

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2011-18

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

IN THE MATTER OF:

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:
:
: Case No.: 11-T-0012
: Use Tax
:
:

Taxpayer.

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Hearing and Appointment of Hearing Officer (“Notice”) that was issued on May 25, 2011 to (“Taxpayer”) by the Division of Taxation (“Division”) in response to the Taxpayer’s request for hearing. A hearing was scheduled for July 7, 2011 which was continued at the Taxpayer’s request. A hearing was then scheduled for September 22, 2011 at which time the Taxpayer did not appear. The Taxpayer had adequate notice of the hearing by first class mail. As the Taxpayer chose not to appear at hearing, the undersigned held the hearing. The Division was represented by counsel and rested on the record.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-35-1 *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 the assessed sales tax, interest, and penalty.

IV. MATERIAL FACTS AND TESTIMONY

Senior Revenue Agent, testified on behalf of the Division. She testified she performed a sales and use tax audit on the Taxpayer for the period of October 1, 2002 to December 31, 2007. She testified that a statute of limitations waiver was not required as the Taxpayer had not filed any sales or use tax returns. She testified that the Taxpayer's business was home financing and real estate services but it did not have a permit to make sales at retail and did not have a history of paying taxes. She testified that she reviewed the corporate returns, bank statements, expenses, 1099 forms, and payroll records, etc., and the Taxpayer had incomplete records and minimal invoices.

testified that she determined that there were three (3) schedules of deficiencies: 1) assets; 2) supplies and expenses; and 3) utilities. She testified that for the assets schedule, the Taxpayer purchased furniture out-of-state (mostly from Massachusetts) and did not pay the difference (2%) in Massachusetts and Rhode Island sales tax. She testified that the supplies and expenses schedule was for clerical supplies purchased out-of-state (mostly from Massachusetts) and again the Taxpayer did not pay the difference in taxes charged in Massachusetts and Rhode Island. She testified that utility companies do not charge tax on residential use but the Taxpayer converted a residential house into its place of business and never informed the utility company so the Taxpayer owes use tax on its utility usage. She testified that she was able to give credit for taxes paid in Massachusetts when she had the appropriate records.

testified after the Notice of Deficiency (See Division's Exhibit 13) was issued, the Taxpayer produced further information which caused a minimal revision to the deficiency which was offset by the accrued interest. See Division's Exhibit 16. She testified after the preliminary conference, an offer of settlement was made to waive the penalty. See Division's Exhibit 16.

In closing, the Division argued that pursuant to R.I. Gen. Laws § 44-18-20 and R.I. Gen. Laws § 44-18-21, use taxes are imposed on all purchases unless sales tax is paid and the Taxpayer did not overcome the statutory presumption under R.I. Gen. Laws § 44-18-25 that use tax is owed.

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 the gross receipts of a retailer. Pursuant to R.I. Gen. Laws § 44-18-20¹ and R.I. Gen. Laws § 44-18-21,² a use tax is imposed on the storage, use or consumption of tangible personal property. As explained in *Dart Industries, Inc. v. Clark*, 696 A.2d 306, 309 (R.I.1997), “[t]he 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.’”

¹ 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.

(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.

(h) The use tax imposed under this section for the period commencing July 1, 1990 is at the rate of seven percent (7%).

² 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.

C. Whether the Taxpayers Owe Use Tax

R.I. Gen. Laws § 44-19-27³ requires every person storing or using tangible personal property in this State to keep books, records, receipts, etc. The Division's *Sales and Use Tax Regulation* SU 89-91 further details what records must be kept and that such records must be maintained so that the Division may conduct audits and the failure to keep such records is evidence of negligence. R.I. Gen. Laws § 44-19-27.1⁴ authorizes the Division to examine taxpayers' records in order to determine the correctness of any tax return filed or the amount of any tax imposed.

³ R.I. Gen. Laws § 44-19-27 states in part as follows:

Records required – Users – Collectors of taxes – Promoters – Inspection and preservation of records. – (a) Every person storing, using, or consuming in this state tangible personal property purchased, leased, or rented from a retailer, or from a person other than a retailer in any transaction involving a taxable casual sale, shall keep books, records, receipts, invoices, and other pertinent papers in the form the tax administrator may require. Those books, records, receipts, invoices, and other papers shall at all reasonable times be open to the inspection of the tax administrator and his or her agents.

(d) The records shall be available for inspection and examination at any time upon demand by the tax administrator or his or her authorized agent or employee and preserved for a period of three (3) years, except that the tax administrator may consent to their destruction within that period or may require that they be kept longer

⁴ R.I. Gen. Laws § 44-19-27.1 states as follows:

Examination of taxpayer's records – Witnesses. – The tax administrator and his or her agents for the purpose of ascertaining the correctness of any return, report, or other statement required to be filed under chapters 18 or 19 of this title or by the tax administrator under those chapters, or for the purpose of determining the amount of any tax imposed under the provisions of those chapters, may examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, report, or other statement, and may require the attendance of the person executing the return, report, or other statement, or of any officer or employee of any taxpayer, or the attendance of any other person, and may examine the person under oath respecting any matter which the tax administrator or his or her agent deems pertinent or material in determining the liability of any person to a tax imposed under the provisions of chapters 18 or 19 of this title.

Pursuant to R.I. Gen. Laws § 44-18-25,⁵ the Taxpayer had the burden to demonstrate that the Division should not impose use tax. The Taxpayer was given a chance to present further information which it did prior to the preliminary conference. The Taxpayer did not appear at hearing. At hearing, the Division presented evidence that the Taxpayer had not filed returns and kept minimal records so that the Division made its assessments based information obtained during the investigation. See R.I. Gen. Laws § 44-19-14.⁶

Therefore, the Division properly assessed the Taxpayer the use tax owed by the Taxpayer. See Division's Exhibits 13 (initial notice of deficiency) and 16 (proposed revision). Pursuant to R.I. Gen. Laws § 44-19-13, a statute of limitations waiver was not

⁵ 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.

⁶ R.I. Gen. Laws § 44-19-14 states in part as follows:

Determination without return – Interest and penalties. – If any person fails to make a return, the tax administrator shall make an estimate of the amount of the gross receipts of the person or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this state is subject to the use tax. The estimate shall be made for the month or months in respect to which the person failed to make a return and is based upon any information, which is in the tax administrator's possession or may come into his or her possession. Upon the basis of this estimate, the tax administrator computes and determines the amount required to be paid to the state, adding to the sum arrived at a penalty equal to ten percent (10%) of that amount. One or more determinations may be made 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 (15th) day after the close of the month for which the amount or any portion of the amount should have been paid until the date of payment. If the failure of any person to file a return is due to fraud or an intent to evade the provisions of this chapter and chapter 18 of this title, a penalty of fifty percent (50%) of the amount required to be paid by the person, exclusive of penalties, is added to the amount in addition to the ten percent (10%) penalty provided in this section. After making his or her determination, the tax administrator shall mail a written notice of the estimate, determination, and penalty.

required to be signed as the Taxpayer had not filed any tax returns. The Division imposed interest on its assessment pursuant to R.I. Gen. Laws § 44-19-14. See Division's Exhibits 12 and 15 (interest work papers). In addition, the Division properly imposed a 10% penalty on said deficiencies pursuant to R.I. Gen. Laws § 44-19-14. This statute provides that if a taxpayer does not pay a tax because of negligence (e.g. poor records) or does not pay, a 10% penalty is imposed. See *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977). The penalty may be abated by the Tax Administrator in settlement as offered by the Division in its Exhibit 16; however, the penalty cannot be abated at hearing. *Id.* Therefore, the penalty is imposed on the revised deficiency.

Pursuant to R.I. Gen. Laws § 44-18-25, the Taxpayer is presumed to owe use tax. The Taxpayer did not overcome this presumption and has provided no proof that it does not owe any of the assessed tax. The Taxpayer owes the deficiency and interest as revised by Division's Exhibit 16 but also owes the 10% penalty.

VI. FINDINGS OF FACT

1. This matter came before the undersigned as a result of a Notice of Hearing and Appointment of Hearing Officer that was issued on May 25, 2011.
2. A hearing was held on September 22, 2011. The Taxpayer did not appear despite being noticed of hearing.
3. A field audit was conducted by the Division on the Taxpayer for the period October 1, 2002 to December 31, 2007.
4. The initial Notice of Deficiency and the revised assessment were not disputed at the hearing.
5. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

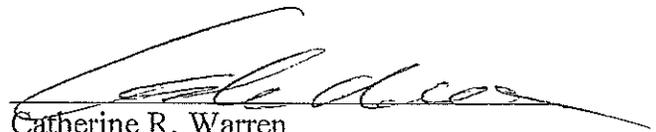
1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.* and R.I. Gen. Laws § 44-18-1 *et seq.*
2. Pursuant to R.I. Gen. Laws § 44-1-1 *et seq.* and R.I. Gen. Laws § 44-19-14, the Taxpayer owes the assessed use tax, the assessed interest, and a 10% penalty.

VIII. RECOMMENDATION

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

Based on R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-19-1 *et seq.*, the Taxpayer owes the use tax assessment and interest as set forth in the Division's Exhibit 16 but also owes the 10% penalty as applied to the revised deficiency.

Date: September 29, 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

Dated: December 4, 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 5th day of October, 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 Linda Riordan, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.



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