

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:)
LISTON B. BEVARD,)
dba O’Sullivan Cigars & Accessories,)
Petitioner)

Account Number: LR Q ET 91-306355
Case ID 484215

Walnut Creek, Contra Costa County

Type of Business: Cigarette and tobacco store
Seizure Date: November 13, 2008
Approximate Value: \$1,866.10¹

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 section 22974.3, subdivision (b). We conclude that the tobacco products should be forfeited.

Petitioner, a sole proprietor, owns and operates a cigarette and tobacco store at 1628 Locust Street, Walnut Creek, California. Petitioner holds the cigarette and tobacco products retailer license referenced above, and seller’s permit SR CH 101-125096, for this business location. At the time of this inspection, petitioner did not hold a cigarette and tobacco products distributor or wholesaler license for this location.²

¹ Consisting of the following cigars: 11 Hoyo de Monterrey Excalibur, 7 Ashton #6, 4 Diamond Crown Robusto, 9 Punch Crystale, 16 Punch #6, 7 Punch Santa Rita, 16 Por Larranaga Robusto, 18 La Gloria Cubana Wavell , 4 Bolivar Colosales, 20 Gispert Robusto, 33 Saint Luis Rey Maduro, 6 Perdomo Robusto, 23 La Gloria Series R, 11 CAO Pato, 35 Punch Rothschilds, 15 El Rey Del Mundo Robusto, and 4 Macanudo Maduro.

² The Board created for petitioner distributor license LD Q ET 090-005211, on December 22, 2008, for the purposes of issuing an AB 71 Warning Notice in connection with the seizure of tobacco products at issue here.

1 On November 13, 2008, ID conducted a cigarette and tobacco products inspection of this
2 location. Petitioner was on the premises and authorized the inspection. ID found that all cigarettes
3 tested were properly stamped, with the exception of one package of unstamped Turkish cigarettes,
4 which petitioner voluntarily destroyed. When ID requested petitioner's purchase invoices for the
5 previous twelve months, petitioner provided invoices from licensed suppliers JMG and Phillips &
6 King, and unlicensed out-of-state suppliers JR Cigars.com (JR) and New Global Marketing, dba
7 BestCigarPrices.com (BestCigar). Petitioner also provided a list of the products that were in the
8 store's inventory and that he received when he purchased the store from the previous owner on
9 September 1, 2008. In a walk-in humidor in petitioner's store, ID found premium cigars purchased
10 from JR and BestCigar. ID advised petitioner that as a licensed retailer he cannot purchase tobacco
11 products for which tax has not been paid. According to ID, petitioner stated that he was aware that
12 California excise taxes had not been paid on the cigars purchased from JR and BestCigar, and he
13 planned to pay the tax when the Board did an inspection. In addition, petitioner stated that he asked JR
14 and BestCigar whether they could legally sell to him, and they replied that they could do so.³

15 ID identified the untaxed cigars that petitioner purchased from JR and BestCigar, seized those
16 tobacco products, and issued petitioner a Receipt for Property Seized and a Civil Citation for violations
17 of Business and Professions Code sections 22980.2, subdivision (a), 22978.2, subdivision (b), and
18 22974.3, subdivision (b). ID served petitioner with a Notice of Seizure and Forfeiture dated
19 December 31, 2008, which states that tobacco products valued at \$1,886.10 were seized and are
20 subject to forfeiture under Business and Professions Code section 22974.3. Due to the value of
21 tobacco products seized, a notice of the seizure was posted on the Board's website on January 15,
22 2009. (Rev. & Tax. Code, § 30437, subs. (b), (c).)

23 Petitioner submitted a verified petition dated January 25, 2009, for release of all of the seized
24 tobacco products, which he states is "based on the notion of simple fairness." Petitioner asserts that
25 the inspection occurred because of a complaint made to the Board by a former employee, who now
26 works for a competitor, and ID made the inspection in an arbitrary manner, ignoring some violations
27 but not others. Petitioner states that he possessed untaxed tobacco products because his vendors and
28 _____

³ ID notes that both JR (located in North Carolina) and BestCigars (located in New York), include warnings on their websites stating that for sales shipped outside of their states, the purchasers are responsible for the applicable taxes.

1 the previous owner of this business told him that it was his responsibility to pay the applicable taxes.
2 Petitioner states that he now understands that as a retailer he must purchase only tax-paid tobacco
3 products, and he will not purchase untaxed tobacco products in the future. Petitioner requests that all
4 of the seized tobacco products be returned to him so that he can pay the tobacco excise taxes due on
5 those products, as he originally intended.⁴

6 In its Reply to Petition, ID asserts that the petition should be denied because petitioner was
7 found possessing untaxed tobacco products purchased from unlicensed out-of-state vendors, and he has
8 not shown that those products were erroneously or illegally seized. ID asserts that there is no
9 exception to allow an owner of untaxed tobacco products to pay the excise taxes due in exchange for
10 the return of seized property. ID further states that petitioner was provided Publication 78, "Sales of
11 Cigarettes and Tobacco Products in California," when the Board issued petitioner's license, and
12 therefore petitioner should have been aware that the law prohibits possession of untaxed cigarettes or
13 tobacco products.

14 Business and Professions Code section 22974.3, subdivision (b), provides that, where any
15 person holds tobacco products for which tax is due but such tax has not been paid, the untaxed tobacco
16 products are subject to seizure and forfeiture, and petitioner bears the burden of proving that the
17 applicable taxes have been paid. Here, it is undisputed that at the time of the inspection and seizure,
18 petitioner was not a licensed distributor, and the applicable California excise taxes had not been paid
19 on the tobacco products in dispute. Therefore, those products were properly seized and they must be
20 forfeited. There are no provisions in the law or the Board's regulations which might enable us to
21 recommend that the Board release any of the disputed tobacco products to petitioner upon payment of
22 the applicable California excise taxes, or for any other reason. Accordingly, we recommend that the
23 petition be denied.

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26 Summary prepared by Cindy Chiu, Tax Counsel
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⁴ In addition, petitioner states that he is dissatisfied regarding an inspection that ID made on November 14, 2008, at a restaurant (Café Rivera) located near petitioner's business. ID made that inspection because petitioner placed a small humidor box containing cigars, and his business card, on display in that restaurant.