

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

In the Matter of the Appeal of:	)	OTA Case No. 21129312
<b>J. MANN,</b>	)	CDTFA Case ID 2-486-112
	)	
<b>dba Namaste Vape &amp; More</b>	)	
	)	
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**OPINION**

Representing the Parties:

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

S. BROWN, Administrative Law Judge: Pursuant to California Code of Regulations, title 18, (Regulation) sections 30103(b)(1) and 35065(e)(2), J. Mann (appellant) appeals a November 8, 2021 decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant’s appeal of a Notice of Decision (NOD) dated March 19, 2021. The NOD upheld a 10-day suspension for violations of Business and Professions Code (B&PC) sections 22974, 22974.3(b), and 22980.2(a).

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUES**

1. Whether appellant violated B&PC section 22974.3.<sup>1</sup>
2. Whether a waiver of the 10-day suspension is warranted.

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<sup>1</sup> As discussed below, appellant concedes the violations of B&PC sections 22974, 22974.3(b), and 22980.2(a), and disputes only the 10-day suspension. Because the license suspension was based on a violation of B&PC section 22974.3(b), the issue addresses that code section.

FACTUAL FINDINGS

1. Appellant, a sole proprietor doing business as Namaste Vape & More (Namaste), operates a smoke shop selling cigarettes and tobacco products in Stockton, California. Appellant obtained a seller's permit on July 10, 2019, but did not obtain a cigarette and tobacco products retailer's license until January 9, 2020.
2. On January 7, 2020, CDTFA inspected Namaste's business location and found appellant was in violation of B&PC sections 22974 (failure to maintain and provide purchase invoices), 22974.3(b) (possession of untaxed tobacco products), and 22980.2(a) (unlicensed sale of cigarettes or tobacco products). At the time of the inspection, appellant also operated three other businesses selling cigarettes and tobacco products at retail. CDTFA issued appellant a civil citation and seized untaxed tobacco products.<sup>2</sup>
3. On January 9, 2020, appellant applied and was approved for a cigarette and tobacco products retailer's license.
4. On March 5, 2020, CDTFA examined the seized inventory and determined that the seized tobacco products had a wholesale value of \$18,436.
5. On October 6, 2020, CDTFA issued appellant a Notice of Violation (NOV) describing the violations and potential penalties, and informing appellant of his right to appeal the violations.
6. Appellant appealed the NOV, and CDTFA held a citation conference with appellant on January 28, 2021. Subsequently, CDTFA issued the March 19, 2021 NOD upholding the violations and imposing a 10-day suspension of appellant's cigarette and tobacco products retailer's license.
7. Appellant appealed the NOD. During CDTFA's appeals process, appellant conceded that he violated B&PC sections 22974, 22974.3(b), and 22980.2(a), but requested a waiver of the 10-day suspension.
8. On November 8, 2021, CDTFA issued a Decision upholding the violations and the 10-day suspension.
9. This timely appeal followed.

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<sup>2</sup> CDTFA examined appellant's cigarette inventory but did not find any unstamped cigarette packages or any cigarette packages affixed with counterfeit stamps. Because all of appellant's cigarette inventory appeared to be tax-paid, CDTFA did not seize any cigarettes.

## DISCUSSION

### Issue 1: Whether appellant violated B&PC section 22974.3.

A retailer must have in place and maintain a license to engage in the sale of cigarettes or tobacco products. (B&PC, § 22972(a).) A retailer that owns or controls more than one retail location must obtain a separate license for each retail location. (*Ibid.*) A retailer must conspicuously display the license at the retail location in a manner visible to the public. (B&PC, § 22972(b).)

A retailer must retain purchase invoices that meet the requirements set forth in B&PC section 22978.4 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 CDTFA. (*Ibid.*) Any retailer found in violation of the invoice 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.*)

Possession of untaxed tobacco products is a violation of the Cigarette and Tobacco Products Licensing Act. (B&PC, § 22974.3(b).) If a retailer possesses, stores, owns, or has made a retail sale of such tobacco products for which tax is due but has not been paid, CDTFA is authorized to seize the untaxed tobacco products. (*Ibid.*) It is presumed that tax has not been paid to CDTFA on all tobacco products in the possession of a retailer until the contrary is established by a proof of payment to CDTFA or by a purchase invoice showing the retailer paid the tax-included purchase price to a licensed distributor, wholesaler, manufacturer, or importer as described in B&PC 22978.4. (*Ibid.*) The purchase invoice must include the license number of the retailer, distributor, or wholesaler to whom cigarettes or tobacco products are sold. (B&PC, § 22978.4.) The retailer in possession of the tobacco products bears the burden of proof to show that tax has been paid. (*Ibid.*)

The Cigarette and Tobacco Products Licensing Act imposes strict penalties for violations, including possession of untaxed tobacco products and failure to retain purchase invoices. Any distributor making a sale or distribution of untaxed cigarettes or tobacco products in this state, and any wholesaler making a sale of tax paid cigarettes or tobacco products for purposes of resale, must include the following information on each invoice for the sale of such

products: (1) the name, address, and telephone number of the distributor; (2) the distributor's license number; (3) the amount of excise taxes due to CDTFA by the distributor; (4) the name, address, and license number of the retailer to whom the products are sold; (5) an itemized listing of the products sold; and (6) the date the products are sold. (B&PC, § 22978.4(a).)

Appellant contends that, although he did not have a valid cigarette and tobacco products retailer's license at the time of the inspection, he purchased all the seized tobacco products tax-paid from licensed distributors. In support of this assertion, appellant provides invoices from California Wholesale Trading, which show tax-paid purchases by appellant<sup>3</sup> totaling \$11,027 from October 12, 2019, to January 11, 2020.<sup>4</sup> Appellant also provides bank statements for September 2019, October 2019, November 2019, and January 2020 from an account listing Namaste's dba name. Appellant asserts that he did not transfer any inventory from his other businesses. Appellant argues that, during CDTFA's appeals process, he presented purchase invoices and bank statements proving that the tobacco tax was paid on all the seized tobacco products. Furthermore, appellant argues that he did not have a cigarette and tobacco products retailer's license at the time of the inspection due to an honest mistake. Appellant asserts that he had previously applied for a license but was not issued one because he misspelled the name of the business location, and that he forgot to later check on the status of the license.

Here, appellant did not have a valid cigarette and tobacco products retailer's license at the time of the inspection. Consequently, the purchase invoices appellant provided as supporting documentation do not include the requisite retailer's license number (as it did not yet exist) and the invoices are therefore insufficient pursuant to B&PC section 22978.4. Moreover, even if the Office of Tax Appeals (OTA) were to accept the invoices as valid, CDTFA identified a wholesale value of \$18,436 for the seized tobacco products, which exceeds the total amounts listed on appellant's invoices. As such, the provided invoices, even if accepted in their entirety, are insufficient to establish that appellant did not violate B&PC section 22974.3, because there were still additional untaxed tobacco products in appellant's possession on the date of seizure. As for the bank statements appellant provided, they do not identify the products purchased or state that tax was paid on the purchases. Furthermore, there is no provision in the law which

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<sup>3</sup> The invoices list Namaste's seller's permit number.

<sup>4</sup> The products listed in the invoices are presumably vape liquid, but it is not clear from the product description.

excuses a violation of B&PC section 22974.3 based on an inadvertent omission or oversight. Therefore, OTA finds that appellant has failed to establish that he paid tax on the seized tobacco products.

Issue 2: Whether waiver of the 10-day suspension is warranted.

In addition to any other civil or criminal penalties provided by law, any retailer found to be in violation of the Cigarette and Tobacco Products Licensing Act, in the case of a first offense, may have its license revoked or suspended. (See B&PC, §§ 22974.7(a), 22980.3(a).) A first offense for a violation of B&PC sections 22974 or 22980.2 will result in the issuance of a written notice. (Cal. Code Regs., tit. 18, § 4603(a).) A first offense for a violation of B&PC section 22974.3 shall result in the following: (1) issuance of a warning notice when the licensee has been in business for less than one month and there has been no new purchases of new cigarette or tobacco product inventory during that period; (2) a 10-day suspension for a seizure of less than 20 packs of cigarettes, or the equivalent amount of tobacco products based on wholesale cost; or (3) a 20-day suspension for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.<sup>5</sup> (Cal. Code Regs., tit. 18, § 4603(d).) In cases involving multiple violations, the violation punishable by the most severe penalty will be used for purposes of determining the penalty assessed. (Cal. Code Regs., tit. 18, § 4603(e).) However, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation section 4606. (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.*) Factors to determine whether mitigating circumstances exist include, but are not limited to, the following: (1) how recently the licensee purchased the business or began operations and acquired inventory of cigarettes and tobacco products; (2) the amount of cigarettes without tax stamps and with counterfeit tax stamps in relation to the size of the licensee's overall inventory; (3) the size of the licensee's cigarette and 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.)

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<sup>5</sup> In its Decision, CDTFA noted that the wholesale cost of 20 packages of cigarettes at the time of inspection was \$113.72. The wholesale cost of the tobacco products seized in this appeal (\$18,436) far exceeds that threshold amount.

Although CDTFA's Decision states that appellant began operating in August 2019, appellant argues he was fixing up the business during that time and did not begin operating until October 15, 2019. Appellant also argues that the 10-day suspension should be waived because his violations were unintentional, and the suspension will ultimately result in the closing of his business.

While this was appellant's first offense for a violation of B&PC section 22974.3, the applicable penalty is a 20-day suspension because he had operated his business for longer than one month and the wholesale cost of the seized inventory (\$18,436) exceeded the wholesale cost of 20 packages of cigarettes. (Cal. Code Regs., tit. 18, § 4603(d).) When an appeal involves multiple violations, as is the case here, the most severe penalty, or the 20-day suspension in this instance, is used for determining the penalty assessed. (Cal. Code Regs., tit. 18, § 4603(e).) CDTFA found that mitigating circumstances existed to reduce the 20-day suspension to a 10-day suspension because appellant had not previously had any cigarettes or tobacco products seized. However, the record does not reflect any other circumstances that warrant further mitigation. Appellant has not raised any arguments with respect to the mitigating factors set forth in Regulation section 4606, and OTA concludes that none of these factors are met here. Furthermore, appellant's argument that the violations at issue were unintentional does not constitute a mitigating circumstance given that appellant owned three other smoke shops at the time of the investigation and should therefore have known of his responsibilities as a cigarette and tobacco products retailer.<sup>6</sup> Additionally, with respect to appellant's argument that the suspension would result in the closing of his business, financial loss or hardship resulting from a penalty does not constitute circumstances warranting mitigation. Accordingly, OTA finds that no further reduction of the 10-day license suspension period is warranted.

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<sup>6</sup> According to CDTFA's investigative report, during a March 26, 2018 investigation of one of appellant's other stores, CDTFA provided appellant a copy of Publication 78 – Sales of Cigarettes and Tobacco Products in California, as well as Publication 152 – Cigarette and Tobacco Products Inspections.

HOLDINGS

1. Appellant violated B&PC section 22974.3.
2. Waiver of the 10-day license suspension is not warranted.

DISPOSITION

CDTFA's action is sustained.

DocuSigned by:

*Suzanne B. Brown*

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Suzanne B. Brown  
Administrative Law Judge

Date Issued: 6/14/2023