said or
19 give us any more information that you need to pass along
20 to us.

21

22 CLOSING STATEMENT

23 MS. SALEH: Okay. And also, the invoices that I
24 provided in my appeal, they did not calculate those
25 correctly. There are juices in there that were not

1 calculated correctly, and I do not agree with how they
2 calculated that. There's not 589 juices -- e-juices on
3 there still not paid for taxes. Like I said, there is 221
4 Puff Pods. There's 27 Naked Disposables. Those are items
5 that I didn't pay for, and I didn't pay taxes on. Those
6 are samples. And those are samples for our customers, and
7 I would not receive an invoice for those because I did not
8 pay for them, and I did not pay taxes on those.

9 And the remaining products, they did not add them
10 on there. They said that I gave that invoice to the -- to
11 Eve at the investigation, but she did not leave those.
12 They were confiscated. And I had asked her, when she was
13 there, if we could email her directly invoices for her to
14 look at so that she didn't have to confiscate anything.
15 And she denied that. She denied me emailing her any
16 invoices, and I understand they had to be there.

17 Some of them were past 12 months old. And she
18 said I have to have four years. I didn't have the e-juice
19 for four years. But I understand that I have to have
20 those for at least 12 months inside the store. And I
21 tried to email her. She did not want -- she did not want
22 those invoices emailed. She said I had to appeal it. And
23 so that's why she -- she confiscated those. And like I
24 said, the 221 Puff Pods and the 27 Naked Disposables are
25 not for resale.

1 And I would not -- I was not compensated also for
2 any of the items that they did return back to me. And I'm
3 not asking for any of the items that I have invoices for
4 that they're saying that I -- that they are saying on
5 these the itemized papers that they sent in. I'm not
6 asking for those back as well. And they are not
7 compensating me for those that they took also that I paid
8 taxes on.

9 I'm asking the Panel to revoke the zero -- the
10 five-day suspension to a zero-day suspension and a warning
11 on my account as this is my first offense, my first
12 citation that I received. And this is my first inspection
13 for my business that I ever received. This is a new
14 business for me, and this is my only business. And so
15 like I said, I was closed for three weeks because of the
16 Covid pandemic, and I already suffered an income loss. If
17 they ask me to close for five more day, that's another
18 burden upon me and my family. And that's what I just want
19 you to take into account when you do make this decision.

20 Thank you.

21 JUDGE STANLEY: This is Judge Stanley. Thank
22 you, Ms. Saleh.

23 Judge Aldrich, do you have any final follow-up
24 questions?

25 JUDGE ALDRICH: No further questions. Thank you.

1 JUDGE STANLEY: And Judge Hosey, do you have any
2 follow-up questions?

3 JUDGE HOSEY: No. Thank you for your
4 presentations today.

5 JUDGE STANLEY: Okay. I did have one follow-up
6 question. Ms. Saleh, you were talking about 221 Puff Pods
7 and 27 Naked Disposables that you say are samples that
8 were marked as samples; is that correct?

9 MS. SALEH: Yes.

10 JUDGE STANLEY: And are you saying that the
11 500-and-something products that CDTFA says --

12 MS. SALEH: 588.

13 JUDGE STANLEY: 588 that were not substantiated,
14 you -- did you just say that they were substantiated with
15 the investigator, and that you didn't get the paperwork
16 back?

17 MS. SALEH: No. There was -- the first invoice
18 that I had sent, she's -- when I -- the CDTFA, when I had
19 sent that into the Office of Tax Appeals, they said that
20 they -- that she didn't confiscate those. She left those
21 in the store, but she did not leave those in the store.
22 They are clearly marked on this paper the items that
23 she -- that they did take.

24 JUDGE STANLEY: Okay. So this is Judge Stanley
25 again. So you -- but you said you disagree with the 588

1 number?

2 MS. SALEH: Yeah. I disagree with that amount.

3 JUDGE STANLEY: And that's because -- well, not
4 all of those would have been sample products; right?

5 MS. SALEH: No. So the 201 plus the 27 out of the
6 588, and then I submitted three invoices. And out of the
7 three invoices they said one of those invoices was not
8 valid because they -- I gave one of those, which I believe
9 was the 2954. They said I gave that to the -- I gave it
10 to Eve the investigator at the time of the investigation,
11 and she left those in the store, which she did not. And
12 that is the Glass E-Liquids and the Pod Juice Salts, and
13 the Bell One Liquids.

14 JUDGE STANLEY: And this is Judge Stanley. I'll
15 just follow up with Ms. Paley. The Department is not
16 disputing that those were confiscated; is that correct?

17 MS. PALEY: As indicated in our reply briefing,
18 Exhibit 1, the Luxor Distro Invoice 2735, dated
19 August 21st, 2019, our investigator indicated that invoice
20 was provided at the time of inspection and that inspector
21 accepted the invoice during the inspection and did not
22 seize the products that were listed on that invoice.

23 JUDGE STANLEY: Okay. It looks like we have all
24 of our questions answered at this time. So what we're
25 going to do is conclude the hearing. The record is now

1 closed. The matter is submitted for deliberation. The
2 panel of judges will meet to jointly deliberate and decide
3 this appeal, and the Office of Tax Appeals will mail a
4 written opinion no later than 100 days from today.

5 I want to thank everyone for being here timely
6 and making their presentation to us. We're going to
7 adjourn today as no more appeals are on the schedule, but
8 we will reconvene tomorrow morning at 9:30 a.m.

9 Thank you all. Have a nice afternoon.

10 (Proceedings adjourned at 3:34 p.m.)
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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for
the State of California, do hereby certify:

That the foregoing transcript of proceedings was
taken before me at the time and place set forth, that the
testimony and proceedings were reported stenographically
by me and later transcribed by computer-aided
transcription under my direction and supervision, that the
foregoing is a true record of the testimony and
proceedings taken at that time.

I further certify that I am in no way interested
in the outcome of said action.

I have hereunto subscribed my name this 10th day
of April, 2023.

ERNALYN M. ALONZO
HEARING REPORTER