



1 Violation dated September 30, 2011, recommending a 20-day license suspension as the penalty for the  
2 cited violations. Appellant timely appealed that Notice of Violation, after which the Department held a  
3 conference with appellant on December 13, 2011. As a result of that conference, the Department  
4 issued to appellant a Notice of Decision (NOD) on March 16, 2012, in which the Department found  
5 that appellant committed the cited violations and recommended a reduction of the 20-day license  
6 suspension to a 10-day license suspension as the penalty for those violations. Appellant did not appeal  
7 the NOD, which became final on April 26, 2012. In accordance with the NOD, the Department mailed  
8 a Notice of Suspension to appellant on April 27, 2012, notifying appellant that his license would be  
9 suspended for 10 days, from May 11, 2012, through May 20, 2012.

10 On July 13, 2012, ISOD conducted the inspection at issue in this appeal. During the inspection,  
11 ISOD found a box behind the sales counter containing various packages of unstamped cigarettes.  
12 While inspecting the back area of the store, ISOD found a black bag which also contained various  
13 packages of unstamped cigarettes. Petitioner's mother indicated that the cigarettes found in the black  
14 bag must have been left over from the prior inspection when she purchased cigarettes from the walk-in  
15 vendor. Petitioner was able to provide some purchase invoices, but not enough to support all of the  
16 cigarettes found in his inventory. ISOD seized 17 packages of Craven 'A' brand unstamped and non-  
17 MSA cigarettes; 16 packages of 555 brand unstamped cigarettes; 2 packages of 555 brand unstamped  
18 cigarettes labeled US Export Only; 3 packages of Jet brand unstamped and non-MSA cigarettes; 1  
19 package of Hero brand unstamped and non-MSA cigarettes; 1 package of Virginia Slims brand  
20 unstamped cigarettes labeled US Export Only; and 1 package of Marlboro brand counterfeit-stamped  
21 cigarettes labeled US Export Only.

22 Based on the results of inspection and seizure, ISOD issued to appellant a Civil Citation for  
23 violations of Business and Professions Code section 22974 (failing to have the necessary invoices on  
24 the premises and available for inspection) and Business and Professions Code section 22974.3,  
25 subdivision (a)(4) (second seizure within 5 years of 20 or more packages of unstamped cigarettes). On  
26 September 21, 2012, the Department issued to appellant a Notice of Violation, stating that the penalties  
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28 <sup>3</sup> During the inspection, appellant's mother, who operates the business, admitted that she purchased cigarettes from a walk-in vendor without obtaining a purchase invoice.

1 for the cited violations were a 30-day license suspension and a \$5,000 fine. Appellant filed an  
2 untimely request for an appeals conference with the Department dated October 4, 2012, and the  
3 Department conducted a telephone conference on June 19, 2013. Following the conference, on  
4 September 27, 2013, the Department issued an NOD in which it concluded that appellant violated BPC  
5 sections 22974 and 22974.3, subdivision (a)(4), and upheld the 30-day license suspension and \$5,000  
6 fine as the penalty for those violations.

7 On October 3, 2013, appellant filed a timely request for an appeals conference with the Appeals  
8 Division. The Appeals Division held a conference on January 22, 2014, during which appellant stated  
9 that he works two other jobs and so his mother and father operate the business. Appellant asserted that  
10 the seized cigarettes belonged to his father and were for his father's personal use and were not for sale.  
11 As a result of this conference, we issued a Second Decision concluding that appellant violated  
12 Business and Professions Code sections 22974 and 22974.3, subdivision (a)(4), and also upholding the  
13 30-day license suspension and \$5,000 fine as the appropriate penalty for those violations.

14 On February 18, 2014, appellant filed a request for Board hearing stating that he does not agree  
15 with the conclusion in the Second Decision. Appellant continues to argue that the cigarettes in  
16 question belonged to his father and were not for sale. Appellant argues that his father was not aware  
17 that he could not have his personal cigarettes at the business. Appellant contends that a \$5,000 fine is  
18 too severe in light of the fact that only \$132.50 of cigarettes was seized. Appellant contends that it is  
19 unfair to impose such a high fine when ISOD cannot prove that appellant was selling the unstamped  
20 cigarettes.

21 Business and Professions Code section 22974.3, subdivision (a), provides for the seizure of any  
22 unstamped cigarettes found in the possession of, being stored by, or being sold by a retailer or any  
23 other person.<sup>4</sup> California Code of Regulations, title 18, section (Regulation) 4603, subdivision (d)(4),  
24 provides that a second seizure within 5 years of 20 packages or more of unstamped cigarettes must

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26 <sup>4</sup> We are only addressing the violation of Business and Professions Code section 22974.3, subdivision (a)(4) and the  
27 applicable penalty because it is that penalty that is in dispute in this case. The penalty imposed for a second violation of  
28 Business and Professions Code section 22974 is a 30-day license suspension and a \$1,000 fine. When there are multiple  
violations in a given appeal, the violation punishable by the most severe penalty will be the one used to determine the  
appropriate penalty. (Cal. Code Regs., tit. 18, § 4603, subd. (e).) Here, the violation of Business and Professions Code  
section 22974.3, subdivision (a)(4) carries a more severe penalty.

1 result in a 30-day license suspension and a fine determined in accordance with Regulation 4607.  
2 Regulation 4607, subdivision (b)(4)(A), provides that the appropriate fine for a violation of Business  
3 and Professions Code section 22974.3, subdivision (a)(4) is \$5,000. Here, appellant was found to be in  
4 possession of more than 20 packages of unstamped cigarettes during the February 11, 2009 inspection.  
5 On July 13, 2012, less than five years later, appellant again was found to be in possession of more than  
6 20 packages of unstamped cigarettes. Accordingly, appellant was in violation of Business and  
7 Professions Code section 22974.3, subdivision (a)(4), and the 30-day license suspension and \$5,000  
8 fine is the appropriate penalty.

9 Appellant's contention that the cigarettes belonged to his father and were for his father's  
10 personal consumption misses the point. Likewise, appellant's contention that there is no evidence that  
11 appellant actually sold the cigarettes also misses the point. Business and Professions Code section  
12 22974.3, subdivision (a) provides that the mere possession of unstamped cigarettes is sufficient to  
13 warrant a violation. There is no dispute that ISOD found untaxed cigarettes at the business location.  
14 Appellant need not own the cigarettes or actually engage in selling the cigarettes; the fact that the  
15 unstamped cigarettes were found at the business location constitutes a punishable act. Moreover, the  
16 amount of the fine is set by regulation and the amount of cigarettes actually seized is immaterial  
17 unless, as relevant here, five times the amount of the cigarettes exceeds \$5,000.<sup>5</sup> The regulation sets  
18 the minimum fine for a violation of Business and Professions Code section 22974.3, subdivision (a)(4)  
19 at \$5,000.

20 Because appellant was found in possession of more than 20 packages of cigarettes for the  
21 second time within 5 years, the 30-day license suspension and \$5,000 fine is the appropriate penalty.

#### 22 OTHER DEVELOPMENTS

23 None.

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25 Summary prepared by Chad T. Bacchus, Tax Counsel

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28 <sup>5</sup> California Code of Regulations, title 18, section 4607, subdivision (b)(4) provides in relevant part that the second offense shall result in a fine of \$5,000 or five times the retail value of any cigarettes or tobacco products seized, whichever is greater.