

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:)

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: \$619.84¹

We have not held an appeals conference in this matter. This summary is prepared based on the information we have obtained concerning this dispute, including the Petition, Reply to Petition of the Investigations Division (ID), follow up letter from ID to petitioner, and petitioner's response.

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 husband-and-wife partnership, owns and operates 7-11 Store 2232-24003C located at 2301 Lincoln Avenue, Alameda, California. Petitioner holds seller's permit SR CH 99-122356, and the cigarette and tobacco products retailer license referenced above, for this business location. Petitioner does not hold a cigarette and tobacco products distributor or wholesaler license for this location.

On April 7, 2009, ID conducted a cigarette and tobacco products inspection of this location. Petitioner's manager, Mr. Prem Moharjen, was on the premises and authorized the inspection. Shortly thereafter, Mr. Sukhwant Sekhon arrived at the premises. ID found that all cigarettes were properly

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

1 stamped. When ID requested invoices for petitioner's purchases of cigarettes and tobacco products for
2 the previous twelve months, Mr. Sekhon provided purchase invoices from licensed vendor McLane.
3 ID found that those invoices supported petitioner's inventory of cigarettes and tobacco products other
4 than the 60-count boxes of single sticks of Swisher Sweets and Optimo cigarillos. ID therefore asked
5 for any additional invoices that might reflect the purchase of the tobacco products not already covered
6 by the supplied invoices. Mr. Sekhon responded that he only purchases cigarettes and tobacco
7 products from McLane (and, presumably, had already provided all the McLane invoices). Since
8 petitioner did not provide invoices showing the tax-paid purchase of the Swisher Sweets and Optimo
9 cigarillos in the 60-count boxes of single sticks, those tobacco products were considered untaxed and
10 were seized.

11 ID issued petitioner a Receipt for Property Seized and a Civil Citation for violations of
12 Business and Professions Code sections 22974 and 22974.3, subdivision (b). Subsequently, on April
13 8, 2009, Mrs. Amarjit Sekhon contacted ID and stated that petitioner had spoken with a representative
14 from McLane who agreed that there could have been an error on petitioner's purchase invoices such
15 that they indicated the purchase of *other than* (but similar to) the 60-count boxes of Swisher Sweets
16 and Optimo cigarillos that petitioner had actually received from McLane.

17 On May 7, 2009, ID served petitioner with a Notice of Seizure and Forfeiture dated May 6,
18 2009, which states that tobacco products valued at \$619.84 were seized and are subject to forfeiture
19 under Business and Professions Code section 22974.3. Petitioner submitted a verified petition dated
20 May 16, 2009, for release of all of the seized tobacco products. Petitioner states that it purchases all of
21 its cigarettes and tobacco products from McLane, and attached invoices from McLane to the petition.
22 Petitioner states that the seized cigarillos were single sticks and petitioner generally sells packages of
23 cigarillos, but very few single sticks. Petitioner states that its January 9, 2009, invoice from McLane
24 includes a purchase of "60 cigarillos," and that McLane may have incorrectly shipped petitioner the
25 60-count boxes of single sticks of Swisher Sweets cigarillos in question rather than packages of
26 Swisher Sweets cigarillos (indicating that it usually orders 20 or 40 packs). Petitioner states that it
27 contacted a McLane representative who admitted that it is possible that McLane might incorrectly fill
28 an order with a product other than that specified by the customer.

1 In its Reply to Petition, ID asserts that the petition should be denied because petitioner has not
2 shown that tax has been paid on the tobacco products in question. ID states that it reviewed the
3 McLane purchase invoices attached to the petition, and did not find any of the seized tobacco products
4 listed on those invoices. ID acknowledges the possibility that McLane may have incorrectly filled
5 petitioner's orders. However, ID states that it is petitioner's responsibility to ensure that the items
6 delivered match the items ordered and listed on the purchase invoices. ID states that without a
7 purchase invoice to establish that tax has been paid on the seized tobacco products, those products
8 cannot be returned. ID asserts that petitioner should have been aware that the law prohibits possession
9 of untaxed cigarettes or tobacco products because petitioner was provided Publication 78, "Sales of
10 Cigarettes and Tobacco Products in California," when the Board issued his license.

11 Given petitioner's allegation of a delivery mistake, we asked ID whether it was possible for
12 petitioner to provide any documentation that ID would find satisfactory to show that the products were
13 tax paid, and if so, whether that information had been relayed to petitioner in response to its argument
14 of mistake. ID explained the documentation ID would accept, subject to verification, to show that a
15 mistake in delivery had occurred and that the subject tobacco products were tax paid. Since
16 information about the specific documentation ID needs in order to find that the seized tobacco products
17 were tax paid had not been clearly communicated to petitioner, we asked that ID communicate this
18 information to petitioner and provide petitioner another opportunity prior to the hearing to provide that
19 documentation.

20 By letter dated July 29, 2009, ID explained that petitioner must provide evidence, subject to ID's
21 independent verification, that tax was paid on the seized product in order for ID to return that product
22 to petitioner. To support its assertion that the seized products were tax paid, ID asked petitioner to
23 provide: copies of the original purchase invoice(s) for the alleged mistaken deliveries of 60-count
24 boxes of singles instead of packs; for each such invoice, a statement from petitioner's supplier that it
25 delivered to petitioner an incorrect order, with the date of that incorrect delivery, quantity and flavor of
26 the product incorrectly delivered; and a corrected invoice. Petitioner responded by letter dated August
27 13, 2009, reiterating that petitioner received an incorrect shipment from McLane, and that Mr. Richard
28 Cromar, a vice president of McLane, acknowledged to petitioner that errors do occur in filling orders.

1 Petitioner included a copy of page 5 of the January 9, 2009 invoice that petitioner asserts reflects the
2 order that was misdelivered. (Summary exhibit A.) Petitioner contends that instead of receiving the
3 60 5-packs (totaling 300 sticks) it ordered, reflected in the last item on page 5 of the invoice, McLane
4 delivered 5 boxes of 60 single sticks (totaling 300 sticks). Petitioner did not provide a corrected copy
5 of the invoice to reflect the products petitioner asserts it actually received, instead stating that in its 17
6 years of doing business, it has never seen a corrected invoice for misdelivered items.

7 ID concluded that petitioner's response to its request for additional supporting evidence is not
8 sufficient to establish that tax was paid on the specific products at issue here. ID decided to contact
9 McLane to see if it could provide additional information to establish that the subject products were tax
10 paid, and on August 19, 2009, contacted Mr. Cromar of McLane. Although Mr. Cromar
11 acknowledged that mistakes may occur, he did not indicate knowledge that the products at issue here
12 were misdelivered to petitioner by McLane. Thus, ID continues to conclude that petitioner has not
13 established the products were tax paid.

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 by proof of payment to the Board or by a purchase invoice showing
18 that petitioner paid a tax-included price for the tobacco products to a licensed distributor, wholesaler,
19 manufacturer or importer. Petitioner has not provided a corrected invoice or any other evidence that
20 establishes that the tobacco products in question are tax paid. We recognize the *possibility* that there
21 was a mistaken delivery by McLane, but McLane itself cannot confirm such a claim now. Under these
22 facts, we find that petitioner has not established that tax has been paid on the seized products. We thus
23 conclude that ID properly seized the tobacco products in question and that these products must be
24 forfeited. Accordingly, we recommend that the petition be denied.

25
26 Attachment: Summary exhibit A

27 Summary prepared by Cindy Chiu, Tax Counsel