

**CALIFORNIA STATE BOARD OF EQUALIZATION**

**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Petition for Release of Seized Property Under the Cigarette and Tobacco Products Tax Law and the Cigarette and Tobacco Products Licensing Act of 2003 of:

JEFF & AMY INCORPORATED,  
dba Discount Mini Mart

Petitioner

Account Number: LR Q ET 91-228089  
Case ID 547450

San Jose, Santa Clara County

Type of Business: Mini mart

Seizure Date: June 16, 2010

Approximate Value of Products in Dispute: \$412.43<sup>1</sup>

We have not held an appeals conference in this matter. This summary is prepared based on the information contained in the Petition, the Amended Reply to Petition of the Investigations Division (ID), and related documents. This matter was scheduled for Board hearing on December 15, 2010, but was removed at the request by ID for further review.

**UNRESOLVED ISSUE**

**Issue:** Whether the tobacco products should be forfeited because they are described by Business and Professions Code section 22974.3, subdivision (b). We conclude that the tobacco products should be forfeited.

Petitioner, a corporation, owns and operates Discount Mini Mart (Discount) located at 1587 Kooser Road, San Jose, California. Petitioner holds the cigarette and tobacco products retailer license referenced above, and seller's permit SR Y GH 99-670267, for this location. Petitioner does not hold a cigarette and tobacco products distributor or wholesaler license for this location.

On June 16, 2010, ID conducted a cigarette and tobacco products inspection of this location. Petitioner's clerk Mr. Paul Singh was on the premises and telephoned petitioner's president Mr. Joseph Mathew, who authorized the inspection and stated that he would come to the store. During the

<sup>1</sup> Consisting of 2 12-count boxes of Bugler roll-your-own (RYO) tobacco, 9 pouches of Bugler RYO tobacco, 34 Optimo Peach cigarillos, 2 60-count boxes and 11 Swisher Sweets Wine cigarillos, 1 60-count box of Swisher Sweet Strawberry cigarillos, 4 Black & Mild Wine cigars, 23 Black & Mild Wood Tip cigars, and 7 tins of Grizzly Long Cut Mint tobacco.

1 inspection, ID found that all cigarettes were properly stamped. Shortly thereafter, Mr. Mathew arrived  
2 at the store and provided ID with two binders located on a shelf behind the front counter, which  
3 contained cigarette and tobacco products purchase invoices. ID reviewed those invoices and found  
4 that petitioner purchased cigarettes and tobacco products from licensed vendors Naser Distributor  
5 (Naser), Pitco, Altadis, Commonwealth, and Nat Sherman. ID also found 22 invoices from Naser in  
6 the binders, which had been issued to petitioner's other store, Fiesta Liquors (Fiesta).<sup>2</sup> ID concluded  
7 that the purchase invoices in the binders which listed Discount as the purchaser did not support a  
8 portion of the tobacco products in Discount's store inventory as tax paid. ID asked Mr. Mathew if he  
9 purchased from other vendors, and he replied that he did not, but also that he occasionally transfers  
10 tobacco products from Fiesta's inventory to Discount. ID stated to Mr. Mathew that if cigarettes and  
11 tobacco products are transferred between stores, transfer records and copies of the original purchase  
12 invoices must be kept at each location. ID also stated that such transfer records must include the  
13 address of each store, the date of transfer, a description of the items transferred, and the amounts of  
14 items transferred. ID further stated to Mr. Mathew that during the previous inspection of Discount on  
15 December 18, 2007, ID advised petitioner's employee Mr. Raskiklal that transfer records must be  
16 maintained if petitioner transferred products between its stores. During the inspection at issue here,  
17 Mr. Mathew telephoned petitioner's secretary, Ms. Amy Mathew, who stated that she could provide  
18 additional invoices, and possibly transfer records.

19 ID seized the tobacco products not supported by invoices showing payment of tax and issued  
20 petitioner a Receipt for Property Seized and a Civil Citation for alleged violations of Business and  
21 Professions Code sections 22974 and 22974.3, subdivision (b). On July 14, 2010, ID served petitioner  
22 with a Notice of Seizure and Forfeiture dated July 7, 2010, stating that tobacco products valued at  
23 \$524.35 were seized and are subject to forfeiture under Business and Professions Code section  
24 22974.3. Petitioner submitted a verified petition dated July 29, 2010, for release of all of the seized  
25 tobacco products, and attached to the petition nine Naser invoices dated May 18, April 4, March 12,  
26 March 19, and January 8, 2010, and November 20, October 21, October 9, and October 2, 2009; and  
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<sup>2</sup> Petitioner owns and operates Fiesta Liquors located at 672 North Fair Oaks Avenue, Sunnyvale, California, and holds license LR Q ET 91-228088 for that location.

1 two Pitco purchase invoices dated May 27 and April 29, 2010, each listing Fiesta as the purchaser, and  
2 five handwritten pages described as a log of transfers of cigarettes and tobacco products.

3 Initially, ID concluded that this documentation did not support any of the seized tobacco  
4 products. However, following ID's review that occurred per the postponement, ID concluded that tax  
5 has been paid on nine pouches of Midnight Special roll-your-own tobacco and one 25-count box and  
6 three Black & Mild Regular cigars because ID was able to match certain products listed on the  
7 invoices with entries on the transfer log. Therefore, on December 14, 2010, ID returned those products  
8 with an approximate retail value of \$55.50 to petitioner.

9 On January 19, 2011, petitioner submitted a typed document listing the date and vendor from  
10 whom petitioner purchased tobacco products, the quantity of tobacco products transferred, and the date  
11 of transfer. In this document, petitioner also stated that when it purchases Swisher Sweets tobacco,  
12 there are box deals where petitioner buys one box of cigarillos and receives a second box of cigarillos  
13 for free. Petitioner stated that it opens the second box and places the individual cigars into an open  
14 display box that petitioner reuses. On January 21, 2011, ID reviewed the provided document, and  
15 concluded that tax has been paid on 31 Swisher Sweets Strawberry cigarillos and 31 Swisher Sweets  
16 Grape cigarillos. ID stated that it will return those 62 Swisher Sweets cigarillos, with an approximate  
17 retail value of \$56.42, leaving products with an approximate retail value of \$412.43 (\$524.35 - \$55.50  
18 - \$56.42) in ID's custody and remaining in dispute.

19 As to the remaining products in ID's custody, ID states that Bugler tobacco is listed on Naser  
20 invoices dated October 9 and November 20, 2009, but the manufacture date of the Bugler products in  
21 ID's custody is February and January 2010, which is after the date of the provided invoices. ID states  
22 that a 50-count box of Optimo tobacco is listed on the Naser invoice dated March 12, 2010, but the  
23 Optimo tobacco in ID's custody is a 60-count box, which is a different configuration. ID states that the  
24 Naser invoice dated April 2, 2010, lists Black & Mild Original tobacco, but the Black & Mild cigars in  
25 ID's custody are Black & Mild Wine cigars and Black & Mild Wood Tip cigars, which are different  
26 flavors. ID states that Grizzly Long Cut Straight tobacco is listed on the September 4, 2009 Naser  
27 invoice and Grizzly Long Cut Wintergreen is listed on the March 12, 2010 Naser invoice, but the  
28 Grizzly tobacco in ID's custody is Long Cut Mint, which is a different flavor. ID states that the Naser

1 invoice dated March 19, 2010, contains Swisher Sweets Wine cigarillos, but the Swisher Sweets Wine  
2 cigarillos in ID's custody have a manufacture date of April 2010, which is after the date of the March  
3 19, 2010 Naser invoice. ID states that two 60-count boxes Swisher Sweets Grape cigarillos are listed  
4 on the March 12, 2010 Naser invoice and Swisher Sweets Grape five-packs are listed on the May 27,  
5 2010 Pitco invoice. ID states that the seized Swisher Sweets cigarillos in ID's custody are in a 60-  
6 count box, which is a different configuration than those cigarillos listed on the May 27, 2010 Pitco  
7 invoice. In addition, the seized Swisher Sweets Grape cigarillos have a May 2010 manufacture date,  
8 which is after the date of the March 12, 2010 Naser invoice. ID states that the May 27, 2010 Pitco  
9 invoice contains a purchase for Swisher Sweets Strawberry five-packs "B1G1," which is the buy one  
10 box get a second box free deal. As described earlier, petitioner stated that it opens the second box and  
11 will place the individual cigarillos into an already opened display box that petitioner re-uses. ID states  
12 that the Swisher Sweets Strawberry cigarillos remaining in ID's custody are in a *sealed* 60-count box.  
13 ID asserts that petitioner could not have placed cigarillos from the B1G1 deal into the sealed box, and  
14 thus concludes that the May 27, 2010 Pitco invoice does not support the remaining Swisher Sweets  
15 Strawberry cigarillos in ID's custody. In its Amended Reply to Petition, ID also notes that petitioner  
16 was provided Publication 78, "Sales of Cigarettes and Tobacco Products in California," when the  
17 Board issued petitioner's license, which informed petitioner that the law prohibits the possession of  
18 untaxed tobacco products.

19 Business and Professions Code section 22974.3, subdivision (b), provides that, where a person  
20 holds tobacco products for which tax is due but such tax has not been paid, the untaxed tobacco  
21 products are subject to seizure and forfeiture, and that person bears the burden of proving that the  
22 applicable taxes have been paid to the Board either by proof of such payment, or by a purchase invoice  
23 which complies with Business and Professions Code section 22978.4 and which shows that applicable  
24 taxes have been paid. Here, petitioner has not presented additional invoices showing that tax has been  
25 paid on the seized tobacco products remaining in custody. Therefore, those products were properly  
26 seized and they must be forfeited. Accordingly, we recommend that the petition be denied.

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28 Summary prepared by Cindy Chiu, Tax Counsel III (Specialist)