STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2017-11

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

IN THE MATTER OF:	:	
	:	**Case No.: 17-T-035**
	:	**Historic Preservation Tax Credit**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Hearing and Appointment of Hearing Officer ("Notice") issued on July 17, 2017 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing. A hearing was held on August 28, 2017 with the record closing on August 30, 2017. The Division was represented by counsel and the Taxpayer was *pro se*. The parties rested on the record.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-33.6-1 *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 the Division correctly denied the Taxpayer's historic tax credits pursuant to R.I. Gen. Laws § 44-33.6-1 *et seq*.

IV. MATERIAL FACTS AND TESTIMONY

On August 13, 2015, the Taxpayer entered into a contract with the Division regarding the receipt of tax credits under the Historic Preservation Tax Credits 2013 program. The Taxpayer provided the Division with a quarterly report on April 5, 2016 and on July 5, 2016. See Division's Exhibits B, C, and D. The Taxpayer was required to begin substantial construction on the project by July, 2016. See Division's Exhibits F (Taxpayer's affidavit that substantial construction started on July 11, 2016) and E (email between Taxpayer and Division). The Taxpayer provided a quarterly report to the Division on October 5, 2016 which indicated that the project's window contractor had gone out of business. See Division's Exhibit G. By letter dated April 24, 2017, the Division notified the Taxpayer that it was no longer eligible for the tax credits as the project had been idle for over six (6) months. See Division's Exhibits H.

The Taxpayer testified on his behalf. He testified that the project was idle for more than six (6) months because the window company went out of business. He testified that he contacted the Commission for a list of firms that do historic windows. He testified that the building is in great shape with a sprinkler system and he pays taxes on it. On cross-examination, he testified that this is a commercial building and the windows are to be done first since the inside is to be renovated to tenant specifications as he obtains tenants. He testified that he has received an estimate from a new company for windows and a window mock-up is now needed for approval. See Taxpayer's Exhibit One (1).[1]

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[1] The exhibit includes an August 31, 2016 email to the Taxpayer from a new window firm with proposal; a January 26, 2017 email from a new window firm to the Taxpayer with revised proposal and a February 6, 2017 response from the Taxpayer that would like to move on one of the proposals; a March 21, 2017 email from a new window company to the Taxpayer regarding setting up a meeting to take field dimensions; a May 5, 2017 email from the Taxpayer to new window company about scheduling the window mock-up; and an April 13, 2017 email from the Taxpayer to Division indicating that work has not been performed because could not have done the window work in the winter as the building is heated.

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, 1049 (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) (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 and Regulation

R.I. Gen. Laws § 44-33.6-1 *et seq.* is the Historic Preservation Tax Credits 2013 act. R.I. Gen. Laws § 44-33.6-2 provides in part as follows:

> (13) "Remain idle" means that substantial work has ceased at the subject project; work crews have been reduced by more than twenty-five percent (25%) for reasons unrelated to scheduled completion of work in accordance with the project schedule, reasonably unanticipated physical conditions, or force majeure; or the project schedule that was originally submitted by the taxpayer to the commission has been extended by more than twelve (12) months for reasons other than reasonably unanticipated physical conditions or an event of force majeure (by way of example, and not in limitation, any delays, work

stoppage, or work force reduction caused by issues with project funding, finances, disputes, or violation of laws shall be deemed to cause a project to remain idle).

R.I. Gen. Laws § 44-33.6-7 provides in part as follows:

> Timing and reapplication
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> Taxpayers shall have twelve (12) months from the approval of Part 2 application to commence substantial construction activities related to the subject substantial rehabilitation. Upon commencing substantial construction activities, the taxpayer shall submit an affidavit of commencement of substantial construction to the commission, together with evidence of such requirements having been satisfied. Furthermore, after commencement of substantial construction activities, no project shall remain idle prior to completion for a period of time exceeding six (6) months. In the event that a taxpayer does not commence substantial construction activities within twelve (12) months from the approval of Part 2 application, or in the event that a project remains idle prior to completion for a period of time exceeding six (6) months, the subject taxpayer shall forfeit all fees paid prior to such date and its then-current contract for tax credits shall be deemed null and void, and shall terminate without need for further action or documentation. Upon any such forfeiture and termination, a taxpayer may re-apply for tax credits pursuant to this chapter, however, notwithstanding anything contained herein to the contrary, one hundred percent (100%) of the fees required shall be paid upon reapplication and such fees shall be non-refundable. . . . The provisions of this section shall be further detailed and incorporated into the form of contract for tax credits used in connection with this chapter.

The *Historic Preservation Tax Credits 2013 Regulation* CR14-16 ("CR14-16") provides in part as follows.

> Rule 6 Definitions
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> "Force Majeure" means an event which is (i) reasonably unforeseen, (ii) outside the control of the Applicant and (iii) could not be avoided by the Applicant's exercise of due care. By way of example, and not in limitation, any delays, work stoppages, or work force reductions caused by financial difficulties, labor disputes or violations of the law shall not be deemed a force majeure.[2]

[2] The regulation also repeats the statutory definition of "Remain Idle."

Rule 13. Timing and Reapplication

(a) Taxpayers shall have twelve (12) months from the certification date of Part 2 Application to commence Substantial Construction activities.

(1) For this purpose, Substantial Construction activities shall be deemed to have commenced upon receipt by the Division of Taxation of all of the following:

(i) Building permit;

(ii) Executed construction contract; and

(iii) Notice to proceed issued to the contractor.

(2) For taxpayers acting as their own contractor, Substantial Construction activities shall be deemed to have commenced upon receipt by the Division of Taxation of the building permit along with an affidavit of commencement of Substantial Construction and supporting documentation.

(b) Upon commencing Substantial Construction activities, the Applicant shall submit an affidavit of Commencement of Substantial Construction Activities to the Commission and the Division of Taxation, together with evidence of such requirements having been satisfied.

(c) Furthermore, after Commencement of Substantial Construction Activities, no project shall Remain Idle prior to completion for a period of time exceeding six (6) months. In the event that a Applicant does not commence Substantial Construction activities within twelve (12) months from the date of Part 2 Certification, or in the event that a project Remains Idle prior to completion for a period of time exceeding six (6) months, the subject Applicant shall forfeit all fees paid prior to such date, and all rights and entitlements to the tax credits, and its then-current Contract for tax credits shall be deemed null and void, and shall terminate without need for further action or documentation.

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C. Arguments

The Division argued that it is undisputed that the project remained idle for over six (6) months and the Taxpayer does not fall under any exemptions from the provision that remaining idle for six (6) months will cause a denial of tax credits. The Division argued that the purpose of the tax credit is to get people working so the policy is not to award tax credits if no work is being performed.

The Taxpayer admitted that the project had remained idle for six (6) months. He argued that the employment situation has improved since the tax credit legislation was

passed. The Taxpayer argued that once the window company went out of business, it was not able to obtain a new company until the spring since the windows could not be done in the winter so that was beyond the Taxpayer's control.

D. Whether the Taxpayer Can Receive the Tax Credits

There is no dispute that the Taxpayer's project was idle for over six (6) months. The statutory definition of remain idle means substantial work has ceased on the project. It also means that if work crews are reduced by over 25% for reasons other than 1) scheduled completion of work in accordance with work schedule; 2) reasonably unanticipated physical conditions; or 3) force majeure. Remain idle does not include if the work schedule has been extended for reasonably unanticipated physical conditions or force majeure by the Rhode Island Historical Preservation and Heritage Commission ("Commission"). In other words, work crews can be reduced and the project not be idle if the crews are reduced in accordance with the work schedule, reasonably unanticipated physical conditions, or force majeure or the Commission extends the work schedule for acceptable reasons. The statute also provides that delays, work stoppages, or work force reduction caused by project funding shall be deemed to cause a project to remain idle. Force Majeure is defined in CR14-16 to mean an event that is reasonably unforeseen, outside the control of the applicant, and could not be avoided by exercise of due care by the applicant. The definition provides by way of example that work stoppages, labor disputes, work force reductions caused by financial hardship, or violations of the law are not deemed force majeure.

In looking at the facts of this project, the Commission has not extended the Taxpayer's work schedule. The work crew was not reduced pursuant to the work schedule.

The failure of a window company was not an unanticipated physical condition. While the failure of the window company is out of the Taxpayer's control and could not necessarily be avoided by the exercise of due by the applicant, the inability of a sub-contractor to perform is not a reasonably unforeseen event. Indeed, the force majeure definition speaks of work stoppage or labor disputes as not being deemed force majeure. In addition, while presumably the example of work force reduction because of financial hardship[3] is in relation to a taxpayer's work force, the concept is similar in that here the project's contractor went out of business presumably due to financial issues.

The Taxpayer argued that it could not obtain a new contractor until after the winter. The Taxpayer reached out to a new contractor in August, 2016, but there was apparently no further contact until January, 2017. Whatever the reason for the delay in obtaining a new contractor, the evidence does not show that there were unanticipated physical conditions. Unanticipated physical conditions relate to the work site and its conditions. It would not relate to a known season (winter) in regard to obtaining a new contractor.

The Taxpayer's project was idle for six (6) months. The failure of the window contractor does not fall under the statutory and regulatory exemptions provided in the definition of remain idle or force majeure.

VII. FINDINGS OF FACT

1. A Notice was issued on July 17, 2017 by the Division to the Taxpayer in response to its request for a hearing.

2. A hearing was held on August 28, 2017 with the record closing on August 30, 2017. The parties rested on the record.

[3] Included in the statutory definition of remain idle and the regulatory definition of force majeure.

3. The facts contained in Sections 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 § 44-33.6-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-33.6-1 *et seq.*, and R.I. Gen. Laws § 44-33.6-7, the Taxpayer's historic tax credits are deemed null and void.

VIII. RECOMMENDATION

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

Based on R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-33.6-1 *et seq.*, and R.I. Gen. Laws § 44-33.2-1 *et seq.*, the Taxpayer's historic tax credits are deemed null and void.

Date: September 19, 2017

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: 9/25/17

Neena S. Savage
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 § 8-8-25 Time for commencement of proceeding against the division of taxation. – (a) Any taxpayer aggrieved by a final decision of the tax administrator concerning an assessment, deficiency, or otherwise may file a complaint for redetermination of the assessment, deficiency, or otherwise in the court as provided by statute under title 44.

(b) The complaint shall be filed within thirty (30) days after the mailing of notice of the final decision and shall set forth the reasons why the final decision is alleged to be erroneous and praying relief therefrom. The clerk of the court shall thereupon summon the division of taxation to answer the complaint.

CERTIFICATION

I hereby certify that on the 25th day of September, 2017 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 Revenue, One Capitol Hill, Providence, RI 02908.

Paul Belasco