STATE BOARD OF EQUALIZATION
CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION FINAL ACTION SUMMARY

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:	)	
SUKHWANT SEKHON and AMARJIT SEKHON, dba 7-11 2232-24003C	)	Account Number: LR Q ET 91-236245 Case ID 491719
Petitioner	)	Alameda, Alameda County

Type of Business: Convenience store

Seizure Date: April 7, 2009

Approximate Value: $619.84[1]

The Board heard this petition for release of seized tobacco products on September 1, 2009, delaying its decision until the October calendar so that the Investigations Division (ID) had time to investigate whether the seized products might be identified as having been supplied specifically by petitioner's primary vendor, McLane.[2] This is relevant because, if it were established that the products were supplied by McLane, ID would accept that McLane had paid the applicable excise taxes and that the products were thus tax paid. ID explains the results of its post-hearing investigations in its memorandum dated September 17, 2009. ID continues to assert that the seized tobacco products should be forfeited.

ID contacted McLane and talked with Mr. Richard Cromar, Vice President, Sales, and Mr. Roy Davenport, Controller, both of whom indicated that McLane cannot identify a product as having been sold by McLane based on the UPC on the package since that code is issued to the manufacturer for all of a particular type of product. In other words, all of those particular products produced by the manufacturer would have the same UPC, regardless of the wholesaler, distributor, or retailer who sells

[1] Consisting of 356 Swisher Sweets cigarillos and 60 Optimo cigarillos.

[2] Although petitioner has asserted that it only purchases tobacco products from its approved vendor, McLane, it has also essentially stated that, under exigent circumstances, it makes purchases from other vendors. Hence, we refer to McLane as petitioner's *primary* vendor.

them. ID explains that it has also examined the products in its custody and cannot find any other markings on the packages which would identify them as having been supplied by McLane.

We conclude that the markings on the products in ID's custody do not establish that those products were supplied to petitioner by McLane. Thus, the petition must be denied unless petitioner can otherwise establish that the products were tax paid. Petitioner's sole assertion to support that the products were tax paid even though they are not included on any invoice petitioner has provided is that McLane must have mis-picked the seized products and delivered them to petitioner instead of other products which petitioner had ordered and which do appear on invoices. We note that petitioner has identified a single invoice dated January 9, 2009, which includes one line item for a box of 60 Swisher Sweet five-packs (300 total sticks) for which it asserts it must have received instead 5 boxes of 60 Swisher Sweet single sticks (300 total sticks) as a result of a mis-pick of the order by McLane. However, the seized products consist of five full boxes of Swisher Sweets (two regular flavor, two Strawberry, and one Grape), 20 individual regular flavor Swisher Sweets, 36 grape flavor Swisher Sweets, and one box of Optimo. We assume that the individual sticks represent no more than one partial box for each of the two flavors, meaning that ID seized a total of eight whole or partial boxes. Thus, even if the one proffered invoice supported petitioner's assertion of a mis-pick, it could support only five boxes (i.e., some combination of the five whole and two partial boxes of Swisher Sweets, but *not* the box of Optimo).

Petitioner alleges that these seized products include five boxes of 60 single sticks which were mis-picked by McLane instead of petitioner's order for one box of 60 five-packs. The products seized by ID include no more than three boxes of any one flavor of Swisher Sweets: the seven full or partial boxes of Swisher Sweets seized by ID consist of two full and one partial box of regular flavor, two full boxes of strawberry flavor, and one full and one partial box of grape flavor. Thus, had McLane actually delivered five of these boxes pursuant to the alleged mis-pick, it would have delivered at least two different flavors of Swisher Sweets, if not three. However, the order alleged to have been mis-picked was for a single item, that is, a single flavor. Based on McLane's procedures explained in ID's September 17, 2009 memorandum, we simply do not accept that the seized products could reasonably have been mis-picked and delivered to petitioner to fulfill the January 9, 2009 invoice. We note also

that we do not accept the possibility that there was any intentional substitution made by McLane. McLane has advised ID that it does not substitute for out of stock items unless it has preauthorization from the customer, and petitioner has not even alleged that such preauthorization was requested or granted. Furthermore, had McLane sought and received authorization to make an intentional and knowing substitution, the invoice it issued on January 9, 2009, presumably would have reflected the actual products delivered, even if different than the original order. In any event, we find that the record does not establish that McLane delivered any products pursuant to its January 9, 2009 invoice other than those reflected therein.

We conclude that petitioner has provided no documentary evidence whatsoever with respect to at least three of the full or partial boxes of tobacco products seized by ID. We conclude that the January 9, 2009 invoice petitioner alleges covers five of the full or partial boxes of tobacco products seized by ID does not support a finding that McLane delivered any portion of the seized products to petitioner, nor has ID's additional investigation and discussions with McLane support such a finding. Rather, we conclude that petitioner has not established that tax has been paid with respect to any of the seized products. Therefore, in accordance with Business and Professions Code section 22974.3, subdivision (b), we recommend that the petition be denied.

Summary prepared by David H. Levine, Tax Counsel IV