

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**BHAIRAV, LLC
d/b/a AVA'S MARKET**

v.

COMMISSIONER OF REVENUE

Docket No. C348459

Promulgated:
March 20, 2025

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the decision of the Commissioner of Revenue ("appellee" or "Commissioner") to revoke an electronic nicotine delivery systems ("ENDS") retailer's license held by Bhairav, LLC d/b/a Ava's Market ("Bhairav, LLC" or "appellant").

Commissioner Metzger heard the appeal. Chairman DeFrancisco and Commissioners Good, Elliott, and Bernier joined her in the decision for the appellee.

These findings of fact and report are made at the request of the appellant pursuant to 831 CMR 1.34.

Edward F. Grouke, Esq., for the appellant.

Eugene Langner, Esq. and James P. Burbridge, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on testimony and documents admitted into evidence during the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

At all times relevant to this appeal, the appellant was a Massachusetts limited liability company managed by Sakshi Kishan ("Mr. Kishan"). The appellant owned and operated Ava's Market, a convenience store located in Plainville that was licensed to sell products that were subject to the Massachusetts tobacco excise: cigarettes and smokeless tobacco, cigars and smoking tobacco, and ENDS products. Mr. Kishan also owned a second establishment, Cigar City Smoke Shop, a smoke shop located in North Attleboro.

On May 16, 2023, the Massachusetts Department of Revenue ("DOR") issued a notice to the appellant stating that the Commissioner was revoking the ENDS retailer's license held by Ava's Market as of June 12, 2023. The letter justified revocation of the license for violations of the following: (1) G.L. c. 64C, § 7E(b), which imposes upon a retailer an excise of 75 percent of the wholesale price on all ENDS products at the time they are manufactured, purchased, imported, received, or acquired in the Commonwealth; (2) G.L. c. 64C, § 7E(c), which deems every ENDS retailer liable for the collection of the excise on ENDS products in their possession at any time; (3) G.L. c. 64C, § 7E(1)(1), which prohibits acting as an ENDS distributor without a license; and/or

(4) G.L. c. 62C, § 16(c 3/4), which requires licensees to file with the Commissioner a tax return stating the quantity of ENDS products sold. The Commissioner exercised his authority to revoke the referenced license under G.L. c. 62C, § 68 ("§ 68"), specifically § 68(5), which authorizes the Commissioner to suspend or revoke a tobacco license if, among other reasons, "the licensee has willfully failed to comply with any provision of the Commonwealth's tax laws."

On May 24, 2023, the appellant filed a timely appeal with the Board.¹ The appellant also filed the appropriate surety bond in accordance with § 68. Based on the above facts, the Board found and ruled that it had jurisdiction to hear and decide the instant appeal.²

The appellant did not present any witnesses or evidence, choosing instead to cross-examine the appellee's witness. The appellee presented his case in chief through the testimony of Michael Azevedo, a tax fraud investigator for the DOR Criminal Investigation Bureau, and the submission of evidence, including investigation reports with supporting documentation.

¹ While the petition was stamped as having been docketed by the Board on June 1, 2023, the envelope containing the petition bore a United States Postal Service postmark of May 24, 2023. Pursuant to G.L. c. 58A, § 7, the Board considered the date of the postmark to be the date of filing.

² The ENDS license revocation has been inoperative during the pendency of this appeal pursuant to § 68, which states: "During the pendency of any such appeal the decision of the commissioner so appealed from shall, unless otherwise ordered by said board, be inoperative."

According to Investigator Azevedo, he was investigating an unrelated retailer and discovered invoices from RZ Smoke, an out-of-state tobacco vendor not licensed in Massachusetts, listing flavored and untaxed tobacco products that were sold to the unrelated retailer. In February 2023, after requesting and analyzing 91 different invoices showing sales of RZ Smoke to Massachusetts retailers, Investigator Azevedo determined that Bhairav, LLC was one of the top purchasers from RZ Smoke, purchasing \$251,593.98 worth of ENDS products from RZ Smoke between June 2020 and November 2022. Inspector Azevedo's findings are reproduced below:

| ENDS Excise Evasion Based On RZ Smoke Invoices | | |
|--|-------------------------|---------------------|
| Year | ENDS products Purchased | ENDS Tax Loss |
| 2020 | \$87,146.20 | \$65,359.65 |
| 2021 | \$125,820.27 | \$94,365.20 |
| 2022 | \$38,627.51 | \$28,970.63 |
| Totals | \$251,593.98 | \$188,695.49 |

The invoices submitted into evidence bore a "PAID" stamp and contained a disclaimer that "Buyers are responsible for all local laws & taxes." The invoices showed the "SHIP TO" and "BILL TO" addresses as "Sakshi Kishan, Avas Market." Investigator Azevedo also obtained receipts of FedEx shipments to Ava's Market of ENDS products from RZ Smoke and copies of checks issued by the appellant to RZ Smoke corresponding to invoices to Ava's Market for ENDS products.

Investigator Azevedo conducted a surveillance of Ava's Market in March of 2023. Initially, Investigator Azevedo observed a person unloading various products, including water bottles and candy packages, from a car into the grocery store. He did not observe any tobacco products being unloaded, but he did observe a box labeled "Marlboro" in the back of the vehicle. After the vehicle left, Investigator Azevedo went into Ava's Market and made a brief inspection at which time he observed various ENDS products for sale. There is no indication that Investigator Azevedo checked whether the ENDS products bore the proper excise stamps.

On May 1, 2023, Investigator Azevedo together with a second agent, Investigator Lisa Dell'Anno, investigated Cigar City Smoke Shop. Investigator Azevedo testified that he decided to investigate Cigar City Smoke Shop because he determined that most of the products corresponding to the RZ Smoke invoices that were ordered and purchased by Ava's Market had ultimately arrived at the Cigar City Smoke Shop location. During this investigation, the agents observed, photographed, and seized 536 ENDS products.

Investigator Azevedo prepared an affidavit discussing the findings of this inspection, which Mr. Kishan signed, acknowledging the following facts: that he was the sole owner of Ava's Market and Cigar City Smoke Shop; that he purchased tobacco products for both stores; that he had continued to purchase ENDS products from RZ Smoke until about September or October of 2022;

that he had no invoices from RZ Smoke reflecting a payment of tax on those purchases; that the products ordered by Ava's Market were delivered to Ava's Market and products ordered by Cigar City Smoke Shop were delivered to Cigar City Smoke Shop; that products were delivered by RZ Smoke delivery drivers, who transported products in regular cars; that most times the products were paid for with cash that was removed from the cash registers; that he was aware that ENDS products purchased from RZ Smoke were untaxed, which is why he ceased business with RZ Smoke prior to this inspection; that Juul Menthol and Virginia 5% pods were not purchased to be sold at Ava's Market because he knew that it was illegal to sell these items at a convenience store;³ and that at times he purchased ENDS products from RZ Smoke that he sold individually to friends.

Investigator Azevedo testified that Mr. Kishan initially claimed that he no longer bought ENDS products from RZ Smoke after June 1, 2020, the date on which the ENDS excise went into effect. However, when confronted with four Ava's Market invoices showing sales of ENDS products from RZ Smoke between June 3, 2020 and November 15, 2022, Investigator Azevedo said that Mr. Kishan admitted that he continued ordering ENDS products from RZ Smoke after June 1, 2020 for Ava's Market, but Mr. Kishan disputed the

³ Cigar City Smoke Shop was a smoke shop and was thus allowed by law to sell these products, while Ava's Market, a grocery store, was not.

purchase of approximately \$251,000 of taxable ENDS products reflected in the RZ Smoke invoices.

Responding to the Commissioner's allegations, the appellant claimed that the only documentation obtained by Investigator Azevedo of products delivered to the appellant were two FedEx records from February 19, 2021, which corresponded with one invoice totaling \$5,436.48, and further, that the only proof of payment by the appellant to RZ Smoke were canceled checks from the appellant's bank account totaling \$30,754.95.

The appellant further countered that, while the appellee introduced 91 invoices from RZ Smoke purporting to show purchases made by the appellant, none of these invoices showed any signature reflecting acceptance of delivery by the appellant.

The appellant requested leniency in this case, asserting the following allegedly mitigating factors: the appellant had ceased doing business with RK Smoke in November 2022, six months prior to the inspection of Ava's Market; the appellant never sold any banned products at Ava's Market; this investigation represented the only time the appellant had engaged in any wrongful action; the appellant fully cooperated with the investigation; and a license revocation would effectively terminate the appellant's business and leave the appellant with no means to repay any taxes or penalties.

As will be further explained in the following Opinion, the Commissioner is charged with enforcing § 68, the statute pertaining to regulation of licenses for tobacco, including ENDS products. Internal DOR guidelines for tobacco excise infractions, which DOR employs to ensure consistency in its enforcement of § 68, allow license revocation for a first-time infraction involving over \$2,808 wholesale value of ENDS products. The infraction here was for product totaling \$251,593.98. While the appellant disputed this amount with reference to cashed checks and FedEx invoices, Mr. Kishan himself admitted that many ENDS products were purchased with cash and delivered by regular cars, and thus the appellant was not credible. The Board therefore found that the appellant failed to meet its burden of refuting the ENDS excise liability that was assessed by the Commissioner.

Section 68 gives the Board equitable powers to grant relief from these penalties. The appellant asked the Board to invoke its equitable powers to reduce the license revocation to a suspension. Based on the evidence advanced at the hearing, and for the reasons stated more fully in the Opinion, the Board declined to exercise its equitable powers to reverse the license revocation.

Accordingly, the Board issued a decision for the appellee in the instant appeal.

OPINION

The Commissioner is authorized by § 68 to "suspend or revoke" a retailer's tobacco license for, among other offenses, "willfully fail[ing] to comply with any provision of the tax laws of the commonwealth." The statute affords discretion to the Commissioner and his delegees in suspending and revoking retail tobacco licenses for any failure to pay the requisite excise.

With respect to the substantive grounds authorizing penalty, G.L. c. 64C, § 7E(c) holds an ENDS retailer liable for the collection of the excise on all ENDS products that are in the retailer's possession at any time and upon which the excise has not been paid by the ENDS distributor. Retailers thus have the burden of proving that excise has been paid on ENDS products in their possession. Further, retailers are required to keep complete and accurate records of all tobacco products purchased or otherwise acquired for a period of three years, and to make those records available for inspection by the Commissioner to determine whether the excise has been paid.⁴ G.L. c. 64C, § 11.

The Board here found and ruled that the appellant failed to meet its burden of refuting the ENDS excise assessment by the Commissioner. Whether the products were purchased by the appellant for sale at Ava's Market, at Cigar City Smoke Shop, or anywhere

⁴ G.L. c. 64C, § 1 provides that "'tobacco products' shall mean cigarettes, an electronic nicotine delivery system as defined in subsection (a) of section 7E and smokeless tobacco."

else is a difference without distinction here, as the applicable laws penalize a retailer for having untaxed ENDS products "in their possession at any time."

According to documentation offered by the Commissioner and not rebutted successfully by the appellant, the appellant purchased \$251,593.98 worth of ENDS products, of which at least \$30,754.95 was ordered and paid for by Ava's Market with its checks and of which at least \$5,436.48 was delivered by FedEx to Ava's Market. Under the facts of this appeal, the Board found and ruled that no circumstances existed to warrant exercising the equitable powers granted to it by § 68.

Accordingly, the Board issued a decision for the appellee upholding the ENDS license revocation.

THE APPELLATE TAX BOARD

By:



Mark J. DeFrancisco, Chairman

A true copy,

Attest:


Clerk of the Board