

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**SALEM7FS LLC**

**v.**

**COMMISSIONER OF REVENUE**

Docket No. C348494

Promulgated:  
October 2, 2024

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 68 ("§ 68"), from the decision of the Commissioner of Revenue ("Commissioner" or "appellee") to impose a 90-day suspension of a cigar and smoking tobacco retailer's license and a 120-day suspension of an Electronic Nicotine Delivery Systems ("ENDS") retailer's license held by Salem7FS LLC ("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>

*Logan Ahmed, manager, pro se, for the appellant.*

*Eugene Langner, Esq., for the appellee.*

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<sup>1</sup> All citations to the Board's Rules of Practice and Procedure in these findings of fact and report are to the version in effect prior to January 5, 2024.

## **FINDINGS OF FACT AND REPORT**

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

The appellant is a Massachusetts LLC that owns and operates Salem Food Store ("Store"), a convenience store located in Salem. It is a licensed retailer of three categories of tobacco products that are subject to the Massachusetts cigarette excise tax: cigarettes and smokeless tobacco; cigar and smoking tobacco; and ENDS. The latter two licenses are at issue in this appeal.

On April 20, 2023, Drew Adelman ("Examiner Adelman"), a Massachusetts Department of Revenue ("DOR") Tax Examiner, conducted an inspection of the Store. In response to Examiner Adelman's request for tobacco invoices corresponding to tobacco products in the Store, the appellant produced invoices from its wholesale distributors that listed inventory purchases made by the appellant over the previous four months. Examiner Adelman reviewed the invoices to determine whether all tobacco products in possession of the Store were accounted for on the invoices, as excise taxes for tobacco products are charged and paid at the wholesale level. Invoices listing tobacco products were therefore

relied upon to confirm that excise taxes had been paid on the invoiced items.

Based on Examiner Adelman's observations, certain tobacco products in the Store were not listed on the invoices that had been provided by the appellant. Those items were determined by Examiner Adelman to be untaxed and were therefore seized by the DOR. Examiner Adelman subsequently detailed the inspection in a report that included an itemized list of the seized products. The list consisted of twenty-five cigars and thirty-two units of ENDS products. The appellant was afforded the opportunity to provide additional invoices after the inspection, but the invoices subsequently produced by the appellant were dated beyond the inspection date, and they therefore did not align with any of the confiscated products.

Based on the inspection and seizure, the Commissioner issued two notices of suspension, both of which were dated May 16, 2023. One of the notices advised the appellant of the Commissioner's intent to suspend the appellant's license to sell cigars and smoking tobacco for 90 days, effective June 15, 2023. The other notice advised the appellant of the Commissioner's intent to suspend the appellant's license to sell ENDS products for 120 days, effective June 15, 2023.

In support of the suspension of the cigar and smoking tobacco license, the notice stated that untaxed cigars were held by the

appellant in violation of the following: G.L. c. 64C, §7B(b), which imposes an excise of 40 percent of all cigars and smoking tobacco at the time they are manufactured, purchased, imported, received, or acquired in the commonwealth; § 7B(c), which states that every cigar retailer is liable for the collection of the excise on cigars or smoking tobacco in their possession at any time; § 7B(1)(1), which prohibits acting as a cigar distributor without a license and from purchasing or possessing any cigars or smoking tobacco from an unlicensed cigar distributor or unlicensed cigar retailer; and/or G.L. c. 62C, § 16(c 1/2), which requires licensees of tobacco products to file a return with the Commissioner stating the quantity of cigars and smoking tobacco sold.

Similarly, in support of the suspension of the ENDS products license, the notice stated that ENDS products were held by the appellant in violation of G.L. c. 64C, § 7E(b), which imposes an excise of 75 percent of all the ENDS at the time they are manufactured, purchased, imported, received or acquired in the commonwealth; § 7E(c), which deems every ENDS retailer liable for the collection of the excise on ENDS in their possession at any time; § 7E(1)(1), which prohibits acting as an ENDS distributor without a license; and/or G.L. c. 62C, § 16(c 3/4), which requires

licensees to file a return with the Commissioner stating the quantity of ENDS products sold.

On May 26, 2023, the appellant timely filed an appeal with the Board and filed the appropriate surety bond in accordance with § 68.<sup>2</sup> On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal. The suspensions have been inoperative during the pendency of this appeal.<sup>3</sup>

The appellant presented its case through the testimony of Logan Ahmed, Store Manager. In addition to submitting the surety bond, the appellant also submitted into evidence invoices dated January 1, 2023, through April 20, 2023, which were within four months prior to the inspection visit. The appellant did not submit invoices for November 2022 or December 2022, which would have been within the relevant six-month timeframe preceding the date of inspection.<sup>4</sup> The appellant made an unsubstantiated argument that the invoices submitted at the hearing reflected that tax had been paid on all of the seized ENDS products. The appellant further argued that the cigars were old products that were stored in a back room and that they had not been held for sale for several

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<sup>2</sup> While the petition was stamped as having been docketed by the Board on May 31, 2023, the envelope containing the appeal bore the United States Postal Service postmark of May 26, 2023. Pursuant to G.L. c. 58A, § 7, the Board considered the date of postmark to be the date of filing.

<sup>3</sup>Section 68 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."

<sup>4</sup>The appellant also submitted invoices dated *after* the inspection date, which were therefore not reflective of the seized items.

years. The appellant testified that they were thought to have been discarded.

The Commissioner presented his case through the testimony of Examiner Adelman, as well as the submission into evidence of the Tobacco License Seizure Report, including a spreadsheet listing the total retail values of the products seized by the DOR by tobacco category; the DOR's internal suspension guidelines for untaxed tobacco and ENDS ("guidelines"); the aforementioned suspension notices dated May 16, 2023; and previously issued cigar and smoking tobacco and ENDS license suspension notices dated August 15, 2022, issued to the appellant resulting from an earlier inspection of the Store that occurred on July 6, 2022.

The Commissioner credibly submitted that certain cigar and smoking tobacco and ENDS products were held for sale that were unaccounted for on invoices produced by the appellant, indicating that excise taxes had not been paid on those products. The Commissioner argued that, after applying the guidelines and considering that these were the appellant's second violations, the issuance of a 90-day suspension of the appellant's cigar and smoking tobacco retailer's license and a 120-day suspension of the appellant's ENDS retailer's license were warranted under § 68 and the guidelines.

The Board found and ruled that the appellant failed to establish that excise taxes had been paid on the ENDS products and

cigars that were seized by the Commissioner. The Board found the appellant's claim that all the seized items were accounted for on invoices that were provided to the Board to be unsubstantiated. Furthermore, the Board did not find the appellant's testimony credible with respect to the claim that the appellant believed that the cigars had been discarded. On the other hand, the Board found the evidence presented by the Commissioner to be credible, indicating that the seized products were not listed on any invoice dated within six months prior to the inspection and that the appellant willfully failed to pay excise taxes on those products. Based on the evidence advanced, the Board declined to exercise its equitable powers under § 68 to provide any relief to the appellant.

Accordingly, the Board issued a decision for the appellee, upholding both the 90-day and the 120-day suspensions imposed against the appellant.

#### **OPINION**

Section 68 authorizes the Commissioner to suspend or revoke a cigar and smoking tobacco retailer's license and an ENDS retailer's license if, among other offenses, "the licensee or registrant willfully fails to collect, truthfully account for or pay over any tax under the provisions of this chapter" or "the licensee or registrant has otherwise willfully failed to comply with any provision of the tax laws of the commonwealth or regulations thereunder."

In this case, the Board found and ruled that the appellant willfully failed to pay excise taxes imposed by G.L. c. 64C, §7B and § 7E. While invoices are generally relied upon to prove that excise taxes have been paid on tobacco products, here, the invoices introduced by the appellant failed to account for all products that were held for sale by the appellant. Pursuant to G.L. c. 64C, § 7B(c):

[T]he failure of any cigar retailer to produce or exhibit to the commissioner or his authorized representative, upon demand, an invoice by a cigar distributor for any cigars or smoking tobacco in his possession, shall be presumptive evidence that the excise thereon has not been paid and that such cigar retailer is liable for the collection of the excise thereon.

Likewise, pursuant to G.L. c. 64C, § 7E(c):

There shall be a presumption that the excise on the electronic nicotine delivery system has not been paid and that the electronic nicotine delivery system retailer is liable for the collection of the excise on the electronic nicotine delivery system if, upon demand, an electronic nicotine delivery system retailer fails to produce or exhibit to the commissioner or the commissioner's authorized representative an invoice by an electronic nicotine delivery system distributor for an electronic nicotine delivery system in the electronic nicotine delivery system retailer's possession.

Furthermore, the appellant presented no other credible evidence that excise taxes were paid on the seized items.

Section 68 also grants the Board the power to review a license suspension or revocation and "grant such relief as may be equitable." The Board found and ruled that no circumstances existed



here to warrant exercising the equitable powers granted to it under this provision.

Section 68 grants the Commissioner broad authority to suspend or revoke a retailer's license for failure to pay excise taxes on cigar and smoking tobacco products and ENDS products. Absent any credible evidence that excise taxes were paid on the products seized from the Store, the Board found and ruled that the Commissioner's 90-day suspension of the appellant's cigar and smoking tobacco retailer's license and the 120-day suspension of the appellant's ENDS retailer's license were authorized by the provisions of § 68. Accordingly, the Board issued a decision for the appellee in this appeal.

**THE APPELLATE TAX BOARD**

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

A true copy,

Attest:   
**Clerk of the Board**