

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**EAST COAST WHOLESALE**

**v.**

**COMMISSIONER OF REVENUE**

Docket No. C347868

Promulgated:  
September 16, 2024

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 68 from the decision of the Commissioner of Revenue ("appellee" or "Commissioner") to revoke a cigarette/smokeless tobacco retailer's license held by East Coast Wholesale ("appellant").

Commissioner Good heard this appeal. She was joined by Chairman DeFrancisco and Commissioners Elliott, Metzger, and Bernier in the decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.<sup>1</sup>

*Robert J. Vital, pro se*, for the appellant.

*Wendi Safran, Esq.*, and *James P. Burbridge, Esq.*, for the appellee.

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<sup>1</sup> This citation is to the regulation in effect prior to January 5, 2024.

## **FINDINGS OF FACT AND REPORT**

Based on testimony and documentary evidence submitted by the parties 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 owned and operated a retail convenience store located in Fall River that was licensed to sell cigarette and smokeless tobacco products that were subject to the Massachusetts tobacco excise. The appellant was not licensed to sell cigar products.

On March 10, 2023, the Massachusetts Department of Revenue ("DOR") issued a notice to the appellant stating that the Commissioner was revoking the appellant's cigarette/smokeless tobacco retailer's license as of April 10, 2023. The revocation letter was personally delivered to the store on March 30, 2023.<sup>2</sup> The letter revokes the appellant's license for violations of the following: G.L. c. 64C, § 34, which prohibits the holding for sale, offering for sale, sale, or possession with intent to sell, of packs of cigarettes in Massachusetts that are not stamped with a Massachusetts cigarette excise stamp; G.L. c. 64C, § 35, which prohibits the knowing possession, delivery, or transportation of unstamped packs of cigarettes in Massachusetts; and G.L. c. 64C, § 33, which prohibits cigarette retailers from accepting

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<sup>2</sup> DOR Inspector Michael Azevedo testified that an attempt was made to send the revocation letter to the appellant by certified mail but that the appellant had refused delivery of the letter.

deliveries of unstamped or improperly stamped packs of cigarettes and requires that cigarette retailers immediately return to their supplier all unstamped or improperly stamped packs of cigarettes. General Laws c. 62C, § 68 ("§ 68") grants the Commissioner the authority to revoke a cigarette/smokeless tobacco retailer's license for the willful failure to comply with any provision of the tax laws.

On April 8, 2023, the appellant filed a timely appeal with the Board.<sup>3</sup> The appellant filed the appropriate surety bond in accordance with § 68. Based on the above, the Board found and ruled that it had jurisdiction to hear and decide the instant appeal.<sup>4</sup>

The appellant's witness, Robert Vital, the owner and operator of the appellant, made a statement requesting leniency and was then cross examined by the appellee. The appellant did not contest the Commissioner's account of the facts.

The appellee presented his case in chief through the testimony of: Scott Cliff, a tobacco inspector for the DOR Miscellaneous Excise Bureau; Peter French, a tax fraud investigator for the DOR Criminal Investigation Bureau; and Michael Azevedo, a tax fraud investigator for the DOR Criminal Investigation Bureau.

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<sup>3</sup> While the petition was stamped as having been docketed by the Board on April 10, 2023, the envelope containing the petition bore a United States Postal Service postmark of April 8, 2023. Pursuant to G.L. c. 58A, § 7, the Board considered the date of the postmark to be the date of filing.

<sup>4</sup> The 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 Inspector Cliff, on April 29, 2019, he visited the appellant's convenience store to conduct a tobacco compliance inspection. At the time, Mr. Vital was working behind the counter at the cash register. In the rack by the cash register, Inspector Cliff observed seven packs of cigarettes that did not bear Massachusetts excise stamps. Inspector Cliff asked Mr. Vital if there were any other unstamped packs of cigarettes for sale and Mr. Vital denied that there were. Inspector Cliff then observed a chair behind the counter holding a sweater and a gym bag. Upon removing these items, Inspector Cliff noticed a box containing cartons of unstamped packs of cigarettes. In all, Inspector Cliff seized 113 unstamped packs of cigarettes on that day.

According to Inspector French, he visited the convenience store on two separate occasions to conduct "observation purchases," which are purchases made by an inspector posing as an ordinary customer. On June 26, 2019, Inspector French entered the convenience store and asked the woman working the cash register for a pack of menthol cigarettes. The woman reached into a box behind the counter that was not on display and sold him a pack of menthol cigarettes. After leaving the store, Inspector French inspected the pack and noted that there was no excise stamp on the purchased pack.

Then on April 8, 2021, Inspector French entered the convenience store and asked the two store clerks at the cash

register for a pack of "greens," a discreet way to ask for menthol cigarettes, which were banned for sale in Massachusetts on this inspection date.<sup>5</sup> One of the clerks went to a back room behind the cash register and retrieved a pack of menthol cigarettes, which the second clerk sold to Inspector French. After leaving the store, Inspector French examined the pack and noted that there was no Massachusetts excise stamp on the pack, but that a New Hampshire excise stamp, which he was trained to identify, had been mostly removed from the pack.<sup>6</sup>

A third DOR inspector, Inspector Azevedo, entered the convenience store on October 5, 2021, to conduct an observation purchase. He approached the two clerks at the cash register and asked for a pack of "shorts," which Inspector Azevedo knew to be a discreet way to ask for menthol cigarettes. One of the clerks retrieved a pack of menthol cigarettes from underneath the register counter and sold them to Inspector Azevedo. After leaving the store, Inspector Azevedo examined the pack and noted that a Massachusetts excise stamp was affixed to the pack, suggesting to Inspector Azevedo that the pack had been purchased prior to the ban on sales of menthol cigarettes.

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<sup>5</sup> Menthol cigarettes were banned for sale in Massachusetts as of June 1, 2020.

<sup>6</sup> The New Hampshire excise on tobacco products was lower than the Massachusetts excise at all relevant times.

On February 22, 2023, Inspector Azevedo, together with employees of the local board of health, entered the convenience store to conduct a tobacco compliance inspection. Inspector Azevedo observed the store clerk waiting on the customer ahead of him and selling that customer a pack of cigarettes from a blue storage bin that was on the floor behind the checkout counter. Inspector Azevedo heard the clerk say that the price of the pack was \$6, which Inspector Azevedo knew to be an illegally low price for cigarettes in Massachusetts, considering that the Massachusetts excise was \$3.51 per pack.

After that sale was complete, Inspector Azevedo and the health inspectors approached the counter and identified themselves. Inspector Azevedo observed that the appellant's tobacco license was not posted in the convenience store or even located on premises. Inspector Azevedo inspected the blue storage bin near the checkout counter and discovered a moderate quantity of cigarette packs sold on Native American reservations<sup>7</sup> as well as other cigarette packs, including menthol brands, that had either no excise stamps or New Hampshire excise stamps. From various spots behind the counters in the store, Inspector Azevedo seized 1,434

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<sup>7</sup> "[C]igarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped." *Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 64-65 (1994). On-reservation sales to non-tribal members, however, are not exempt. *Id.*

unstamped cigarette packs as well as 1,120 cigar products, which the appellant did not have a license to sell.

Inspector Azevedo then discovered and seized unstamped packs of cigarettes from other areas of the convenience store, including storage closets and back rooms. In all, Inspector Azevedo discovered and seized a total of 1,449 unstamped packs of cigarettes and 17,199 unstamped cigar products that were for sale on the premises.

Following this seizure, the DOR issued two letters to the appellant dated March 10, 2023, including the revocation letter which is the subject of this appeal. The second letter was a warning letter stating that it had seized from its premises untaxed cigarette and cigar products that the appellant had held in violation of the following statutes: G.L. c. 64C, § 7B(b), which imposes an excise of 40 per cent of the wholesale price on all cigars and smoking tobacco at the time it is manufactured, purchased, imported, received or acquired in the Commonwealth; G.L. c. 64C, § 7B(c), which deems every cigar retailer liable for the collection of the excise on cigars and smoking tobacco in their possession at any time; G.L. c. 64C, § 7B(1)(1), which prohibits acting as a cigar distributor without a license and from purchasing or possessing any cigars and smoking tobacco from an unlicensed cigar distributor or unlicensed cigar retailer; and/or G.L. c. 62C, § 16(c 1/2), which requires licensees to file with the

Commissioner a return stating the quantity of cigars and smoking tobacco sold.

On April 25, 2023, during the pendency of the revocation procedure at issue in this appeal, Inspector Azevedo returned to the appellant's convenience store and conducted another tobacco compliance inspection, whereupon he discovered and seized a total of 82 unstamped packs of cigarettes, many of which were Native American or menthol brands, as well as 20 cigars.

Mr. Vital was previously arrested and charged with illegally purchasing untaxed cigarettes on a Native American reservation in New York state in 2007.

As will be further explained in the following Opinion, the Commissioner is charged with enforcing § 68, the statute pertaining to enforcement of cigarette and smokeless tobacco excise infringements, by such means as license suspension and revocation. Internal DOR guidelines for cigarette and smokeless tobacco excise infractions, which DOR employs to ensure consistency in its enforcement of § 68, recommend a license revocation for seizures of 600 or more packs of cigarettes. The seizure on February 22, 2023, alone far exceeded this amount.

Section 68 also gives the Board equitable powers to grant relief from these penalties. The appellant asked the Board to invoke its equitable powers to reduce its revocation to a suspension. Based on the evidence advanced, and for the reasons



stated more fully in the Opinion, the Board declined to exercise its equitable powers to reverse the license revocation.

Therefore, 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.

The appellant knowingly and repeatedly engaged in illegal activity to enrich itself, including during the pendency of the revocation proceeding at issue. The Board found and ruled that the appellant's multiple violations, together with the overwhelming quantity of untaxed cigarette packs seized from the appellant's convenience store, justified the Commissioner's decision to revoke the appellant's cigarette and smokeless tobacco retail license. In further outright defiance of the law, the appellant did not possess a license to sell the thousands of cigar products that were also seized from the appellant's convenience store.

As previously noted, § 68 grants the Board the power to review a license suspension or revocation and "grant such relief as may

be equitable." Considering the facts of the instant appeal, the Board found no justification to invoke its equitable powers.

Accordingly, the Board issued a decision for the appellee.

**THE APPELLATE TAX BOARD**

By:   
**Mark J. DeFrancisco, Chairman**

A true copy,

Attest:   
**Clerk of the Board**