

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

In the Matter of the Appeal of:	)	OTA Case No. 221011592
<b>M. MUTHANNA,</b>	)	CDTFA Case ID: 3-103-348
<b>dba King's Smoke Shop</b>	)	
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**OPINION**

Representing the Parties:

For Appellant:	M. Muthanna
For Respondent:	Sunny Paley, Attorney Stephen Smith, Attorney Shelley Anselmi, Hearing Representative Jeanine Candelaria, Hearing Representative

K. LONG, Administrative Law Judge: Pursuant to California Code of Regulations, title 18, (Regulation) sections 30103(b)(1) and 35065(e)(2), M. Muthanna (appellant) appeals a September 20, 2022 decision issued by respondent California Department of Tax and Fee Administration (CDTFA), partially denying appellant's appeal of a February 16, 2022 Notice of Decision (NOD), and reducing a license suspension from 20 days to 10 days for violations of Business and Professions Code (B&PC) sections 22974 and 22974.3(b).

Office of Tax Appeals (OTA) Administrative Law Judges Natasha Ralston, Andrew Wong, and Keith T. Long held an online oral hearing for this matter on October 16, 2024. At the conclusion of the oral hearing, the record was closed and this matter was submitted on the oral hearing record pursuant to Regulation section 30209(b).

### ISSUES

1. Whether appellant violated B&PC sections 22974 and 22974.3(b).
2. Whether the 10-day license suspension was properly imposed.

### FACTUAL FINDINGS

1. Appellant, a sole proprietor doing business as King's Smoke Shop, operates a smoke shop selling cigarettes and tobacco products in Napa, California. Appellant holds a valid cigarette and tobacco products retailer's license.
2. On April 21, 2021, CDTFA inspected appellant's business location and found appellant to be in violation of B&PC sections 22974 (for failure to maintain and provide purchase invoices) and 22974.3(b) (for possession of untaxed tobacco products). Specifically, CDTFA found 22 Hyde Plus Disposable Device (Hyde) products (with an estimated retail value of \$440 and a wholesale cost of \$176) that were not supported by provided purchase invoices. CDTFA issued appellant a civil citation for the violations and seized the unsupported products.
3. On August 18, 2021, CDTFA issued appellant a Notice of Violation. Appellant did not appear at the subsequent citation conference.
4. On February 16, 2022, CDTFA issued appellant an NOD upholding the violations and imposing a 20-day license suspension. Appellant timely appealed the NOD.
5. On September 20, 2022, CDTFA issued a decision reducing the 20-day license suspension to a 10-day suspension but otherwise upholding the violations.
6. This timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellant violated B&PC sections 22974 and 22974.3(b).

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.) 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.<sup>1</sup> (*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 section 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(a)(4).) The retailer in possession of the tobacco products bears the burden of proof to show that tax has been paid. (B&PC, § 22974.3(b).)

On appeal, appellant contends that they did not purchase or sell the Hyde products. Instead, appellant contends that the products at issue were free samples, and that they do not sell flavored products. In support, appellant provided witness testimony from two employees that the Hyde products were received as samples and not for sale. Regardless, even if appellant did not purchase or sell the Hyde products, mere possession of untaxed tobacco products is considered a violation of B&PC section 22974.3(b). The Hyde products are presumed to be untaxed unless appellant can provide documentation showing that tax was paid for those products. Because appellant has not provided any documentation showing that tax was paid, OTA finds that appellant has failed to rebut this presumption.

Based on the foregoing, OTA finds that appellant was in violation of B&PC section 22974 for failing to provide the requisite purchase invoices, and in violation of B&PC section 22974.3(b) for possessing untaxed tobacco products.

Issue 2: Whether the 10-day license suspension was properly imposed.

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

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<sup>1</sup> Any violation of the Cigarette and Tobacco Products Licensing Act is a misdemeanor, punishable by a fine up to \$5,000, imprisonment for a period not exceeding one year, or both. (B&PC, § 22981.)

first offense for a violation of B&PC sections 22974 or 22974.3 will result in the issuance of a written notice. (Cal. Code Regs., tit. 18, § 4603(a), (d).) 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. (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.)

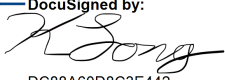
Here, as found above, appellant violated B&PC section 22974.3. Upon inspection, CDTFA seized 22 Hyde products. Accordingly, CDTFA properly imposed the 20-day license suspension. CDTFA later determined that the length of the suspension should be reduced from 20 days to 10 days due to mitigating circumstances. Specifically, CDTFA noted that the retail value of the Hyde products would have represented only a minimal amount of appellant's total monthly cigarette and tobacco retail sales. Appellant has not presented any arguments that additional mitigating circumstances exist to warrant further reducing the license suspension period. Therefore, OTA finds that the 10-day license suspension was properly imposed.

HOLDINGS


1. Appellant violated B&PC sections 22974 and 22974.3(b).
2. The 10-day license suspension was properly imposed.


DISPOSITION

CDTFA's decision reducing the 20-day suspension to a 10-day suspension but otherwise denying appellant's appeal is sustained.

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Keith T. Long  
Administrative Law Judge

We concur:

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Andrew Wong  
Administrative Law Judge

Signed by:  
  
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Natasha Ralston  
Administrative Law Judge

Date Issued: 12/10/2024