STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2017-12

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

IN THE MATTER OF:	:	**SC 15-044; 15-T-0072**
	:	**other tobacco tax and**
	:	**cigarette dealer's license**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to an Order to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer issued on July 15, 2015 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). The Taxpayer holds a cigarette dealer's license ("License") pursuant to R.I. Gen. Laws § 44-20-1 *et seq*. A hearing was held on September 19, 2017. The Division was represented by counsel. No one appeared for the Taxpayer. The Taxpayer did not contact either the undersigned or the Division. The Taxpayer received notice of the hearing.[1] As the Taxpayer received notice of the 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 § 44-1-1 *et seq*., R.I. Gen. Laws § 44-20-1 *et seq*., *Division of Taxation Administrative Hearing Procedures, Regulation AHP 97-01*, and the *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings*.

[1] The hearing was scheduled via the email address that the Taxpayer has continuously used to correspond and communicate with the Division. See testimony below.

III. ISSUE

Whether the Taxpayer owes the assessment issued by the Division in relation to tobacco tax and if so, what should be the sanction.

IV. MATERIAL FACTS AND TESTIMONY

Tax Investigator, testified on behalf of the Division. He testified that on April 28, 2014, he performed a routine tobacco compliance inspection of the Taxpayer. He testified that he found premium cigars and the Taxpayer did not have any invoices onsite for said cigars. He testified that the Division's records showed that the Taxpayer had not remitted any tax for "other tobacco products" ("OTP"). See Division's Exhibit B (April 28, 2014 compliance report). He testified that the Taxpayer eventually provided the names of its distributors; though, not promptly and the Division issued a subpoena to the distributor for its records of sales to the Taxpayer. See Division's Exhibit C (subpoena). He testified that after obtaining more information about the Taxpayer's purchases, two (2) more compliance reports were completed. See Division's Exhibits D (January 9, 2015 compliance report) and E (March 31, 2015 compliance report). He testified that after the initial inspection, the Taxpayer did not remit any cigar taxes for the rest of 2014 (which would be done by filing "form OTP-4"), but did remit some OTP tax in 2015. He testified that calculations were made on how much tax was owed under the statute and a penalty was imposed because there had been no filing of OTP tax between 2009 and 2014 and the Taxpayer did not keep the required records and did not cooperate and did not start to file the OTP tax (by way of the OTP-4 form) immediately after the inspection.

Revenue Officer II, testified on behalf of the Division. She testified that she reviewed the distributors' invoices and the compliance reports, and created a spreadsheet and audit report in order to calculate how much tax was owed. See Division's Exhibit F (audit report).

She testified that a notice of deficiency and 30 day License suspension notice were issued to the Taxpayer. See Division's Exhibits G (notice of deficiency) and H (notice of License suspension)

Both and testified that the Taxpayer used the same email address for communication during the entire investigation with that address being used for example by the Taxpayer to forward to the Division its revocation of its attorney's power of attorney.

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. DEM*, 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).

B. Relevant Statutes

R.I. Gen. Laws § 44-20-12 imposes a tax on cigarettes sold. R.I. Gen. Laws § 44-20-13.2 imposes a tax on "other tobacco products" and provides as follows:

> Tax imposed on smokeless tobacco, cigars, and pipe tobacco products. – (a) A tax is imposed on all smokeless tobacco, cigars, and pipe tobacco products sold or held for sale in the state by any person, the payment of the tax to be accomplished according to a mechanism established by the administrator, division of taxation, department of administration. Any tobacco product on which the proper amount of tax provided for

in this chapter has been paid, payment being evidenced by a stamp, is not subject to a further tax under this chapter. The tax imposed by this section shall be as follows:

(1) At the rate of eighty percent (80%) of the wholesale cost of cigars, pipe tobacco products and smokeless tobacco other than snuff.

(2) Notwithstanding the eighty percent (80%) rate in subsection (a) above, in the case of cigars, the tax shall not exceed fifty cents ($.50) for each cigar.

(3) At the rate of one dollar ($1.00) per ounce of snuff, and a proportionate tax at the like rate on all fractional parts of an ounce thereof. Such tax shall be computed based on the net weight as listed by the manufacturer, provided, however, that any product listed by the manufacturer as having a net weight of less than 1.2 ounces shall be taxed as if the product has a net weight of 1.2 ounces.

(b) Any dealer having in his or her possession any tobacco, cigars, and pipe tobacco products with respect to the storage or use of which a tax is imposed by this section shall, within five (5) days after coming into possession of the tobacco, cigars, and pipe tobacco in this state, file a return with the tax administrator in a form prescribed by the tax administrator. The return shall be accompanied by a payment of the amount of the tax shown on the form to be due. Records required under this section shall be preserved on the premises described in the relevant license in such a manner as to ensure permanency and accessibility for inspection at reasonable hours by authorized personnel of the administrator.

(c) The proceeds collected are paid into the general fund.

R.I. Gen. Laws § 44-20-40.1 provides in part as follows:

Inspections. – (a) The administrator or his or her duly authorized agent shall have authority to enter and inspect, without a warrant during normal business hours, and with a warrant during nonbusiness hours, the facilities and records of any manufacturer, importer, distributor or dealer.

R.I. Gen. Laws § 44-20-8 provides in part as follows:

Suspension or revocation of license. – The tax administrator may suspend or revoke any license under this chapter for failure of the licensee to comply with any provision of this chapter or with any provision of any other law or ordinance relative to the sale of cigarettes; and the tax administrator may also suspend or revoke any license for failure of the licensee to comply with any provision of chapter 13 of title 6.

During most of the time for the assessment, R.I. Gen. Laws § 44-20-51.1 provided as follows:

Civil Penalties

(a) Whoever omits, neglects, or refuses to comply with any duty imposed upon him/her by this chapter, or to do, or cause to be done, any of the things required by this chapter, or does anything prohibited by this chapter, shall, in addition to any other penalty provided in this chapter, be liable to a penalty of one thousand dollars ($ 1,000),

or five (5) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action.

(b) Whoever fails to pay any tax imposed by this chapter at the time prescribed by law or regulations, shall, in addition to any other penalty provided in this chapter, be liable to a penalty of five (5) times the tax due but unpaid.

After June 23, 2014, R.I. Gen. Laws § 44-20-51.1 provides as follows:[2]

Civil penalties. – (a) Whoever omits, neglects, or refuses to comply with any duty imposed upon him/her by this chapter, or does, or cause to be done, any of the things required by this chapter, or does anything prohibited by this chapter, shall, in addition to any other penalty provided in this chapter, be liable as follows:

(1) For a first offense in a twenty-four month (24) period, a penalty of not more than one thousand dollars ($1,000), or not more than five (5) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action;

(2) For a second or subsequent offense in a twenty-four-month (24) period, a penalty of not more than five thousand dollars ($5,000), or not more than twenty-five (25) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action.

(b) Whoever fails to pay any tax imposed by this chapter at the time prescribed by law or regulations, shall, in addition to any other penalty provided in this chapter, be liable for a penalty of not more than five (5) times the tax due but unpaid.

C. The Taxpayer Owes Tax and Penalties

The Taxpayer did not appear at hearing. It is undisputed that the Taxpayer owes the taxes assessed by the Division on the other tobacco products. See Division's G (notice of deficiency).

R.I. Gen. Laws § 44-20-51.1 was amended effective June 23, 2014. The amendment changed penalties from specific amounts to be "not more than five (5) times" a certain amount or not more than 25 times in some circumstances. R.I. Gen. Laws § 44-20-51.1 provides for a penalty in sections (a) and (b). Since the new statute now provides that penalties be calculated as "not more than" rather than the old statute that mandated a specific penalty, the new law added subsection (c) which provides that when determining the penalty to be imposed, mitigating and aggravating factors such as history, severity, and intent shall be considered. Thus, the statute

[2] See P.L. 2014, ch. 151, § 1; P.L. 2014, ch. 168, § 1.

envisions some kind of progressive discipline based on the history of offenses with the penalties becoming greater based on aggravating factors.

The Division issued its notice of deficiency in June, 2015. The audit report was completed on May 28, 2015. The audit report relied on invoices from before and after June 23, 2014. See Division's Exhibits D, E, and F.

For those taxes owed under the old statute, the statute provides that a mandatory penalty of five (5) times the tax owed must be imposed. For those taxes owed after the amendment, a penalty of up to five (5) times the taxes owed are to imposed based on mitigating and aggravating factors. In this situation, the Taxpayer has a long history of not paying taxes (2009 to 2014) and failed to maintain its records. The severity and history of nonpayment of tax results in a higher penalty despite this being a first violation so that a penalty of three (3) times the tax owed shall be imposed on any tax owed on or after June 23, 2014.

The Division seeks a suspension of the License. While the statute for administrative penalties changed in 2014, the suspension and revocation statute did not change. The suspension statute does not contain the same kind of mitigating and aggravating factors as those found in the administrative penalty statute. However, the same kind of considerations of history, severity, and proportionality should be at play in determining the appropriate suspension.[3]

---

[3] For a good discussion of what should be considered in considering a sanction by an administrative agency, see *Jake and Ella's Inc. v. Department of Business Regulation*, 2002 WL977812 (R.I. Super.). In that case, the Court found there are two (2) components to an administrative decision: 1) a determination of the merits of the case; and 2) determination of the sanction and while the former is mainly factual, the latter not only involves ascertainment of factual circumstances but the application of administrative judgment and discretion. *Jake and Ella*'s concluded that the facts to be considered in weighing the severity of the violation should include the frequency of the violations, the real or potential danger to the public posed by the violation, the nature of any previous violations and sanctions, and any other facts deemed relevant to fashioning an effective and appropriate sanction. In other words, the imposition of sanctions is not always a mechanical grid and the determination of sanctions should include a consideration of a variety of factors.

The Division requested a 30 day suspension of the Taxpayer's License. This is a first violation by the Taxpayer, but the nonpayment of taxes had been ongoing for six (6) years at time of the assessment.[4] See Division's Exhibit D. The Taxpayer also did not maintain its records. A 30 day suspension can be seen as a five (5) day suspension of License for each year that there was no payment of taxes. While this is a 30 day suspension for a first violation, the violations have ongoing for six (6) years and the amount of tax owed is very high.

VI. FINDINGS OF FACT

1. A compliance inspection was performed at the Taxpayer on April 28, 2014 resulting in an audit being conducted of the Taxpayer via distributors' records.

2. A hearing was held on September 19, 2017. The Taxpayer did not appear. The Taxpayer was adequately noticed of the hearing. The Division was represented by counsel and rested on the record.

3. 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 § 44-20-1 *et seq*.

2. The Taxpayer owes the assessed other tobacco tax.

[4] The assessment covered 2009 to 2015. R.I. Gen. Laws § 44-20-1 *et seq*. does not provide any limit to how long a period an assessment can cover whether or not a return is filed. However, *Couture v. Norberg*, 338 A.2d 538 (R.I. 1975) found that a six (6) year period is reasonable.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-20-1 *et seq.*, the tax owed by the Taxpayer was properly assessed as set forth in Division's Exhibit G. However, the penalty shall be re-calculated based on the date of invoices so that a penalty of five (5) times the tax owed prior to June 23, 2014 and a penalty of three (3) times the tax owed on and after June 23, 2014 shall be imposed. The License shall be suspended for 30 days to commence on the 31st day after the execution of this decision. The tax and penalty owed by the Taxpayer shall be due to the Division by the 31st day after the execution of this decision.

Date: October 12 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: 10/12/17

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 § 44-20-48 Appeal to district court.

Any person aggrieved by any decision of the tax administrator under the provisions of this chapter may appeal the decision within thirty (30) days thereafter to the sixth (6th) division of the district court. The appellant shall at the time of taking an appeal file with the court a bond of recognizance to the state, with surety to prosecute the appeal to effect and to comply with the orders and decrees of the court in the premises. These appeals are preferred cases, to be heard, unless cause appears to the contrary, in priority to other cases. The court may grant relief as may be equitable. If the court determines that the appeal was taken without probable cause, the court may tax double or triple costs, as the case demands; and, upon all those appeals, which may be denied, costs may be taxed against the appellant at the discretion of the court. In no case shall costs be taxed against the state, its officers, or agents. A party aggrieved by a final order of the court may seek review of the order in the supreme court by writ of certiorari in accordance with the procedures contained in § 42-35-16.

CERTIFICATION

I hereby certify that on the 16th day October, 2017 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail to the Taxpayer's address on record with the Division and by electronic delivery to the Taxpayer and by hand delivery to Meaghan Kelly, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco