

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

ALI A. KHAN d/b/a QUICK PIC v. COMMISSIONER OF REVENUE

Docket No. C347966

Promulgated:
December 20, 2023

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 impose a thirty-day suspension of a cigarette and smokeless tobacco retailer's license upon a retail store owned and operated by Ali A. Khan d/b/a Quick Pic ("appellant").

Commissioner Bernier heard this appeal. He was joined by Chairman DeFrancisco and Commissioners Good, Elliott, and Metzger 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.

Ali A. Khan, pro se, for the appellant.

James P. Burbridge, Esq., for the appellee.

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.

The appellant owns and operates a Sunoco gas station convenience store located in Agawam and is licensed as a retailer to sell products that are subject to the Massachusetts tobacco excise.

On April 6, 2023, the Massachusetts Department of Revenue ("DOR") issued a notice to the appellant that the Commissioner intended to suspend the appellant's cigarette and smokeless tobacco retailer's license for thirty days for violations of the following: G.L. c. 64C, § 33, prohibiting the acceptance of deliveries of unstamped packs of cigarettes and requiring that the retailer immediately return unstamped packs of cigarettes to the supplier; G.L. c. 64C, § 34, prohibiting the holding for sale of unstamped packs of cigarettes; and G.L. c. 64C, § 35, prohibiting the knowing possession of unstamped packs of cigarettes. On April 18, 2023,¹ the appellant filed a timely appeal with the Board and

¹ An appeal from a suspension of a cigarette license must be filed within ten days of receipt of the letter of suspension pursuant to G.L. c. 62C, § 68. Ten days from the April 6, 2023 notice date was Sunday, April 16, 2023. The following day, April 17, 2023, was Patriots' Day, a legal holiday in the commonwealth. When the last day of a filing period falls on a Sunday or legal holiday, the due date is extended by operation of law to the following business day. See G.L. c. 30, § 24, G.L. c. 4, § 9. Accordingly, the appellant's last day for filing an appeal with the Board was Tuesday, April 18, 2023. While the appeal was stamped as having been docketed by the Board on April 23, 2023, the envelope

filed the appropriate surety bond in accordance with G.L. c. 62C, § 68 ("§ 68"). Based on the above findings, the Board found and ruled that it had jurisdiction to hear and decide the instant appeal.²

The parties presented their cases primarily through the testimony of Ali A. Khan ("Mr. Khan") for the appellant and Inspector Blake Russo, Tax Examiner ("Inspector Russo") for the appellee.

The license suspension arose from an inspection of the appellant's convenience store on March 21, 2023, conducted by Inspector Russo and another DOR inspector, John Donohue. Mr. Khan was working behind the counter at the time. After viewing the displayed cigarettes for sale, Inspector Russo examined the area behind the sales counter, and he noticed several cartons that were covered by plastic bags and empty boxes. Upon removal of the plastic bags and empty boxes, Inspector Russo discovered that the concealed cartons contained packs of menthol cigarettes as well as many other cigarette types. Most of the concealed cigarette packs bore New Hampshire cigarette stamps, some of which were partially scratched off. A total of 209 packs, 36 varieties in all, of

containing the appeal bore a United States Postal Service postmark of April 18, 2023. Pursuant to G.L. c. 58A, § 7, the Board considered the date of postmark to be the date of filing.

² The suspension has been inoperative during the pendency of this appeal pursuant to G.L. c. 62C, § 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."

cigarettes without Massachusetts excise stamps were found and seized during this inspection. With reference to its internal guidelines for cigarette and smokeless tobacco excise infractions, the DOR imposed a thirty-day suspension upon the appellant for this violation.

Mr. Khan testified at the hearing before the Board. Upon questioning about the concealed cigarettes, Mr. Khan admitted to purchasing them in 2019 from "a guy who came to the store" shortly after the ban on menthol cigarettes was enacted in the commonwealth. When asked for the identity of this individual or company from whom he had purchased the cigarettes, Mr. Khan denied knowledge, insisting that it was just a "random man." He claimed that he had been taken advantage of by the man, and that he then had difficulty selling the cigarettes. When pressed further whether he had sold any of the untaxed cigarettes, Mr. Khan did not admit or deny but just repeated that he had difficulty selling them.

The Board found that Mr. Khan was not forthcoming in his testimony. Mr. Khan refused to affirm or deny whether he had sold any of the unstamped cigarettes, but the numerous odd packs that were discovered at the store indicated that some packs in the cartons had been sold. The Board also did not find plausible Mr. Khan's claim that he, a businessman, would purchase a large quantity of cigarettes and not know the identity of the individual

who had sold them to him. The Board thus did not find Mr. Khan's testimony to be credible. The Board further found that the appellant knowingly possessed the untaxed cigarettes.

The Commissioner is charged with applying § 68, the enforcement statute pertaining to unpaid cigarette and smokeless tobacco excises, by such means that include license suspension and revocation. As will be explained in the Opinion below, § 68 also grants the Board equitable powers to grant relief from these penalties. The appellant asked the Board to invoke its equitable powers to reduce its thirty-day suspension to a warning.

Based on the evidence advanced, and for the reasons stated more fully in the following Opinion, the Board declined to exercise its equitable powers and issued a decision for the appellee upholding the thirty-day license suspension imposed against the appellant.

OPINION

The Commissioner is authorized by § 68 to "suspend or revoke" a retailer's tobacco license for, among other offenses, "willfully fail[ing] to collect, truthfully account for or pay over any tax" or for "willfully fail[ing] to comply with any provision of the tax laws of the commonwealth." This statute also grants the Board the power to review a license suspension or revocation and "grant such relief as may be equitable."

As previously explained, the Board found that the appellant knowingly possessed untaxed cigarettes. Further, the appellant knowingly failed to comply with Massachusetts tax laws in order to enrich himself, to the detriment of other Massachusetts taxpayers who pay excises due under the relevant statutes governing the taxation of cigarettes. See G.L. c. 64C, §§ 6, 7A and 7C. Finally, the Board did not find the appellant to be credible. 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 thirty-day suspension against the appellant.

THE APPELLATE TAX BOARD

By: /s/ Mark J. DeFrancisco
Mark J. DeFrancisco, Chairman

A true copy,

Attest: /s/ William J. Doherty
Clerk of the Board