STATE BOARD OF EQUALIZATION
CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT APPEAL

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:	
EYAD Y. ARIEKAT & AIMAN ABUHAMDIEH, dba North Beach Market & Deli	Account Number: LR Q ET 91-277437 Case ID 509965
Petitioner	San Francisco, San Francisco County
Type of Business:	Convenience store
Seizure Date:	May 20, 2009
Approximate Value of Products in Dispute:	$1,782.89[1]

We have not held an appeals conference in this matter. This summary is prepared based on the information contained in the Petition, Reply to Petition of the Investigations Division (ID), and related documents.

UNRESOLVED ISSUE

Issue: Whether the tobacco products should be forfeited because they are described by Business and Professions Code sections 22974.3, subdivision (b), or 22978.2, subdivision (b). We conclude that the tobacco products should be forfeited.

Petitioner, a partnership consisting of Mr. Eyad Y. Ariekat and Mr. Aiman Abuhamdieh, owns and operates North Beach Market & Deli located at 536 Broadway, San Francisco, California. Petitioner holds the cigarette and tobacco products retailer license referenced above and seller's permit SR BH 100-721899, for this location. Petitioner does not hold a cigarette and tobacco products distributor or wholesaler license for this location.[2]

[1] Consisting of the following cigars: 125 Macanudo, 5 Partagas, 15 Fonseca, 24 H. Upmann, 3 Punch, and 32 Romeo Y Julieta.

[2] The Board issued petitioner distributor license LD Q ET 90-005347, effective July 15, 2009, for purposes of processing the AB 71 citation that ID issued in connection with the seizure of tobacco products at issue here. That license was closed out, also effective July 15, 2009, for the reason "did not operate."

On May 20, 2009, ID conducted a cigarette and tobacco products inspection of this location. Mr. Yousef Ahmed Arikat was on the premises, and stated that he was temporarily helping petitioner but was not an employee. ID requested permission to conduct the inspection, and Mr. Arikat authorized the inspection. ID found that all cigarettes were properly stamped. ID reviewed the purchase invoices provided by Mr. Arikat and found that they did not support the cigars located in the display case. Mr. Arikat made several phone calls and then stated that the invoices were located with the accountant, who would fax purchase invoices to the Board's Oakland District office. ID contacted the supervising investigator at the Oakland District office, who stated one purchase invoice was received, and it was issued by unlicensed out-of-state vendor Mike's Cigars located in Bay Harbor, Florida (the bottom of that invoice includes the statement, "Outside of the state of Florida, taxes and tax compliance are the responsibility of the individual dealer").

ID seized the tobacco products not supported by invoices showing payment of tax, and issued petitioner a Receipt for Property Seized and a Civil Citation for alleged violations of Business and Professions Code sections 22974, 22980.2, subdivision (a), 22978.1, 22978.2, subdivision (b) and 22974.3, subdivision (b).[3] On July 8, 2009, ID served petitioner with a Notice of Seizure and Forfeiture dated June 27, 2009, which states that tobacco products valued at $2,410.52 were seized and are subject to forfeiture under Business and Professions Code sections 22974.3 and 22978.2. Due to the quantity of the tobacco products seized, a notice of seizure and forfeiture was posted on the Board's website on July 6, 2009. (Rev. & Tax. Code, § 30437, subd. (b).)

Petitioner submitted a verified petition dated July 23, 2009, for release of all of the seized tobacco products, stating that all of those products were purchased from licensed distributors, and attached to the petition two invoices issued by licensed supplier JMG International (JMG), one invoice issued by licensed supplier Lignum-2, Inc., and one invoice issued by Mike's Cigars. Based on the JMG invoices and the Lignum-2, Inc. invoice, ID determined that tax had been paid on a portion of the seized tobacco products, and therefore returned those products, with an approximate retail value of

[3] ID issued Civil Citation 5574 to petitioner on May 20, 2009, but later found an error in it. ID thus returned to petitioner's store on May 26, 2009, to issue petitioner Civil Citation 2982 to replace Civil Citation 5574.

$627.63, to petitioner, leaving products with an approximate retail value of $1,782.89 ($2,410.52 - $627.63) in ID's custody and remaining in dispute.

In its Reply to Petition, ID asserts that the petition should be denied and the tobacco products remaining in custody should be forfeited because the invoices provided do not show that tax has been paid on those products, and therefore petitioner has not shown that those products were erroneously or illegally seized. ID states that one of the JMG invoices, dated October 16, 2006, and the Lignum-2, Inc. invoice include none of the tobacco products remaining in ID's custody. ID states that the other two invoices (from JMG dated October 13, 2006, and from Mike's Cigars dated December 26, 2008) include all of the types of cigars that remain in ID's custody except for 15 Macanudo Petit Corona Café cigars (ID seized three varieties of Macanudo cigars, two of which were included on the invoices from JMG and Mike's Cigars, but not the Petit Corona Café). Nevertheless, although the JMG invoice could theoretically support the tax-paid status of all the cigars remaining in custody except for the Macanudo Petit Corona Café, ID asserts that it does not do so because the invoice from Mike's Cigars reflects a more recent purchase of the same products. ID states that seized tobacco products listed on the Mike's Cigars purchase invoice cannot be returned because it is an unlicensed out-of-state vendor, and petitioner has not provided evidence that tax had been paid on the tobacco products purchased from Mike's Cigars at time of the seizure.[4]

ID states that in an attempt to show that the seized tobacco products are tax paid, petitioner provided evidence that on August 19, 2009, about three months after the seizure, it paid the excise tax due with respect to the products reflected on the Mike's Cigars purchase invoice.[5] However, this payment of tax in August 2009 does not establish that tax was paid on the tobacco products in question at the time of the seizure in May 2009. ID states that there is no exception to allow an owner of

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[4] Revenue and Taxation Code section 30210 provides that if any person becomes a tobacco products distributor without securing a license, the tax becomes immediately due and payable for all tobacco products being distributed. Furthermore, Revenue and Taxation Code section 30008, subdivision (c), provides the placing of untaxed tobacco products in retail stock for sale to consumer is a distribution. ID therefore states that when petitioner placed the cigars purchased from Mike's Cigars in retail stock, it made a distribution and the tax became immediately due.

[5] On August 19, 2009, petitioner filed a Tobacco Products Distributor Tax Return and paid $404.00 in tax for tobacco products with a wholesale cost of $895.60. ID states that the amount petitioner paid does not include the tax for the Macanudo Petit Corona Café cigars, which are not supported by any purchase invoices.

untaxed tobacco products to pay the excise taxes due following a seizure in exchange for the return of seized property. ID further states that petitioner was provided Publication 78, "Sales of Cigarettes and Tobacco Products in California," when the Board issued petitioner's license, and therefore petitioner should have been aware that the law prohibits possession of untaxed cigarettes or tobacco products.

Business and Professions Code section 22974.3, subdivision (b), provides that, where a person holds tobacco products for which tax is due, but such tax has not been paid, the untaxed tobacco products are subject to seizure and forfeiture. Petitioner has the burden of proving that the applicable taxes have been paid. Similarly, Business and Professions Code section 22978.2, subdivision (b), provides that, where a distributor or wholesaler holds tobacco products for which tax is due, but such tax has not been paid, the untaxed tobacco products are subject to seizure and forfeiture. Petitioner again has the burden under this provision of proving that the applicable taxes have been paid.

Petitioner has not provided evidence showing that tax has been paid on 15 Macanudo Petit Corona cigars. As for the other tobacco products remaining in custody, ID does not explain its thinking as to why the JMG invoice cannot support any of the seized tobacco products except to note that the invoice from Mike's Cigars is more recent. We assume that ID believes that if any of the seized products were purchased under one of these two invoices, they would have been purchased under the more recent invoice, with the products purchased almost two and one-half years before the inspection under the JMG invoice having already been sold. In any event, we find that such is the case, and we find that the purchases from Mike's Cigars would have been to replace inventory that had been sold, such as those previously purchased from JMG. Based on this conclusion, we further find that, of the two proffered invoices, the invoice far more likely to represent purchases of the seized products is the more recent invoice from Mike's Cigars, an out-of-state seller who did not pay any California taxes on the products it sold to petitioner.

At the time of the inspection and seizure, petitioner was not a licensed distributor, and the applicable California excise taxes had not been paid on those tobacco products. Therefore, even if those products were purchased under the Mike's Cigars invoice, they were properly seized and must be forfeited. Although petitioner may have paid the excise tax on those products following the seizure, there are no provisions in the law or the Board's regulations which might enable us to recommend that

the Board release any of the disputed tobacco products to petitioner based upon payment of the applicable California excise taxes, or for any other reason. Accordingly, we recommend that the petition be denied with respect to the tobacco products remaining in custody.

Summary prepared by Cindy Chiu, Tax Counsel