

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

**SWAMI BAPA, INC., d/b/a
TRUE CONVENIENCE**

v. COMMISSIONER OF REVENUE

Docket No. C345001

Promulgated:
January 23, 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 thirty-day suspension of a cigarette and smokeless tobacco retailer license held by Swami Bapa, Inc., d/b/a True Convenience ("appellant").

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

These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.34.

Kokila Patel, pro se, for the appellant.

James P. Burbridge, Esq., and *Wendi Safron, 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 is a Massachusetts corporation that owns and operates a convenience store located in Waltham. It is a licensed retailer of three categories of tobacco products that are subject to the Massachusetts cigarette excise: cigarettes and smokeless tobacco; cigar and smoking tobacco; and electronic nicotine delivery systems ("ENDS").

On February 16, 2022, Blanca Lo ("Examiner Lo"), a Massachusetts Department of Revenue ("DOR") Tax Examiner, conducted a routine inspection of the premises of the appellant's convenience store, True Convenience ("store"). At the request of Examiner Lo, the appellant produced invoices from its wholesale distributor listing inventory purchases made by the appellant over the previous six months. Examiner Lo reviewed the invoices to ascertain whether all tobacco products offered for sale in the store were accounted for on the invoices, as excises for tobacco products are charged and paid at the wholesale level. Invoices listing tobacco products are therefore relied upon to confirm that excises have been paid on the invoiced items.

According to Examiner Lo'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 Lo to be untaxed and were therefore seized. Examiner Lo subsequently detailed the inspection in a report that included an itemized list of the seized products. The initial list included fifty-one units of smokeless tobacco.

Based on the inspection and seizure, the Commissioner issued a letter of suspension dated April 6, 2022, notifying the appellant of the Commissioner's intent to suspend the appellant's license to sell cigarettes and smokeless tobacco for thirty days, effective May 5, 2022.¹ In support of the suspension, the notice stated that untaxed smokeless tobacco products were held by the appellant in violation of the following: G.L. c. 64C, §§ 6, 7A, and 7C, which impose a combined excise of 210 percent of the price paid by a licensee to purchase smokeless tobacco; G.L. c. 64C, § 11,² which requires every retailer to keep complete and accurate records of all cigarette and smokeless tobacco purchased or otherwise acquired; G.L. c. 64C, § 2, which prohibits any person from acting as an unclassified acquirer without a license; and G.L. c. 62C, § 16(c), which requires importers or acquirers of tobacco products

¹ The Commissioner sent the appellant two additional letters dated April 6, 2022, in which warnings were issued with respect to the appellant's retail licenses to sell cigar and smoking tobacco and ENDS products. The warning letters and corresponding licenses are not a subject of this appeal.

² Although G.L. c. 64C, § 11 only explicitly references "cigarettes," it applies also to smokeless tobacco pursuant to G.L. c. 64C, § 1, which states, "Whenever used in this chapter or chapter sixty-two C, unless the context otherwise requires, the word 'cigarette' shall include within its meaning, without limitation, little cigars and smokeless tobacco."

to file a return with the Commissioner stating the quantity of tobacco products imported or acquired. The suspension has been inoperative during the pendency of this appeal.³

On April 15, 2022, the appellant timely filed an appeal with the Board and filed the appropriate surety bond in accordance with § 68.⁴ On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

The appellant presented its case through the testimony of Kokila Patel, who operated the store, and her daughter, Sweta Patel, who worked part-time at the store. The appellant also submitted invoices dated within six months of the inspection visit (dated September 1, 2021, through February 2, 2022) as well as older invoices (dated July 30, 2019, through July 7, 2021). Some of the invoices introduced at the hearing were only made available to the Board just prior to the hearing and had not been provided to the DOR until the hearing. The appellant argued that the

³Section 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."

⁴An appeal from a suspension of a cigarette and smokeless tobacco 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, 2022 notice date was April 16, 2022. While the appeal was stamped as having been entered by the Board on April 26, 2022, the envelope containing the appeal bore the United States Postal Service postmark of April 15, 2022. Pursuant to G.L. c. 58A, § 7, the Board considered the date of postmark to be the date of filing.

additional invoices demonstrated that excises had been paid on some of the tobacco products that had been seized by Examiner Lo.⁵

Ultimately, the appellant did not deny having untaxed smokeless tobacco products for sale in the store. However, the appellant offered the theory that some of the seized tobacco products at issue might have been products that were transferred from a second store owned by the appellant that had closed in 2020. No credible evidence supporting this theory was introduced by the appellant. Sweta Patel also sought leniency from the Board, testifying that the license suspension imposed a significant burden on the appellant's ability to support the Patel family.

The Commissioner presented his case through the testimony of Examiner Lo and Evan Garcia, Director of the DOR's Miscellaneous Excise Unit, as well as the submission of various documents pertaining to the inspection and the license suspension.

The Commissioner argued that certain smokeless tobacco products were held for sale that were unaccounted for on invoices produced by the appellant, indicating that excises had not been paid on those products. The Commissioner further argued that, after applying internal DOR guidelines, the issuance of a thirty-day

⁵ oAs these invoices had not been available for inspection by the Commissioner before the hearing, the hearing was continued from July 27, 2022, and reconvened on October 12, 2022, thereby allowing the Commissioner time to review the invoices against the seized products.

suspension of the appellant's cigarette and smokeless tobacco retailer's license was warranted under § 68.

The Commissioner acknowledged that some of the seized smokeless tobacco products were later identified on invoices that were produced by the appellant after the audit, notwithstanding which the Commissioner argued that there remained smokeless tobacco products held for sale by the appellant that were unaccounted for on any invoice that was dated within six months of the inspection. The Commissioner disregarded the invoices dated before August 2021, arguing that the smokeless tobacco items that were listed on these invoices would have expired and therefore could not be the same products offered for sale at the store at the time of the inspection.

The Board found and ruled that the appellant failed to establish that excises had been paid on smokeless tobacco products that were seized by the Commissioner, noting that the appellant did not even argue that excise had been paid on all of the seized smokeless tobacco products. Although the appellant established that excises had been paid on some of the seized inventory, the Board found the testimony presented by the DOR to be credible, indicating that there still were seized smokeless tobacco products that were not listed on any invoice dated within six months of the inspection and that excises on such products had not been paid.

Based on the evidence advanced, the Board further declined to exercise its equitable powers under § 68.

Accordingly, the Board issued a decision for the appellee, upholding the thirty-day license suspension imposed against the appellant.

OPINION

Section 68 authorizes the Commissioner to suspend or revoke a cigarette and smokeless tobacco 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 excises imposed by G.L. c. 64C, §§ 6, 7A, and 7C. While invoices are generally relied upon to prove that excises have been paid on smokeless tobacco products, here, the invoices introduced by the appellant failed to account for all smokeless tobacco products that were held for sale by the appellant. Furthermore, the appellant presented no credible evidence that excises were paid on all the seized items, and, in fact, the appellant did not argue that excises had been paid on all 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.

Given that § 68 grants the Commissioner broad authority to suspend or revoke a retailer's license for failure to pay excises on smokeless tobacco products, and absent any credible evidence that excises were paid on smokeless tobacco products found for sale in the store, the Board found and ruled that the Commissioner's thirty-day suspension of the appellant's cigarette and smokeless tobacco retailer license was authorized by the provisions of § 68. Accordingly, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: /S/ 
Mark J. DeFrancisco, Chairman

A true copy,

Attest: /S/ 
Clerk of the Board