

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**DSD SWEISS, INC.,
dba Tobacco Crush**

) OTA Case No. 20127067
) CDTFA Case ID 1-633-442
)
)
)
)

OPINION

Representing the Parties:

For Appellant:

D. Sweiss, President

For Respondent:

Sunny Paley, Tax Counsel III

For Office of Tax Appeals:

Steven Kim, Tax Counsel III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 30438, DSD Sweiss, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant's Verified Petition for Release or Recovery of Property (petition) dated March 16, 2020. CDTFA seized certain other tobacco products (i.e., nicotine products that are not cigarettes) from appellant on November 13, 2019, pursuant to Business and Professions Code section 22974.3(b), and this is the basis for appellant’s petition.

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

¹ In 2017, functions of the State Board of Equalization (board) relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “CDTFA” shall refer to the board.

ISSUE

Whether the seized other tobacco products (OTP) should be returned to appellant.²

FACTUAL FINDINGS

1. Appellant, a California corporation, operates a smoke shop doing business as Tobacco Crush in Corona, California. Appellant obtained a seller's permit, effective March 12, 2018, and a cigarette and tobacco products retailer's license, effective March 29, 2018.
2. On November 13, 2019, CDTFA conducted a cigarette and tobacco products retail inspection of appellant at its retail location. Appellant's president, D. Sweiss, was present and participated in the inspection. CDTFA reviewed appellant's purchase invoices for the previous 12 months. CDTFA discovered a document entitled "HS Wholesale Packing Slip for Order #103227" dated August 8, 2019 (packing slip), indicating that items were shipped to appellant at its business address. However, the packing slip did not include appellant's name, instead listing a different tax identification number and the name of appellant's predecessor, A. Raad, as the recipient. D. Sweiss explained that appellant had purchased the listed products³ and that the previous owner was named on the packing slip by mistake. CDTFA noted that HS Wholesale was an Illinois business that did not have a valid California seller's permit. CDTFA determined that appellant purchased the OTP listed on packing slip.
3. CDTFA also determined that the packing slip was not a valid purchase invoice because it did not include HS Wholesale's license number or the amount of excise taxes due to CDTFA. Since appellant did not provide a valid invoice, CDTFA concluded that

² There is no dispute that the seized items are OTP.

³ According to the packing slip, appellant purchased the following products:

- 12 boxes, Juul Pods, mint flavor (5%) (8 packs per box)
- 6 boxes, Juul Pods, classic tobacco flavor (5%)
- 12 boxes, Juul Pods, classic menthol flavor (5%)
- 6 boxes, Juul Pods, mint flavor (3%)
- 6 boxes, Juul Pods, Virginia tobacco flavor (3%)
- 6 boxes, Juul Pods, Virginia tobacco flavor (5%)
- 5 boxes, Juul Basic Kit, silver (pack of 48)
- 5 boxes, Juul Basic Kit, slate (pack of 48)
- 6 boxes, STIG pod system, iced mango bomb (10 packs per box, 1.2mL, 6%)

appellant did not pay tax on those products; thus, CDTFA seized products matching the product descriptions from appellant's inventory.⁴

4. On March 16, 2020, appellant filed the petition with CDTFA arguing that the packing slip was not a purchase invoice, and that appellant has paid the applicable tax on all its OTP inventory. Appellant also submitted seven purchase invoices showing that appellant purchased products from licensed California vendors with the same or similar descriptions as the seized products.⁵
5. On November 12, 2020, CDTFA issued a decision denying the petition on the grounds that appellant failed to prove that it paid tax on the seized products.
6. Appellant filed this timely appeal.

DISCUSSION

The California Cigarette and Tobacco Products Licensing Act of 2003 requires retailers of cigarettes or tobacco products to obtain a license and comply with requirements under the Cigarette and Tobacco Products Tax Law. (Stats. 2009, ch. 890 (Assem. Bill No. 71).) "Tobacco products" includes, but is not limited to, a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, but does not include cigarettes. (R&TC, § 30121.) A retailer is a person who engages in the sale of cigarettes or tobacco products directly to the public from a retail location in this state. (Bus. & Prof. Code, § 22971(q).) Retailers are required to retain purchase invoices for all cigarette and tobacco products purchased for a period of four years; and the records shall be kept at the retail location for at least one year after the purchase. (Bus. & Prof. Code, § 22974.) Invoices for the sale of cigarettes and tobacco products must include: the name, address, license number, and telephone number of the seller; the amount of tax due to CDTFA by the distributor or the affirmative

⁴ CDTFA found and seized the following items:

- 12 boxes, Juul pods, mint flavor (5%)
- 11 packs, Juul pods, classic tobacco flavor (5%)
- 3 boxes and 17 packs, Juul pods, classic menthol flavor (5%)
- 3 boxes and 13 packs, Juul pods, mint flavor (3%)
- 2 boxes and 6 packs, Juul pods, Virginia tobacco flavor (3%)
- 5 boxes and 4 packs, Juul pods, Virginia tobacco flavor (5%)

⁵ Appellant submitted purchase invoices dated between July 31, 2019, and October 24, 2019, from Phillip's & King, Cartons 2 Go, and Four Aces Wholesale. OTA notes that only one purchase invoice indicates the amount of tax collected. Six of the purchase invoices include a statement that California excise taxes were paid or included in the total amount of the invoice.

statement that “All California cigarette and tobacco product taxes are included in the total amount of this invoice;” the name, address, and license number of the purchaser; an itemized list of the products sold; and the date of the sale. (Bus. & Prof. Code, §§ 22972, 22978.4(a).)

An excise tax is imposed on distributions of OTP in this state. (R&TC, §§ 30008, 30009, 30011, 30108.) It is presumed that the tax has not been paid to CDTFA on all OTP in the possession of a retailer until the retailer provides proof of payment to CDTFA or a purchase invoice showing that the retailer paid the tax-included purchase price to a licensed distributor, wholesaler, manufacturer, or importer. (Bus. & Prof. Code, § 22974.3(b).) Upon discovery that a retailer possesses, stores, owns, or has made a retail sale of OTP on which tax is due but has not been paid, CDTFA is authorized to seize such products. (Bus. & Prof. Code, § 22974.3(b); see Cal. Code Regs., tit. 18, § 4703.) A retailer of cigarettes and OTP bears the burden of establishing that the applicable taxes have been paid and can meet this burden by providing a valid purchase invoice showing that it purchased tax-included product from a licensed distributor or wholesaler. (Bus. & Prof. Code, § 22974.) Any person owning or claiming any interest in property seized pursuant to this section may file a verified petition with CDTFA stating his interest in the property and requesting the release or recovery of the property on the ground that the property was erroneously or illegally seized. (R&TC, § 30438.) If the Office of Tax Appeals (OTA) determines that the OTP were seized erroneously or illegally, CDTFA shall release the OTP. (R&TC, § 30439; Cal. Code Regs., tit. 18, § 30101(c)(2), (c)(3).)

During the November 13, 2019 inspection, appellant provided a packing slip from HS Wholesale, an out-of-state seller, showing OTP was shipped to appellant’s address and addressed, on the second line of the address, to “Tobacco Crush,” which is appellant’s dba. Although the first line of the address on the packing slip was addressed to appellant’s predecessor (A. Raad), appellant stated at the time of the inspection that it purchased the items listed on the packing slip from HS Wholesale. Furthermore, OTA notes that the packing slip, which typically accompanies a package of the items listed, indicates that OTP was shipped to Tobacco Crush at appellant’s business address, with an order date of August 8, 2019, which is after appellant took over the business. The packing slip does not indicate whether appellant paid tax to HS Wholesale, and appellant has not otherwise provided any evidence showing that tax was paid on the products listed. OTA notes that HS Wholesale is an out-of-state vendor and there is no evidence that HS Wholesale holds a California distributor license.

On appeal, appellant asserts that it did not purchase the products listed on the packing slip from HS Wholesale, and that the packing slip is not an invoice but instead it “could have been an estimate for the products which sales departments create for quote purposes.” Appellant also notes that the packing slip does not include appellant’s name or license number, but rather lists its predecessor. However, appellant admitted during the inspection that it purchased the items listed on the packing slip from HS Wholesale, that the predecessor’s name was included by mistake, and confirmed that HS Wholesale did not have a California distributor license. Appellant has not provided a credible explanation for its prior inconsistent and contradictory statements. After review, OTA finds that the packing slip is not an estimate or a quote, but an invalid purchase invoice from an out-of-state unlicensed distributor. OTA further finds that appellant, more likely than not, purchased the untaxed OTP listed on the packing slip from HS Wholesale. Because appellant has not provided any evidence that it paid tax on the OTP purchased from HS Wholesale, CDTFA was authorized to seize the untaxed OTP.

Appellant also argues that it purchased the seized OTP from licensed California vendors and that it paid tax to those vendors. Appellant submitted seven purchase invoices in support of its position. The invoices show that appellant purchased products with the same or similar description as the seized OTP. While the seven purchase invoices demonstrate that appellant purchased OTP with the same or similar description as the seized OTP, the invoices do not prove that the seized OTP, listed in the HS Wholesale packing slip, was purchased tax paid. Appellant bears the burden to prove that it paid tax on all its OTP inventory, and appellant has failed to satisfy that burden regarding the seized products. Accordingly, OTA finds that appellant is not entitled to release or recovery of the seized property.

HOLDING

Appellant has not established that the OTP was seized erroneously or illegally; and, therefore, appellant is not entitled to their return.

DISPOSITION

CDTFA’s action denying appellant’s petition is sustained.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Andrew J. Kwee
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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

Date Issued: 5/17/2023