STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2015-24

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

IN THE MATTER OF:	:	
	:	**Case No. 13-T-0191**
	:	**sales and use tax**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came before the undersigned as a result of a Notice of Hearing and Appointment of Hearing Officer ("Notice") dated December 13, 2013 and issued to the above captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing filed with the Division. The parties were represented by counsel. A hearing was held on December 14, 2014 and a partial agreed to statement of facts and exhibits were filed by the parties. The parties timely filed briefs by May 4, 2015.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, the *Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01*, and the *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings.*

III. ISSUE

Whether some or all of the disputed sales of gas made by the Taxpayer during the pertinent audit period qualify for sales and use tax exemption as utility services "furnished for

the domestic use by the occupants of residential premises" (R.I. Gen. Laws § 44-18-30(21)) or in the alternative, did some or all of the disputed sales of gas qualify for sales and use tax exemption as "fuel used in the heating of homes and residential premises." (R.I. Gen. Laws § 44-18-30(20)).

IV. MATERIAL FACTS AND TESTIMONY

The parties agreed to the following facts:[1]

1. The Taxpayer is a local utility organized in Rhode Island which provides electricity and natural gas distribution services throughout the State. The Taxpayer holds a permit to make sales at retail. The Taxpayer routinely and regularly remits sales and use tax on a monthly basis by electronic funds transfer and timely files sales and use tax returns on a quarterly basis. See Exhibits One (1), Two (2); Three (3); Four (4); and Five (5).

2. The Division is a state agency statutorily charged with the administration and collection of all state taxes, including but not limited to, the sales and use tax act.

3. The Division conducted a field audit of the Taxpayer for the period September, 2005 through August, 2008 inclusive ("Audit Period"). By letter dated April 14, 2008, the Division notified the Taxpayer of the commencement of the audit. During the audit, the Division agent examined gross earnings tax returns, sales tax returns with supporting documentation, sales journals, financial statements and exemption certificates. The Taxpayer executed a waiver dated July 11, 2008 of the period of limitations under R.I. Gen. § 44-19-13 for assessing sales taxes for the Audit Period. See Exhibits Five (5); Six (6); Seven (7); and Eight (8).

4. The audit was conducted on the basis of a test period for sales of natural gas, and the Taxpayer executed a test period agreement. After review of the Taxpayer's exempt sales for the month of February, 2008, the auditor determined an error factor which was applied, on a month-by-month basis, to the exempt sales of natural gas claimed on the Taxpayer's returns for each other month in the period August, 2006 through August, 2008.[2] The adjustments totaled of additional taxable sales. A closing conference was held with the Taxpayer's representative on May 22, 2013. See Exhibits Nine (9) (test period agreement); Ten (10) (error factor workpaper); 11 (adjustments); 12 (summary); and 13 (work papers receipt).

5. Based upon the adjustments, the Division computed tax deficiencies of in additional tax and in statutory interest, for a total of The Division issued a Notice of Deficiency dated June 19, 2013 reflecting the assessment of those amounts. See Exhibits 14 (computation); 15 and 16 (copies of Notice of Deficiency).

[1] See parties' agreed to statement of facts and agreed to exhibits filed with the undersigned.

[2] The Audit Period assigned for review commenced September of 2005. However, the Taxpayer did not engage in gas distribution prior to August of 2006 and audit documents dealing with this issue will reflect the foreshortened period wherein the assessed transactions occurred

6. The Taxpayer timely requested a hearing with respect to the Notice of Deficiency by letter dated July 3, 2013. A preliminary conference was held before a lay conferee on October 17, 2013. On November 5, 2013, the Division issued a letter informing the Taxpayer that no agreement had been reached after the preliminary conference and that the matter was being referred for a full administrative hearing.

7. The Taxpayer classifies the premises to which it provides gas or electric service as residential or non-residential on its accounting system that it uses for tax and public utility regulatory reporting. The tax classification on the Taxpayer's system is based on the type of property (*e.g.*, commercial, industrial, or residential) and in some cases the use of the property (*e.g.*, apartment or condominium common areas are classified as non-residential). All properties classified on the system as residential are in fact single- or multi-family residential properties, although some of the properties are eligible or required to use commercial rate tariffs. The Taxpayer adjusts the tax classification of the premise when it has specific information that a property otherwise classified as residential is nevertheless being used for commercial purposes.

8. The Taxpayer uses the tax classification on its system to determine the application of the sales and use tax exemptions under R.I. Gen. Laws § § 44-18-30(20) and (21) (the "Residential Utilities Exemptions"). Where a property is classified as residential, the Taxpayer does not collect sales or use tax on sales of gas or electricity. Where a property is not classified as residential (including where the Taxpayer has specific information indicating that an otherwise residential property is being used for commercial purposes), the Taxpayer collects sales tax on the sales of gas or electricity unless another sales and use tax exemption applies.

9. The transactions assessed additional tax in the Notice of Deficiency resulted from the Division's determination that the untaxed sales of gas to particular premises classified as residential on the Taxpayer's system (the "Disputed Sales") were not eligible for exemption under either of the Residential Utilities Exemptions.

10. Generally, the Disputed Sales fall into one of the following five (5) categories: (1) sales to residential premises that were temporarily vacant after a resident moved out (as a result of a foreclosure, the end of a tenancy, or other reason), where a person other than a tenant (*e.g.*, a property owner or management company) paid for the gas between tenancies; (2) sales to residential premises temporarily vacant during renovation, where a person other than a tenant (*e.g.*, the property owner or management company) paid for the gas during renovation; (3) sales to newly constructed, renovated or foreclosed residential premises being held for sale or rental, where a where a person other than a tenant (*e.g.*, contractor, a developer, a realty company or a financial institution) paid for the gas between tenancies; (4) sales to residential premises, where a landlord or property manager paid for the gas, and did not have written documentation whether the landlord or property manager passed the cost through to tenants as part of the rent; and (5) sales to residential premises, where a landlord or property manager paid for the gas, and passed it through to the tenant as a charge separate from the rent.

11. Approximately 70% of the Disputed Sales were sales of gas used for heating purposes.

testified on behalf of the Taxpayer. He testified that he is employed by the Taxpayer's parent company as supervisor of New England accounts. He testified that he located a 1993 letter from the Division to the Taxpayer finding that a real estate management company's apartment buildings that consumed utilities "for domestic use by occupants of residential premises" so that water, gas, electricity, and heating fuel were tax exempt. He testified that he also located a 1992 letter from the Division to a real estate management company that stated "[e]lectricity and gas sold to residential apartment buildings are not subject to sales tax." See Taxpayer's Exhibits One (1) (1993 letter) and Two (2) (1992 letter). On cross-examination, he testified that he does not know what was told to the Division in 1992 to receive the Division's 1992 letter. He testified that properties referenced in the 1993 letter are still serviced by the Taxpayer but he does not know if they were included in the audit and whether the use of the buildings referenced in the letter have changed in the last 20 years.

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). 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) (internal citation omitted). In cases where a statute may contain ambiguous language, the 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

Pursuant to R.I. Gen. Laws § 44-18-18, Rhode Island imposes a sales tax of 7% on gross receipts of a retailer. Pursuant to R.I. Gen. Laws § 44-18-19, the retailer is responsible for the collection of sales tax. Pursuant to R.I. Gen. Laws § 44-18-20, a use tax is imposed on the storage, use or consumption of tangible personal property. "The use tax . . . is a complement to Rhode Island's sales tax . . . The sales tax applies to 'sales at retail in this state.' (citation omitted). The use tax, in contradistinction, is imposed on 'the storage, use, or other consumption in this state of tangible personal property.'" *Dart Industries, Inc. v. Clark*, 696 A.2d 306, 309 (R.I.1997).

However, by statute certain items are exempted from the collection of sales tax. R.I. Gen. Laws § 44-18-30 provides in part as follows:

R.I. Gen. Laws § 44-18-30[3] states in part as follows:

> Gross receipts exempt from sales and use taxes. – There are exempted from the taxes imposed by this chapter the following gross receipts:
> ***
> (20) Heating fuels. From the sale and from the storage, use, or other consumption in this state of every type of fuel used in the heating of homes and residential premises.
> (21) Electricity and gas. From the sale and from the storage, use, or other consumption in this state of electricity and gas furnished for domestic use by occupants of residential premises.

[3] This statute was amended effective December 31, 2014. However, this is the statute that was in effect during the Audit Period.

The *Sales and Use Tax Regulation* SU 95-89 *Television Service, Telegraph, Water, Gas, Electricity, and Steam* ("SU 95-89") provides as follows:

> A. Sales of natural and artificial gas, electricity, steam, water, and sales of telegraph, community antenna television, cable and subscription television services are subject to sales tax except in those cases wherein the purchaser is entitled to exemption as specifically provided in the sales and use tax law. "Subscription television" means television programming services provided to consumers for a fee via satellite transmission or any other means.
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> B. Residential Premises -- Exemptions
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> (1) Heating fuels of every type used in the heating of homes and other residential premises.
>
> (2) Electricity, gas and water furnished for domestic use by occupants of residential premises.
>
> "Residential use" shall mean that the exemption shall apply to multi-family residential premises including apartments, as well as single-family homes whether the heating fuel, electricity, gas or water is furnished to the landlord for all tenants or to the individual tenants.
>
> Such exemption does not apply to motels, hotels, convalescent or nursing homes, or other commercial and industrial users.
>
> Where the premises have both residential use and commercial or industrial use, and there is separate measurement of the heating fuel, electricity, gas or water, the amounts sold or used in the nonresidential premises are subject to tax.
>
> However, where there is a combination of residential and other use of the premises, and there is no separate measurement of heating fuel, electricity, gas or water between the two uses, the sales tax shall apply to the full amount of the sale.
>
> FOR EXAMPLE: (1) If a three decker house has four units, one of which is a store occupying part of the first floor, and uses gas therein, and there is no separate gas meter for such store, the whole amount of the gas bill is taxable to the landlord.
>
> (2) If a resident of a one family home has a permitted hairdressing operation in one or two rooms and has no separate electric meter for the equipment used in the business operation, all electricity is taxable.
>
> As stated above, the retailer must collect the sales tax in a multiple use situation where there is no separate measurement for such gas, water or electric meter or separate heating system. The owner of the premises, however, may apply to the Division of Taxation for a proportionate refund on furnishing adequate substantiation of the portion of domestic use by occupants of the residential premises.

C. Arguments

The Division argued that there is a statutory presumption that all receipts are taxable and that Division's sales and use regulations are *prima facie* evidence of the interpretation of the sales and use statute. The Division argued that there are four (4) criteria needed to apply the R.I. Gen. Laws § 44-18-30(21) exemption: 1) utilities consumed at residential premises; 2) utilities consumed for domestic purposes; 3) those using utilities must be occupants of premises; and 4) occupants must reside in the premise. The Division argued that the when statutory language is clear and unambiguous, all words must be given their plain and ordinary meaning. The Division argued that as both exemptions were enacted at the same time, the statutes cannot be read to be unnecessary or redundant or absurd so that subsection (20) must exclude gas as a heating fuel and only include coal, number 2 hearing oil, propane, etc. The Division argued that the old letters that the Taxpayer relies are irrelevant.

The Taxpayer argued that R.I. Gen. Laws § 44-18-30(20) and (21) both exempt the sale of utilities that are used in residential premises without regard to who pays for utilities or who occupies the premises at the time of sale. The Taxpayer argued that it is the character of the premises that determines the exemption. It argued that its position is supported by statute, regulation, the Division's long standing administrative application of residential exemptions as communicated to the Taxpayer by the Division, and the interpretation of exemptions by other states. Alternatively, the Taxpayer argued that 70% of sales are exempt because of they were of gas were used for heating.

D. Tax Exemptions

Not only are taxation exemption statutes strictly construed against a taxpayer, but "[t]he party claiming the exemption from taxation under a statute has the burden of demonstrating that

the terms of the statute illustrate a clear legislative intent to grant such exemption." *Cookson v. Clark*, 610 A.2d 1095, 1098 (R.I. 1992). Tax exemption statutes are also strictly construed in favor of the taxing authority and against the party seeking the exemption. *Fleet Credit Corp. v. Frazier*, 726 A.2d 452, 454 (R.I. 1999). Pursuant to R.I. Gen. Laws § 44-18-25,[4] there is a presumption that the use of all tangible personal property is subject to the use tax.

E. R.I. Gen. Laws § 44-18-30(20) and R.I. Gen. Laws § 44-18-30(21)

A statute must be examined in its entirety and the words given their plain and ordinary meaning. R.I. Gen. Laws § 44-18-30(21) uses the term "occupants of residential premises." The clear and unambiguous meaning of occupants would be those that live at the residential premises. SU 95-89 includes multi-family residential premises including apartments in the definition of "residential use." Thus, the statute includes apartment buildings such as those at issue in this matter. In applying the "ordinary meaning" of a word, the Rhode Island Supreme Court has relied on a dictionary definition. In *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the "ordinary meaning" of "must." *Id.* at 674. As the Court has found, "[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary." *Defenders of Animals, Inc.*, 553 A.2d at 543. *Random House Webster's Unabridged Dictionary*, 2nd Edition (2001) defines "domestic"

[4] R.I. Gen. Laws § 44-18-25 provides 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, or prewritten computer software delivered electronically or by load and leave, or services as defined in § 44-18-7.3, are subject to the use tax, and that all tangible personal property, or prewritten computer software delivered electronically or by load and leave, or services as defined in § 44-18-7.3, 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.

as "of or pertaining to the home, the household, household affairs, or the family . . . devoted to home life or household affairs." Thus, the exemption applies to those living in a residential premise that are using electricity and/or gas for the household or home.

The clear and unambiguous language of R.I. Gen. Laws § 44-18-30(21) is that the exemption is for home or domestic use by occupants in residential premises. The statute does not give a blanket exemption to residential premises. If the statute was to give such a blanket exemption, it would have stated that the exemption was for residential premises and not distinguish between occupants using the gas and electricity in a residential premise from the gas and electricity being supplied to a residential premise. In other words, the statute expected that not all gas and electricity being supplied to a residential premise would be used by occupants for a domestic use.

In contrast to R.I. Gen. Laws § 44-18-30(21), R.I. Gen. Laws § 44-18-30(20) provides a different limitation on a tax exemption. It provides a tax exemption for "every type of fuel used in the heating of homes and residential premises." The statute does not limit the type of heating fuel but rather specifically indicates the exemption is for every (all) type of fuel used to heat homes and residential premises. The language is clear and unambiguous and every word is to be given its meaning. In other words, any heating fuel that heats homes or residential premises is exempt. Unlike the gas and electricity exemption which limits the exemption to that which is furnished for domestic use by occupants of residential premises, the heating fuel exemption applies to heating fuel used to heat homes and residential premises.

The Division argued that it is presumed that the legislature will not enact legislation that is meaningless, repetitive, or ineffective. The Division argued that since (20) and (21) were enacted at the same time, the legislature cannot be deemed to have enacted duplicative and

overlapping sales and use exemptions for natural gas. The Division argued that it would be absurd for the General Assembly to have placed a narrow restriction on entitlement to a tax exemption in (21) but place little or no restriction to a tax exemption in (20). The Division also argued that under the doctrine of *pari materia* where two (2) or more provisions relate to the same or similar subject manner and are not irreconcilably repugnant with each other, they must be construed so as to be effective while being harmonious with each other and consistent with their general objective. See *State v. Oliveira*, 882 A.2d 1097 (R.I. 2005). The Division argued that in order to harmonize the two (2) statutes, (20) should read to exclude gas used for heating. The Division finds support for its newly created distinction in the fact that gas and electricity are provided by regulated public utility companies so that consumption of those utilities can be separately provided and metered so it is easy to allocate between utilities being used by tenants for domestic or nondomestic purposes in the same building.

The Division makes an assumption that overlapping exemptions are absurd and cannot have been intended by the legislature. The Rhode Island Supreme Court has found that the plain statutory language is the best indicator of legislative intent and if the interpretation will not lead to an absurd or wholly impracticable result, the plain language is the sole evidence of the ultimate legislative intent. *State v. Santos*, 870 A.2d 1029 (R.I. 2005). The legislature chose to make heating fuel to residential premises exempt. At the same time gas used by occupants of residential premises is exempt. The latter exemption could include gas used for heating as well as cooking. A review of exemptions provided for in R.I. Gen. Laws § 44-18-30 reveal exemptions that might cover the same item: 1) R.I. Gen. Laws § 44-18-30(25) and (26);[5] 2) R.I. Gen. Laws §

[5] The former applies a tax exemption to commercial vessels of 50 tons and the latter applies to commercial fishing vessels of five (5) tons. Presumably, a commercial fishing vessel could fall under both exemptions if it weighed more than 50 tons.

44-18-30(19) and (35);[6] and 3) R.I. Gen. Laws § 44-18-30(9) and (39).[7] The fact that different exemption statutes might cover the same item do not make the statutes absurd or in conflict.

The Division argued that in order for the statutes to be effective, (20) needs to be read to only include fuel other than gas than can heat a home. However, if the legislature wanted to make the heating fuel exemption only apply to heating fuel that was not gas, it could have clearly said so. As the Rhode Island Supreme Court has found,

> Another rule of construction is that the court must 'presume that the Legislature intended every word of the enactment to have a useful purpose and to have some force and effect.' *Defenders of Animals, Inc. v. Department of Environmental Management*, 553 A.2d 541, 543 (R.I.1989). This Court and other courts clearly have distinguished between equitable indemnity and indemnity based upon contractual obligations. *See, e.g., Rhode Island Depositors Economic Protection Corp. v. Hayes,* 64 F.3d 22, 25-26 (1st Cir.1995); *Muldowney v. Weatherking Products, Inc.,* 509 A.2d 441, 443 (R.I.1986). We must conclude that the DEPCO settlement statute intended to absolve one who enters into a judicially approved settlement with DEPCO from contribution or *equitable indemnity but not contractual indemnity.* If the Legislature had desired to extinguish obligations derived from contractual indemnity, it would have so stated in clear and unequivocal terms. *Rhode Island Depositors Economic Protection Corp. v. Coffey and Martinelli*, Ltd. 821 A.2d 222, 228-229 (R.I. 2003).

Furthermore, there is no ambiguity in the statute that would necessitate an interpretation changing the exemption provided for in R.I. Gen. Laws § 44-18-30(20). As the Supreme Court has held,

> In construing the Act we cannot imply what the Legislature did not express absent compelling reasons to do so, such as a textual ambiguity in a statute. See *Woods v. Safeway System, Inc.*, 102 R.I. 493, 232 A.2d 121 (1967). Because the pertinent statutes are neither equivocal nor ambiguous, there is no room for implication by judicial construction in this controversy, and we may not consider whether the disputed provisions are consistent with our conception of justice, expediency, or sound public policy. *Id. Orthopedic Specialists, Inc. v. Great Atlantic & Pac. Tea Co., Inc.*, 388 A.2d 352, 357 (R.I.1978).

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[6] The former provides exemptions for motor vehicle and adaptive equipment for persons with disabilities and latter provides exemptions for motor vehicle and adaptive equipment to certain veterans. It could be expected that some people claiming that exemption might fall under both statutes (be a veteran with service related disabilities).

[7] The former is an exemption for food and food ingredients and the latter is for food items paid for by food stamps. It could be expected that perhaps food that is already tax exempt could also be bought using food stamps.

Folan v. State/Department of Children, Youth, and Families, 723 A.2d 287 (R.I. 1999) dealt with whether a statute's exclusive remedy provision barred claims under another statute so that there was an inherent conflict between two (2) statutes that had to be resolved. However, unlike *Folan*, there is no inherent conflict in the two (2) tax exemptions but rather the legislature chose to exempt heating fuel (which might include gas) one way and gas and electricity another way. The Taxpayer argued that both statutes exempt residential premises, but they clearly do not. The Division argued that (20) must exclude gas used for heating, but it clearly does not. One exemption depends on the type of premises and the other exemption depends on the type of user in residential premises. The statutes are clear and unambiguous.[8]

F. Regulation

Pursuant to R.I. Gen. Laws § 44-19-33,[9] the Division may promulgate regulations which are considered *prima facie* evidence of a statute's proper interpretation. The Division has promulgated SU 95-89. Section A of SU 95-89 states that "[s]ales of natural and artificial gas, electricity, steam, water . . . are subject to sales tax except in those cases wherein the purchaser is entitled to exemption as specifically provided in the sales and use tax law." Section B goes on

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[8] Since the statutes are clear and unambiguous, there is no need to discuss legislative intent as the statute speaks to intent. The Division argued that the legislature must have meant for heating fuel to exclude gas based on how gas is provided and metered. However, arguably the policy the legislature chose was that heating fuel – all heating fuel – used by residential premises was exempt because there is no substitute for heat. In other words, residents might use flashlights rather than light or might use canned food rather than cooking food to eat. But unless a home has a fireplace, if the residential premise is using gas for heat, there is no substitute for heat like there could be for the other covered utilities in (21).

Trice v. City of Cranston, 297 A.2d 649 (R.I. 1972) found that long acquiescence without interference from the legislature in a continued practice is entitled to great weight in determining legislative intent. Since the statutes are clear and unambiguous, there is no reason to rely on a long-standing, practical and plausible interpretation given to the statutes. However, SU 89-95 does not support the Taxpayer's position because the regulation clearly provides that commercial usage within a residential premise is not exempt (under R.I. Gen. Laws § 44-18-30(21)).

[9] R.I. Gen. Laws § 44-19-33 provides as follows:

> Rules and regulations – Forms. – The tax administrator may prescribe rules and regulations, not inconsistent with law, to carry into effect the provisions of chapters 18 and 19 of this title, which rules and regulations, when reasonably designed to carry out the intent and purpose of those chapters, are prima facie evidence of their proper interpretation. Those rules and regulations may from time to time be amended, suspended, or revoked, in whole or in part, by the tax administrator. The tax administrator may prescribe, and may furnish, any forms necessary or proper for the administration of those chapters.

to list the exemptions in residential premises as those provided by R.I. Gen. Laws § 44-18-30(20) (heating fuel to homes and residential premises) and R.I. Gen. Laws § 44-18-30(21) (electricity and gas furnished for domestic use by occupants of residential premises).[10] The regulation then indicates that if premises have both residential and commercial use and there is separate measurement for heating fuel, electricity, gas or water, the nonresidential uses are subject to tax. However, the limitation on heating fuel is different from gas and electricity as referenced in Sections A and B. The regulation further provides that if the premises do not have separate meters for the residential and commercial use, tax is owed on the full amount of sale. The Division requires the retailer to collect the sales tax in the multiple-use situation where there is no separate measure for gas and electricity but that the owner may apply to the Division for a proportionate refund on furnishing adequate substantiation of the portion of domestic use by occupants of the residential premises.[11] The provision between domestic and non-domestic usage is clearly consistent with R.I. Gen. Laws §44-18-30(21) for gas and electricity.

Regulations promulgated pursuant to the tax administrator's general rule-making authority under R.I. Gen. Laws § 44-1-4 have the force of law and are as binding as a valid statute. Moreover, regulations issued under the tax administrator's specific rule-making authority under the sales and use tax act are *prima facie* evidence of the proper interpretation of the act, if such regulations are not inconsistent with law and are reasonably designed to carry out the intent and purpose of the act. Such regulations will be declared invalid only when they are "plainly inconsistent with the operative language of the statute." *Dart Industries, Inc. v. Clark*, 696 A.2d 306, 314 (R.I. 1997) (citations omitted).

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[10] The regulation also includes water which is exempted pursuant to R.I. Gen. Laws § 44-18-30(28).

[11] The examples in the regulation include a three (3) decker house with four (4) units one (1) of which is used as a store and there is no separate gas meter so that tax is owed on the entire bill but the premise's owner could obtain a proportionate refund.

The Division argued that the SU 95-89 never has predicated a tax exemption upon a building being classified as residential and that the regulation is *prima facie* evidence that non-conforming use of utilities within a residential structure are not tax exempt. However, SU 95-89 declares that gas and electricity are subject to tax except when exempt by statute. It also includes the two (2) different exemptions at issue here – 1) heating fuel; and 2) gas and electricity. The regulation relies on the statutory exemptions. The statute differentiates between the two (2) exemptions and therefore, the regulation implements the two (2) exemptions that it sets forth in Section B. For the most part, its implementation language is more relevant to R.I. Gen. Laws § 44-18-30(21) but that does not mean that R.I. Gen. Laws § 44-18-30(20) is no longer relevant or can be ignored. By its own terms, SU 95-89 exempts those utilities subject to statutory exemptions. Thus, this matter turns on the statutes at issue.[12]

G. Prior Letters

The Taxpayer relied on a 1992 letter and a 1993 letter to argue that the Division has a long-standing interpretation of both statutes to allow the exemption based on the nature of the premises and not the identity of the user or purchaser. The 1992 letter states that "[e]lectricity and gas sold to residential apartment buildings are not subject to sales tax" and the 1993 letter states that the Division reviewed the customers and found that "all utilities are consumed for domestic use by occupants of residential premises." See Taxpayer's Exhibits One (1) and Two (2). Even accepting these letters, there are no facts regarding the configuration of the premises at issue at the time of these letters and no facts regarding the representations made to the Division to which the Division responded. Nonetheless, the 1993 letter references domestic use

[12] As discussed, tax regulations relating to sales and use are *prima facie* evidence of the proper interpretation of the law. Nonetheless, a statute trumps a regulatory provision and a regulation cannot change a statutory provision. *Chariho Regional School District v. Gist*, 91 A.3d 783 (R.I. 2014). However, in this matter, SU 95-89 relies on the statutory exemptions and indicates that utilities are subject to tax unless exempt by statute and what is exempt depends on whether it is heating fuel or gas (non-heat) or electricity as referenced in Section B of SU 95-89.

by occupants of residential premises as set forth in R.I. Gen. Laws § 44-30-18(21). Both letters are irrelevant as this matter turns on the plain and unambiguous meaning of the statute.

Furthermore, even if it could be proven that the letters gave blanket exemptions for residential property for all gas and electricity, the Division would not have the discretion to ignore or waive statutory or regulatory requirements. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35 (R.I. 2001). Thus, the letters would not preclude the enforcement of the law and/or regulation if that enforcement differs from the letters.[13] [14]

H. Other State Laws

The Taxpayer argued that other states have a similar statutory provisions to Rhode Island's and use similar terminology and have been interpreted in supporting its position in this matter. In 2010 *Division Administration Decision*, 2010 WL 1933727 (R.I.Div.Tax.), the decision found that except for one (1) tangential court case that discussed R.I. Gen. Laws § 44-30-32(b)(2), there were no other court cases and no administrative decisions on said statute. The

[13] It should also be noted that the Division's Regulation *Declaratory Rulings* DR 03-01 provides that "general information letters" may be issued to taxpayers in response to a specific set of facts but that those letters are not binding on the Division if there has been a misstatement or omission of material facts or, on a prospective basis, a change in the law. The same provision was in the predecessor regulation, DR 94-01. The letters submitted include no specific facts upon which the Division relied on in issuing such letters. In addition, general informational letters are only to be used by the taxpayer who requested the information. The letters at issue were issued prior to DR 94-01 but certainly the regulation speaks to the reasons such letters are issued.

[14] It should also be noted that not only can a state official not waive the applicable law, but equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (R.I. 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on so-called inherent equitable powers). On rare occasions, the Rhode Island Supreme Court has found that the doctrine of *equitable estoppel* (as opposed to generic equitable considerations) may apply against public agencies but no grounds for such a finding would exist in this matter. In order to obtain equitable estoppel a party must show that a "duly authorized" representative of the agency made affirmative representations within the scope of his/her authority, that such representations were made to induce the plaintiff's reliance thereon, and that the plaintiff actually and justifiably relied thereon to its detriment. *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607 (R.I. 2000). However, a government entity and its representatives do not have "any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations." See *Romano*, 767 A.2d at 40. *Romano* found that the "doctrine of *equitable estoppel* should not be applied against a governmental entity like the board when, as here, the alleged representations or conduct relied upon were *ultra vires* or in conflict with applicable law." *Id.* at 38. Furthermore, "'[a]s a general rule, courts are reluctant to invoke estoppel against the government on the basis of an action of one of its officers.'" *Casa DiMario,* 763 A.2d at 612. (internal citation omitted).

State of New York had an almost identical law to the pertinent Rhode Island statute and had numerous administrative tax decisions, court cases, and law review articles on the law. (Other states also had almost identical statutes but no developed law like New York). Thus, the 2010 *Administrative Decision* discussed the analysis used in New York State to determine whether intangible property income (exercise of stock options) was related to business carried on in-state.

In contrast to that 2010 decision, there is Rhode Island case law on the issues in this matter. *Woonsocket Hospital v. Quinn,* 173 A. 550, 552 (R.I. 1934) held that "exemption from taxation is to be determined, not by the policy or laws of other states but by the Constitution and laws of this State." The Rhode Island Supreme Court has further found "[i]t is clear to us that New York is free to adopt and follow any policy in the matter of taxation in general and of tax exemption in particular that it may deem just, and that Rhode Island can do likewise." *Wickes v. Stein*, 266 A.2d 911, 914 (R.I. 1970). Thus, there is no reason to look to other states' law as this matter turns on the plain and unambiguous meaning of Rhode Island statutes.

I. Interest and Penalty

The Division imposed interest on the tax assessment pursuant to R.I. Gen. Laws § 44-19-11.[15] Exhibit 14. The parties stipulated that the 10% negligence penalty imposed under R.I. Gen. Laws § 44-19-12 would be abated as provided by R.I. Gen. Laws § 44-1-10.

[15] R.I. Gen. Laws § 44-19-11 states in part 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.

J. Conclusion

The parties stipulated to the following five (5) categories of disputed sales:

(1) sales to residential premises that were temporarily vacant after a resident moved out where a person other than a tenant (*e.g.*, a property owner or management company) paid for the gas between tenancies;

(2) sales to residential premises temporarily vacant during renovation, where a person other than a tenant (*e.g.*, the property owner or management company) paid for the gas during renovation;

(3) sales to newly constructed, renovated or foreclosed residential premises being held for sale or rental, where a where a person other than a tenant (*e.g.*, contractor, a developer, a realty company or a financial institution) paid for the gas between tenancies;

(4) sales to residential premises, where a landlord or property manager paid for the gas, and did not have written documentation whether the landlord or property manager passed the cost through to tenants as part of the rent; and

(5) sales to residential premises, where a landlord or property manager paid for the gas, and passed it through to the tenant as a charge separate from the rent.

In addition, the parties stipulated that approximately 70% of the disputed sales were sales of gas used for heating purposes.

Based on the forgoing and pursuant to R.I. Gen. Laws § 44-18-30(20), the sale of gas for heating purposes made to residential premises at issue is tax exempt. Thus, all five (5) categories of disputed sales of heating fuel (gas) to those residential premises are exempt.

In terms of the fourth and fifth categories of disputed sales, the gas (non-heating fuel)[16] is being "furnished to for domestic use by occupants of residential premises." In other words, the Taxpayer is furnishing gas to occupants – tenants - of residential premises for domestic use. SU 95-89 does not distinguish between whether the gas is furnished to the landlord for tenants or to the individual tenants. This is because the exemption is based on whom the gas (and electricity) is being furnished to and for the fourth and fifth category, the gas is being furnished for the domestic use by occupants of residential premises.[17] In the first three (3) categories, the occupants of the residential premises have moved out and there are no occupants of the premises using the gas for domestic use. Thus, gas is not being furnished for domestic use by occupants of residential premises in terms of the first three (3) categories of disputed sales

Therefore, based on the forgoing and pursuant to R.I. Gen. Laws § 44-18-30(21), the sales of gas (non-heating) is not exempt for the first three (3) categories of disputed sales, but the sales of gas (non-heating) is exempt for the fourth and fifth categories of disputed sales.[18]

VI. FINDINGS OF FACT

1. On or about December 13, 2013, the Division issued a Notice in response to the Taxpayer's request for hearing filed with the Division.

2. A sales and use tax field audit was conducted by the Division on the Taxpayer for the period of encompassing September, 2005 through August, 2008 inclusive.

3. The facts contained in Sections IV and V are reincorporated by reference herein.

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[16] The parties stipulated that only gas is at issue for these exemptions.

[17] If the landlord is paying for the gas (non-heating), only that gas being furnished to the occupants of residential premises for domestic use is tax exempt. In other words, as set forth in SU 95-89, gas (non-heating) and electricity furnished for non-domestic use is taxable. The stipulated facts indicate that the gas in dispute in the fourth and fifth categories is being furnished to tenants (e.g. occupants of residential premises using the gas and electricity for domestic purposes).

[18] The Taxpayer argued in its brief that the Division should impose these taxes as use taxes on the landlord or building owners. However, the audit process and assessment of the tax as sales or use is not an issue at hearing.

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 § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-18-1 *et seq.*, and R.I. Gen. Laws § 44-19-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 44-18-30(20), the sale of gas for heating purposes made to the residential premises at issue is tax exempt so that all five (5) categories of disputed sales that are for heating fuel (gas) to those residential premises are exempt.

3. Pursuant to R.I. Gen. Laws § 44-18-30(21), the sale of gas (non-heating) is not exempt for the first three (3) categories of disputed sales, but the sale of gas (non-heating) is exempt for the fourth and fifth categories of disputed sales

VIII. RECOMMENDATION

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

Based on the forgoing and pursuant to R.I. Gen. Laws § 44-18-30(20), the sale of gas for heating purposes made to residential premises at issue is tax exempt so that all five (5) categories of disputed sales that are for heating fuel (gas) to those residential premises are exempt.

Based on the forgoing and pursuant to R.I. Gen. Laws § 44-18-30(21), the sale of gas (non-heating) is not exempt for the first three (3) categories of disputed sales, but the sale of gas (non-heating) is exempt for the fourth and fifth categories of disputed sales.

Therefore, the Notice of Deficiency is upheld in part and the Division shall re-calculate the tax and interest owed by the Taxpayer.

Date: MAY 19, 2015

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: 10/21/15

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 21ST day of Oct., 2015 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid to the Taxpayer's attorneys at the address on file with the Division of Taxation and by hand delivery to Bernard Lemos, Esquire, and Meaghan Kelly, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.

Gail Belasco