

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**SALEM7FS LLC/  
SALEM FOOD STORE**

**v.**

**COMMISSIONER OF REVENUE**

Docket No. C350432

Promulgated:  
December 18, 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 impose a 120-day suspension of a cigarette/smokeless tobacco retailer’s license, to revoke a cigar/smoking tobacco retailer’s license, and to revoke an electronic nicotine delivery systems (“ENDS”) retailer’s license held by Salem7FS LLC/Salem Food Store (“appellant”).

Chairman DeFrancisco heard the appeal. Commissioners Good, Elliott, Metzger, and Bernier joined him 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.

*W. Matthew Iler, Jr., Esq.*, for the appellant.

*Eugene Langner, Esq.*, and *John Parcellin, 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, a Massachusetts limited liability company, owned and operated Salem Food Store, a convenience store located in Salem. Salem Food Store was licensed to sell products that were subject to the Massachusetts tobacco excise: cigarettes and smokeless tobacco, cigars and smoking tobacco, and ENDS.

On December 6, 2023, Drew Adelman of the Commissioner’s Miscellaneous Excise Bureau conducted an inspection of Salem Food Store to determine the appellant’s compliance with applicable tax reporting and payment requirements. During the inspection, Inspector Adelman determined the appellant was not compliant with such requirements. This was not the appellant’s first infraction, as will be discussed in more detail below.

The Massachusetts Department of Revenue (“DOR”) issued to the appellant three separate notices dated December 14, 2023, regarding the December 6, 2023 violations. The first notice stated that the Commissioner was suspending the appellant’s cigarette/smokeless tobacco retailer’s license for 120 days as of January 15, 2024, based on violations of the following: (1) G.L. c. 64C, §§ 6, 7A, and 7C, which impose upon a retailer an excise of 210 percent of the price paid by a licensee to purchase smokeless tobacco; (2) G.L. c. 64C, § 11, which requires retailers to keep complete and accurate records of all cigarette and smokeless tobacco purchased or otherwise acquired; (3) G.L. c. 64C, § 2, which prohibits any person from acting as an unclassified acquirer without a

license; and/or (4) G.L. c. 62C, § 16(c), which requires importers or acquirers of tobacco products to file a return with the Commissioner stating the quantity of tobacco products imported or acquired. This was the appellant's second cigarette/smokeless tobacco infraction.

The second notice stated that the Commissioner was revoking the appellant's cigar/smoking tobacco retailer's license as of January 15, 2024, based on violations of the following: (1) G.L. c. 64C, § 7B(b), which imposes upon a retailer an excise of 40 percent of the wholesale price on cigars and smoking tobacco at the time it is manufactured, purchased, imported, received, or acquired in the Commonwealth; (2) 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; (3) G.L. c. 64C, § 7B(l)(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 (4) G.L. c. 62C, § 16(c ½), which requires licensees to file with the Commissioner a return stating the quantity of cigars and smoking tobacco sold. This was the appellant's third cigar/smoking tobacco infraction; in 2022 and 2023, the appellant's cigar/smoking retailer's license was suspended.

The third notice stated that the Commissioner was revoking the appellant's ENDS retailer's license as of January 15, 2024, based on violations of the following: (1) G.L. c. 64C, § 7E(b), which imposes an excise of 75 percent of the wholesale price on all ENDS 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 collection of excise on ENDS in their possession at any time; (3) G.L. c. 64C, § 7E(l)(1),

which prohibits acting as an ENDS distributor without a license; and/or (4) G.L. c. 64C, § 16(c ¾), which requires licensees to file with the Commissioner a return stating the quantity of ENDS sold. In 2022 and 2023, the appellant's ENDS retailer's license was also suspended. This was the appellant's third ENDS infraction; in 2022 and 2023, the appellant's ENDS retailer's license was suspended.

The Commissioner exercised his authority to suspend and revoke the licenses under G.L. c. 62C, § 68 ("§ 68"), specifically paragraph (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 December 22, 2023, the appellant filed a timely appeal with the Board.<sup>1</sup> 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.

The appellant presented its case through the testimony of Salem Food Store's manager, Waquas (a.k.a. Logan) Ahmed. Mr. Ahmed testified that English was not his first language and that he was not conversant with the laws regarding the taxation of tobacco products. Mr. Ahmed then testified that several of the seized tobacco items – specifically those that were found in the backpack behind the register counter - were not intended for sale at Salem Food Store but rather for his personal use. He testified that he had been scheduling a trip to see relatives and was planning to bring the items in his backpack to them, but the trip was canceled, and he had not yet unpacked the backpack at the time

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<sup>1</sup> While the petition was stamped as having been docketed by the Board on December 28, 2023, the envelope containing the petition bore a United States Postal Service postmark of December 22, 2023. Pursuant to G.L. c. 58A, § 7, the Board considered the date of the postmark to be the date of filing.

of the inspection. Mr. Ahmed further acknowledged that he had purchased the seized items from a private distributor but professed that he was not aware that the distributor had not paid taxes on the items.

On cross-examination, Mr. Ahmed acknowledged that he had spoken to Inspector Adelman regarding two previous inspections at Salem Food Store – July 6, 2022 and April 20, 2023.<sup>2</sup> The Board thus found that Mr. Ahmed was familiar with the process by which Inspector Adelman inspected suspicious activity and compliance with tobacco excise laws. Mr. Ahmed admitted that Salem Food Store was not compliant on those two visits. The Board did not find Mr. Ahmed to be a credible witness.

Next, the Commissioner presented his case in chief and called Inspector Adelman as a witness. Inspector Adelman testified that he had eight years of experience as a tobacco excise inspector for DOR, during which time he had completed thousands of tobacco inspections. Inspector Adelman testified to his usual inspection practices of observing what tobacco products are being sold, checking the retail licenses to ensure they are current and valid, and reviewing invoices to ensure that the tobacco products for sale correspond with those invoices.

Inspector Adelman then testified to the December 6, 2023 inspection of Salem Food Store. He testified that the items that he seized during that inspection were found in a backpack and in a box that were both located in an open area behind the sales counter: “I didn’t have to go into another room.” Inspector Adelman spoke to the clerk who was working at the time and asked for invoices for these products that the appellant was

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<sup>2</sup> While Mr. Ahmed was not present at the store on April 20, 2023, Inspector Adelman’s report from that inspection indicates that he returned to the store and spoke with Mr. Ahmed a few days later, on April 25, 2023.

required to maintain. Inspector Adelman determined that the invoices he received did not correspond with these products. Inspector Adelman explained that most of the above seized products were either over the legal limit of nicotine or were flavored and thus banned for retail sale in Massachusetts. Inspector Adelman concluded that the appellant had obtained these banned products from a distributor without a Massachusetts license who did not collect and remit Massachusetts taxes on the products. Additionally, he testified that many cigarette packs seized were visibly marked with New Hampshire or Connecticut excise stamps. Inspector Adelman further noted in his report that the appellant was not paying ENDS taxes to the Commonwealth.

Inspector Adelman prepared an inspection report to summarize the December 6, 2023 inspection and to catalogue the following seized tobacco products:

<b>SEIZED ITEMS</b>	<b>CASH VALUE</b>
Cigarettes: 42 packs	N/A <sup>3</sup>
Smokeless Tobacco: 51 tins/cans/pouches	\$838
Cigars: 271 individual items	\$514
Smoking Tobacco: 9 bags	\$ 72
ENDS: 14 individual items	\$409
<b>TOTAL SEIZED ITEMS: 387</b>	<b>TOTAL SEIZED VALUE: \$1,833<sup>4</sup></b>

Having been informed during the December 6, 2023 inspection that Mr. Ahmed was not available because he was traveling, Inspector Adelman asked the clerk to have Mr. Ahmed contact him once he returned. Mr. Ahmed failed to do so.

When asked on cross-examination about finding the items in a backpack and not on the shelves for sale, Inspector Adelman explained that, based on his experience in the field, most seized products found during an inspection are discovered in hidden areas:

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<sup>3</sup> As will be explained *infra*, DOR employs internal guidelines for setting penalties for tobacco excise infringements. These internal guidelines refer to the number of cigarette packages seized rather than their value.

<sup>4</sup> Excluding the value of seized cigarette packs (see *supra* note 3).

[These products] are usually not out in the open eye. They are usually away from the sales counter and not, absolutely not in clear view. Most seized products are not on shelves waiting to be sold to customers because they are flavored and over the limit. So these are the types of products that are in backpacks, locked cabinets, locked closets, floorboards, ceiling tiles, freezers. And the list goes on and on.

Inspector Adelman further stated that the inspection at issue in this appeal was conducted based on a tip from a Department of Health inspector and other individuals who had complained that the appellant was selling tobacco products banned for sale in Massachusetts. He explained that, although the Commissioner does not regulate banned products, the Commissioner is interested in these products because they generally are purchased from wholesalers unlicensed in Massachusetts and are thus untaxed. The Board found Inspector Adelman's testimony to be credible in all respects.

The appellee offered into evidence two reports from prior inspections of Salem Food Store by Inspector Adelman. The first, on July 6, 2022, resulted in the seizure of 2,261 items, comprising: 20 smokeless tobacco items valued at \$312; 2,104 cigars valued at \$ 5,476.80; and 137 ENDS valued at \$3,179.34, for a total seized value of \$8,968.14 of product. The second, on April 20, 2023, resulted in the seizure of 57 items, comprising: 25 cigars valued at \$75; and 32 ENDS valued at \$800, for a total seized value of \$875.

The appellant made several arguments to reduce or eliminate the suspension and revocations at issue. First, the appellant argued that it lacked the requisite willfulness to sell the untaxed tobacco products at issue, claiming that the products were either not for sale at Salem Food Store, or that the appellant's management did not know that they were untaxed.

The appellant next urged the Board to use its discretion and invoke its equitable powers in this appeal. The appellant claimed that it relied upon tobacco sales at Salem

Food Store for the livelihood of its business, and that the penalties at issue would be devastating to the appellant. The appellant also questioned the application of the Internal DOR guidelines (“Guidelines”), which the DOR employs in instances of infractions, including in the instant appeal, to ensure consistency in its enforcement of § 68. The appellant advocated for the Board instead to consider what it deemed to be the equities of the situation, including the supposed lack of willfulness and lack of understanding of the tobacco tax laws as well as the damaging effects of the penalties.

Alternatively, while the appellant admitted that this was not its first violation, the appellant contended that the second “small” violation in April 2023 should be disregarded, thus resulting in lesser penalties under the Guidelines for the violations at issue.

Finally, the appellant contended that all evidence obtained during the December 6, 2023 investigation must be suppressed as obtained through an alleged illegal search and seizure, because Investigator Adelman did not have a search warrant to conduct the investigation.

Based on the record in its entirety, the Board made the following ultimate findings of fact.

As previously stated, the Board found that Mr. Ahmed was not a credible witness. The December 6, 2023 seizure followed the appellant’s third inspection. With respect to Mr. Ahmed’s claimed lack of knowledge of the tobacco tax laws, the Board found that Inspector Adelman had spoken to Mr. Ahmed regarding both prior inspections, which were conducted in the same manner and amply informed Mr. Ahmed of the type of activity that DOR investigated. With respect to the seized items in his backpack being for his personal use, the Board found credible Inspector Adelman’s testimony that hiding banned, untaxed



items held for sale is a widespread practice that he routinely encountered during his many inspections. Mr. Ahmed's testimony that he had not had a chance to unpack his backpack was unconvincing and highly self-serving, particularly in light of the appellant's previous two violations.

The Board further found that, with respect to the second inspection in April 2023, the appellant had previously been instructed at the first inspection, less than a year prior, as to the activity that was being investigated and that would result in penalties. The Board found no reason that this second violation should be disregarded for purposes of setting the penalties at issue.

The Board next found that the appellant, as a tobacco retailer, was involved in an extensively regulated industry and thus, as will be explained in the Opinion below, the December 6, 2023 inspection conducted by DOR did not require a search warrant. Therefore, the Board found the appellant's argument on this point unavailing.

Based on the foregoing, and for the reasons stated more fully in the Opinion, the Board declined to exercise its equitable powers to reverse the 120-day cigarette/smokeless tobacco license suspension and the cigar/smoking tobacco and ENDS license revocations.

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.

Invoices are generally relied upon to prove that excise taxes have been paid on tobacco products. Here, the appellant failed to produce invoices to account for all products that were held for sale by the appellant. The appellant presented no other credible evidence that excise taxes were paid on the seized items, and, in fact, did not argue this point. Many seized items were not legal for sale in Massachusetts, and they were hidden from plain view in an area near the cash register, which Inspector Adelman credibly testified indicated that the appellant was aware that the items had not been taxed in Massachusetts. Moreover, this was the appellant's third inspection and seizure at Salem Food Store. Considering the facts in their totality, the Board found that the appellant's disregard of the tax laws was willful. Accordingly, the Board found and ruled that the suspension and revocations at issue were authorized by § 68. The Board further found and ruled that no circumstances existed to warrant exercising the equitable powers granted to it under § 68.

While G.L. c. 64C, §§ 7B, 7E, and 11 permit the Commissioner to conduct inspections to determine if a retailer is complying with applicable tax reporting and payment requirements, the appellant complained that the December 6, 2023 investigation was conducted without a search warrant. The U.S. Supreme Court has long held that certain inspections are exempt from the Fourth Amendment search warrant requirement, specifically those of a "pervasively regulated business." ***United States v. Biswell***, 406 U.S. 311, 316 (1972). The Court has held that an entity in an industry that has been "long subject to close supervision and inspection" has a reduced expectation of privacy.

**Colonnade Catering Corp. v. United States**, 397 U.S. 72, 77 (1970); see also **New York v. Burger**, 482 U.S. 691, 700 (1987). As a tobacco retailer that was required to obtain a license and was subject to close supervision and inspection by both the revenue and health sectors of government, the Board found that the appellant was engaged in a “pervasively regulated business.” See e.g., **United States v. Hamad**, 809 F.3d 898, 906 (7<sup>th</sup> Cir. 2016) (declining to reverse lower court’s finding that cigarette retail is a pervasively regulated business, “[g]iven that cigarettes have been regulated . . . indeed for most of their existence as a mass produced product”); see also **United States v. Mansour**, 252 F.Supp 3d. 182, 194 (Western Dist. N.Y. 2017)(finding that cigarette retailers are a pervasively regulated business in that state such that warrantless searches conducted pursuant to the applicable state statute may be reasonable under the Fourth Amendment) .

The constitutionality of warrantless inspections of a pervasively regulated business hinges on three factors, which are set forth in **Burger**, 482 U.S. at 702-703:

[A] warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made. [citations omitted] Second, the warrantless inspections must be “necessary to further [the] regulatory scheme.” . . . Finally, “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.” [citation omitted] In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. [citation omitted]

The December 6, 2023 inspection of Salem Food Store satisfied each of these three requirements.

First, there is a substantial government interest pursuant to which an unannounced tobacco retailer inspection is made – the payment of taxes properly due from the tobacco retailer. See **McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco**, 496 U.S. 18, 37 (1990) (recognizing the role of collecting taxes in protecting the government’s “exceedingly strong interest in financial stability”) and **Colonnade**, 397 U.S. at 75 (recognizing a substantial government interest in “protecting the revenue against various types of fraud”).

Second, unannounced inspections are necessary to further the regulatory scheme for the retail tobacco industry. In the context of a warrantless inspection of a firearms dealer, another pervasively regulated industry, the Supreme Court ruled:

It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. ... [I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and, if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

**Biswell**, 406 U.S. at 316. It is likewise necessary for tobacco excise inspections to be unannounced as well as frequent, particularly with respect to repeat offenders like the appellant, who despite having been inspected and penalized on two prior occasions, including less than a year prior, still was found to be in possession of untaxed tobacco products at the December 6, 2023 inspection. See **Salem7FS LLC v. Commissioner**, Mass. ATB Findings of Fact and Report 2024-253.

Finally, the statutes giving rise to the inspections, G.L. c. 64C, §§ 7B, 7E, and 11, inform the holder of a retail tobacco license that inspections will be made on a regular basis. The statutes also prescribe parameters for the inspections by limiting the time

within which records are subject to inspections, limiting the items with the inspector may examine, and prescribing that the purpose for examining records and premises is determining compliance with applicable tax laws.

Thus, the Board ruled there was no constitutional hindrance to the December 6, 2023 inspection or use of the evidence seized therefrom.

### **Conclusion**

Under the facts of the instant appeal, the Board found no justification for exercising its equitable powers under § 68 to reverse the revocations or suspension of the appellant's tobacco retail licenses. The Board further found no constitutional hinderance to the inspection conducted on December 6, 2023, which produced the evidence used in setting the revocations and suspension.

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