STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2011-12

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF REVENUE
DIVISION OF TAXATION
ONE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF:	:	**Sales/Use Tax**
	:	**Case No.: 09-T-031**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came before the undersigned as the result of a Notice of Hearing and Appointment of Hearing Officer dated November 6, 2009 and issued to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to a request for hearing. A hearing was held on April 28, 2011. The parties rested on the record. The Division was represented by counsel and the Taxpayer was *pro se*.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, the *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings*, and the *Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01*.

III. ISSUE

Whether the Taxpayer owes use tax on a truck ("Truck") purchased by the Taxpayer.

IV. MATERIAL FACTS AND TESTIMONY

Senior Revenue Agent, testified on behalf of the Division. He testified he reviews all Dealer Statement of Sales forms ("T-336") that are required to be filed by used and new car dealers. He testified that he reviewed a T-336 from a new car dealer ("Dealer") dated June 26, 2007 for a sale of the Truck to the Taxpayer. See Division's Exhibit One (1). He testified that the Taxpayer was a used car dealer (See Division's Exhibit 16) but bought a new vehicle from a new car dealer which does not automatically trigger a tax but he wanted to verify that it was not a used car purchase. He testified that he sent inquiries to the Dealer (see Division's Exhibits Five (5) and Six (6)) and in response the Dealer forwarded him its complete sales file. He testified the Dealer's complete file included invoice of sale, the T-336 form, checks and payments made for the purchase, Dealer's statement of consumer incentives, Taxpayer's statement of responsibility for registration and sales, the Truck's certificate of origin, and resale certificate dated June 27, 2007. See Division's Exhibits Seven (7) through 17. He testified that Division's Exhibit 11 represented consumer incentives such as rebates received and signed for by the Taxpayer.

testified that since a used car dealer had bought a new vehicle it did not necessarily prove that there was tax owned but it raised questions so he forwarded a routine inquiry letter to the Taxpayer requesting further documentation of his purchase of the Truck. See Division's Exhibits 18 and 19 (inquiry letters). He testified that in response to the second letter, the Taxpayer telephoned him indicating that he would forward documents about the sale and that he (Taxpayer) had sold the Truck. testified that since he didn't receive such documents so that on June 18, 2008, he

forwarded the Taxpayer a Notice of Intent to Bill. See Division's Exhibit 20. He testified that since he received no response to said notice, a Notice of Deficiency was issued on February 10, 2009 to the Taxpayer which was subsequently corrected on March 19, 2009 because of typographical errors. See Division's Exhibits 21 and 22. He testified that the Division eventually received a Bill of Sale for the Truck from when the Taxpayer sold the Truck to a car dealer ("Second Dealer") and it showed the Truck had 2,502 miles. The Bill of Sale is dated July 15, 2007. See Division's Exhibit 24. He testified that the Truck's certificate of origin indicated that it had 16 miles on the odometer when purchased by the Taxpayer. See Division's Exhibit 14.

On cross-examination, testified that he sent the Taxpayer a copy of Division Regulation 96-138 that indicates that a used car might not be subject to tax if a used car dealer buys a car that is resold. He testified that he could not agree that the Truck was sold within 30 days because he had no supporting documents or checks to support the date of July 15, 2007 on the Bill of Sale. He testified that a T-336 is required for motor vehicle sales but the form doesn't demonstrate tax is owed because tax is owed by the car is registered. He testified that Division's Exhibit Ten (10) (Taxpayer's payments and checks) demonstrated that this was a retail sale (e.g. for personal use).

On questioning from the undersigned, testified that when the Truck was sold by the Taxpayer to the Second Dealer there should have been a T-336 filed as said form is required to be filed by dealers.

The Taxpayer testified on his behalf. He testified that prior to June 27, 2007, he went to the Dealer and spoke with a salesmen about buying a truck and was told that if he resold it in a short time there would be no tax and he confirmed that representation by

verifying the law. He testified that he gave the salesman a personal check to hold the Truck and the bought it on June 27, 2007 and within 30 days, as allowed by statute, he sold the Truck so that no sales tax was required.

On cross-examination, the Taxpayer testified that there was 2,500 miles on the Bill of Sale though he thinks the odometer could have been less when he sold it to the Second Dealer. He testified that the Dealer's Statement of Consumer Incentives (Division's Exhibit 11) did have a signature but he did not remember signing it and the document is incomplete and that while he received $ in rebates (Division's Exhibit Seven (7)), he doesn't remember the Statement of Consumer Incentives and does not agree with it. He testified he bought the Truck to advertise his dealership. He testified that he forwarded the information requested by the Division prior to the Division's Notice of Intent to Bill.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental*

Management, 553 A.2d 541 (R.I. 1989) (citing to *Cocchini v. City of Providence*, 479 A.2d 108 (R.I. 1984)). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Relevant Statutes and Regulations

R.I. Gen. Laws § 44-18-20 states in part as follows:

> (a) An excise tax is imposed on the storage, use, or other consumption in this state of tangible personal property, including a motor vehicle, a boat, an airplane, or a trailer, purchased from any retailer at the rate of six percent (6%) of the sale price of the property.
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> (b) An excise tax is imposed on the storage, use, or other consumption in this state of a motor vehicle, a boat, an airplane, or a trailer purchased from other than a licensed motor vehicle dealer or other than a retailer of boats, airplanes, or trailers respectively, at the rate of six percent (6%) of the sale price of the motor vehicle, boat, airplane, or trailer.
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> (h) The use tax imposed under this section for the period commencing July 1, 1990 is at the rate of seven percent (7%).

R.I. Gen. Laws § 44-18-21 states in part as follows:

> (a) Every person storing, using, or consuming in this state tangible personal property, including a motor vehicle, boat, airplane, or trailer, purchased from a retailer, and a motor vehicle, boat, airplane, or trailer, purchased from other than a licensed motor vehicle dealer or other than a retailer of boats, airplanes, or trailers respectively, is liable for the use tax. The person's liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer engaging in business in this state or from a retailer who is authorized by the tax administrator to collect the tax under rules and regulations that he or she may prescribe, given to the purchaser pursuant to the provisions of § 44-18-22, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.
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> (b) Each person before obtaining an original or transferral registration for any article or commodity in this state, which article or commodity is required to be licensed or registered in the state, shall furnish satisfactory evidence to the tax administrator that any tax due under this chapter with

reference to the article or commodity has been paid, and for the purpose of effecting compliance, the tax administrator, in addition to any other powers granted to him or her, may invoke the provisions of § 31-3-4 in the case of a motor vehicle.

R.I. Gen. Laws § 44-18-25 states as follows:

Presumption that sale is for storage, use, or consumption – Resale certificate. – It is presumed that all gross receipts are subject to the sales tax, and that the use of all tangible personal property is subject to the use tax, and that all tangible personal property sold or in processing or intended for delivery or delivered in this state is sold or delivered for storage, use, or other consumption in this state, until the contrary is established to the satisfaction of the tax administrator. The burden of proving the contrary is upon the person who makes the sale and the purchaser, unless the person who makes the sale takes from the purchaser a certificate to the effect that the purchase was for resale. The certificate shall contain any information and be in the form that the tax administrator may require.

R.I. Gen. Laws § 44-18-26 states as follows:

Tax on retailer's use of merchandise. - If a person who gives a certificate consumes or makes any storage or use of purchased property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage, use, or consumption is subject to the sales or use tax, as the case may be, as of the time the property is first stored, used, or consumed, and the cost of the property to the purchaser is the measure of the tax.

Sales and Use Tax Regulation SU 96-138 ("SU 96-138") states as follows:

New Motor Vehicle Purchased by Used Car Dealer or Auto Body Mechanic

When a used car dealer or auto body repairer holding a motor vehicle dealer's license and permit to make sales at retail purchases a new motor vehicle from a new car dealer such used car dealer or auto body repairer shall be deemed liable for the payment of tax thereon unless such used car dealer or auto body repairer can show, by proper records, that the motor vehicle in question was actually purchased for resale in which case the tax shall not apply; provided, however, when the used car dealer or auto body repairer sells the motor vehicle in question within thirty (30) days of its purchase from the new car dealer it shall be presumed that such used car dealer or auto body repairer purchased the motor vehicle for resale.

Sales and Use Tax Regulation SU 87-34 ("SU 87-34") states in part as follows:

> Demonstration and Display
>
> A purchaser of tangible personal property who gives a resale certificate therefor, and who uses the property solely for demonstration or display while holding it for sale in the regular course of business, is not required to pay tax on account of such use. If the property is used for any purpose other than or in addition to demonstration or display, such as for the personal use of the retailer or of his or her employees, the purchaser must include in the measure of the tax paid the purchase price of the property. Tax applies to the subsequent retail sale of the property.

C. Arguments

The Division argued that use taxes are required pursuant to R.I. Gen. Laws § 44-18-20 with a presumption pursuant to R.I. Gen. Laws § 44-18-25 that sales are subject to tax. The Division argued that the fact that a used car dealer bought a new vehicle is not conclusive regarding whether use tax is owed[1] but additionally, the Taxpayer provided personal checks, received consumer rebates that while the Taxpayer denies signing the rebates, he does admit receiving and if the Taxpayer was going to sell it as inventory why take all the rebates. Furthermore, the Division argued that if the Bill of Sale of the sale of the Truck by the Taxpayer is taken at face value within a three (3) week time period, 2,500 miles were put on the Truck which is a lot of use for a demonstration vehicle.

The Taxpayer argued that he personally used his inventory to ensure it worked. He argued that the Division's Exhibit 11 was undated, incomplete, misleading, and he did not know what the rebates were. He argued that this was not a retail sale and the statute does not limit how many miles are allowed for a demonstrator and nowhere in the law does it say that he can not take a car to Cape Cod. He argued that and since he had the

[1] Taxes on purchased vehicles are paid to the Division by the purchaser of the vehicle. See R.I. Gen. Laws § 44-18-21 (above) and SU 03-69.

Truck for less than 30 days, he does not owe tax and other than the 2,500 miles and Division's Exhibit 11, there is no proof that he owes tax.

D. The Taxpayer Owes Use Tax on the Truck

Pursuant to R.I. Gen. Laws § 44-18-20, the use tax is imposed on the "storage, use, or other consumption in this state" of personal property including automobiles. R.I. Gen. Laws § 44-18-10 defines "use" as "the exercise of any right or power of tangible personal property incident to the ownership of that property." The use tax rate is 7% of the "sale price of the property." R.I. Gen. Laws § 44-18-20(a) and (h).

The Taxpayer apparently believes that as long as a car is resold within 30 days taxes are not owed. This is a misreading of the statute and regulations. R.I. Gen. Laws § 44-18-26 provides that a person holding property for sale who makes use of the property other than for retention, demonstration, or display that property is subject to use or sales tax. In other words, personal use of a car is not allowed.

The Taxpayer was a used car dealer. He testified that he bought the Truck and used it for demonstration for his business. This raises the issue of whether he could sell the Truck as it was a new truck and he was only licensed as a used vehicle dealer. If he was holding the Truck for resale and not using it personally, presumably it could not be sold by him as it was new. If he used the Truck personally so that it became used, then he owes tax on it.

However, assuming that the Taxpayer could hold the Truck for resale, he still owes tax on the Truck. The Taxpayer argues that the statute or the regulations should specifically state that driving to the Cape or too many miles on a car is forbidden; however, R.I. Gen. Laws § 44-18-26 specifically states that the property must be used for

retention, demonstration or display while being held for sale in the regular course of business in order for it not to be taxed. In other words, driving a truck to Cape Cod or elsewhere would not be in the regular course of business. Furthermore, SU 87-34 provides that if the property is used solely for demonstration or display then tax is not owed but if the property is used for any other purpose (such as personal use) or in addition to demonstration or display then tax is owed.

Under R.I. Gen. Laws § 44-18-25, the burden is on the Taxpayer to show that he was holding the Truck in the regular course of business. R.I. Gen. Laws § 44-18-25 provides that the burden is on the person who makes the sale and the purchaser but allows that the person who makes the sale shall not have such a burden if he or she receives from the purchaser a certificate that the purchase is for resale. A certificate of resale was apparently given by the Taxpayer to the Dealer. See Division's Exhibit 17. The certificate is dated June 27, 2007 and while it does not contain a description of the Truck, the Taxpayer's d/b/a is listed as the purchaser. Thus, the burden is still on the purchaser to prove otherwise. Pursuant to SU 96-138, the purchaser must show by proper records that the purchase was made for resale but if the sale was made within 30 days, it is presumed to be for resale.

The undersigned will review the evidence assuming that the Truck was indeed sold within 30 days. The Taxpayer tries to rely on his resale of the Truck within 30 days of purchase to argue that he is exempt under SU 96-138. However, the resale in 30 days provision only provides that the initial purchase of a car prior to resale is *presumed* to be a purchase for resale if the resale is within 30 days. SU 96-138 does not mandate that a resale within 30 days is tax free.

The mileage put on the Truck within three (3) weeks was almost 2,500 miles. It can not be inferred from that high mileage that the Truck was sitting on the lot advertising the Taxpayer's business as the Taxpayer testified. The Taxpayer's testimony that the Truck was being used for demonstration is not credible. Indeed, the Taxpayer implied in his arguments that since the regulation did not forbid traveling to Cape Cod such travel would be acceptable. The only conclusion that can be reached from the 2,500 miles is that the Truck was used for personal travel by the Taxpayer. SU 96-138 does not have to specifically forbid personal traveling since it is already prohibited. SU 96-138 provides that tax is not due when a car is purchased for resale. R.I. Gen. Laws § 44-18-26 states that when a person who gives a resale certificate consumes or makes any use of property other than retention, demonstration, or display while holding it for sale in the regular course of business, the property is subject to tax. SU 87-34 states that if property is used for personal use while being used for display or demonstration, then it is subject to tax. The statute and regulation forbids personal use of a vehicle while it is being held for resale.

The 2,500 miles on the Truck can not be explained by being a demonstration vehicle such as taking it for test drives (assuming the Taxpayer could actually resell a new car) or being displayed on the Taxpayer's lot for advertising. SU 96-138's regulatory presumption fails in light of the 2,500 miles put on the Truck. In light of that, SU 96-138 provides that the used car dealer needs to show by proper records that the motor vehicle was purchased for resale.

The Taxpayer received consumer rebates which he admits receiving but denies signing for and also paid for the Truck with personal checks. The Taxpayer disputes that

said exhibits demonstrate his purchase was a personal purchase; however, the bill of sale shows that he received consumer rebates. See Division's Exhibit One (1). However, the Dealer's file also included the Taxpayer's used dealer license and a certificate of resale which could demonstrate that the Taxpayer bought the Truck as a dealer. The Taxpayer did not file a T-336 when the Truck was sold to the Second Dealer. Dealers are required to file such report. None was filed for the resale which supports the argument that the resale was a personal sale by the Taxpayer to the Second Dealer. If the Taxpayer sold the Truck as a personal sale (e.g. not by dealer) and didn't file the form, he owes tax. Assuming the Taxpayer sold the Truck as a dealer, the Taxpayer failed to file the requisite form and the evidence still demonstrates that he owes tax.

It is not clear that the sale of the Truck to the Second Dealer was made within 30 days as no T-336 was filed and the sale was in cash as indicated in the Bill of Sale (See Division's Exhibit 24) so there were no checks demonstrating that the sale took place on July 15, 2007. If the sale was made after 30 days, there is no longer the presumption that the initial sale was for resale as provided for in SU 96-138. However, the loss of presumption is irrelevant because even with the presumption, the evidence overcomes such a presumption.

In the final analysis, it is irrelevant whether the Taxpayer bought the Truck as a personal purchase or not. If he did, he owes tax on the Truck. If he did not, he still owes tax on the Truck. As discussed above, assuming the Taxpayer could purchase the Truck for resale, he did not hold the Truck for sale in the regular course of business; instead, he used the Truck. Since the Taxpayer used the Truck, the exemption contained in R.I. Gen. Laws § 44-18-26 and SU 96-138 do not apply. Looking at the matter in the light most

favorable to the Taxpayer – he bought the Truck as a dealer for resale and was able to sell it even though he was a used vehicle dealer and the Truck was new and he did resell it as a dealer within 30 days – the evidence is that he used the Truck for personal use. Thus, the Taxpayer did not meet the requirements of the exemption from use tax within R.I. Gen. Laws § 44-18-26, SU 96-138, and SU 87-34, etc. The Taxpayer's testimony that he used the Truck as a demonstrator for three (3) weeks and it incurred 2,500 miles as a demonstrator is not credible. The only reasonable conclusion is that the Taxpayer used the Truck for purposes other than retention, demonstration, or display and thus owes use tax on the Truck.

In addition, the Division properly imposed interest on the use tax assessment pursuant to R.I. Gen. Laws § 44-19-11.[2] The Division also properly imposed a 10% penalty on the sales tax deficiency pursuant to R.I. Gen. Laws § 44-19-12.[3] The statute clearly provides that if a taxpayer does not pay a tax because of negligence or does not pay, a 10% penalty is imposed. That penalty is not discretionary because the statute

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[2] R.I. Gen. Laws § 44-19-11 states as follows:

> Deficiency determinations – Interest. – If the tax administrator is not satisfied with the return or returns or the amount of tax paid to the tax administrator by any person, the administrator may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information in his or her possession or that may come into his or her possession. One or more deficiency determinations may be made of the amount due for one or for more than one month. The amount of the determination, exclusive of penalties, bears interest at the annual rate provided by § 44-1-7 from the fifteenth day (15th) after the close of the month for which the amount, or any portion of it, should have been paid until the date of payment.

[3] R.I. Gen. Laws § 44-19-12 states as follows:

> Pecuniary penalties for deficiencies. – If any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the provisions of this chapter and chapter 18 of this title, a penalty of ten percent (10%) of the amount of the determination is added to it. If any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade the provisions of this chapter or chapter 18 of this title, a penalty of fifty percent (50%) of the amount of the determination is added to it.

provides that the penalty "is" to be added rather than "may be added." See *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977).

VI. FINDINGS OF FACT

1. The Taxpayer bought said Truck on June 27, 2007 from the Dealer.

2. The Taxpayer never paid sales or use tax on the Truck.

3. Between the date of purchase (June 26, 2007) and the date of sale (assuming July 15, 2007), the Truck was driven almost 2,500 miles in approximately three (3) weeks.

4. The facts as detailed in Section V are incorporated herein by reference.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-1-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-18-20, the Taxpayer owes the use tax and interest and penalty as assessed in the corrected Notice of Deficiency. See Division's Exhibit 22.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends as follows:

Pursuant to R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-18-20, the Taxpayer owes the use tax and interest and penalty as assessed in the corrected Notice of Deficiency. See Division's Exhibit 22.

Date: June 23 2011

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

_____ ADOPT
_____ REJECT
_____ MODIFY

Date: June 28, 2011

David Sullivan
Tax Administrator

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:

R.I. Gen. Laws § 44-19-18 Appeals

Appeals from administrative orders or decisions made pursuant to any provisions of this chapter are to the sixth (6th) division district court pursuant to chapter 8 of title 8. The taxpayer's right to appeal under this chapter is expressly made conditional upon prepayment of all taxes, interest, and penalties, unless the taxpayer moves for and is granted an exemption from the prepayment requirement pursuant to § 8-8-26.

CERTIFICATION

I hereby certify that on the 29th day of June, 2011, a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid and return receipt requested to the Taxpayer's address on file with the Division of Taxation and by hand delivery to Bernard Lemos, Esquire, Department of Administration, One Capitol Hill, Providence, RI 02908.

Gail Belanger