STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2019-04

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 19-021; 19-T-027**
	:	**other tobacco products**
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 ("Notice) issued on April 1, 2019 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). A hearing was scheduled for June 18, 2019 at which time the Taxpayer did not appear at the hearing. Since the Taxpayer was adequately noticed of hearing,[1] a hearing was held before the undersigned. Pursuant to Section 2.7(G)(3) of the 280-RICR-20-00-2 *Administrative Hearing Procedures*

[1] A prehearing conference was held on May 14, 2019 at which time the Taxpayer did not appear. See Division's Exhibit P (initial notice of hearing). A hearing was scheduled for June 18, 2019 and notice sent to the Taxpayer using its last known addresses. See Division's Exhibit A (2019 Taxpayer's annual report filed with the Secretary of State's office with Taxpayer's business address and its corporate officers' address). See also Division's Exhibit B (business application and registration dated May 16, 2016 with business address). See Division's Exhibits R and S (notice of June, 2019 hearing sent to Taxpayer at business address and corporate officers' address); and T (said notices returned as undeliverable by U.S. Post Office). When the notice of cigarette dealers' license suspension was attempted to be hand-delivered in March, 2019, the Taxpayer's business was closed. See Division's Exhibit O. The Taxpayer requested a hearing on March 18, 2019 after the compliance and seizure of February 16, 2019. See Division's Exhibits Q (Taxpayer's request for hearing dated March 15, 2019 and received by the Division on March 18, 2019 and then by the Special Investigation Unit on March 28, 2019) and L (compliance report and seizure report dated February 16, 2019). See also testimony by , Chief Revenue Agent, that the notices were sent to the Taxpayer's most recent addresses on record with the Division and when the Division's investigator attempted to hand deliver the license suspension notice in March, 2019, the Taxpayer's business was closed. Service was made to the Taxpayer's last known addresses. *Castro v. Employees' Retirement System of Rhode Island*, 2012 R.I. Super. LEXIS 54.

("Hearing Regulation"), a default judgment may be entered against the party not appearing at hearing.[2] The Department was represented by counsel who 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.*, the Hearing Regulation, and 220-RICR-50-10-2, Department of Administration's *Rules of Procedure for Administrative Hearings.*

III. ISSUE

Whether the Taxpayer owes tax on "other tobacco products," and if so, should any sanctions be imposed.

IV. MATERIAL FACTS

On February 16, 2019, Division inspectors inspected the Taxpayer's business to verify compliance with the tobacco taxing statute. At that time, the inspectors seized other tobacco products for which the Taxpayer could not verify tax had been paid. See Division's Exhibit L (compliance report and seizure report dated February 16, 2019). The Division issued a notice of cigarette dealers' license suspension and notice of a deficiency for the unpaid tax on the other tobacco products. See Division's Exhibits M (audit workpaper dated February 16, 2019); N (audit report dated March 12, 2019); and O (notice of license suspension and notice of deficiency both dated March 27, 2019). Notices of hearing were sent to the Taxpayer at its last known addresses. See footnote one (1). The Taxpayer had two (2) previous tobacco tax violations for which it had entered in stipulated agreements with the Division. See Division's Exhibits G and K (stipulation dated March 27, 2017 and stipulation dated April 23, 2018 between the Division and Taxpayer relating to unpaid tobacco tax).

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[2] The Hearing Regulation provides that the defaulted party be given notice of the default by mail and may request reinstatement of the matter pursuant to a motion for reconsideration as set forth in the Hearing Regulation.

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[3] imposes a tax on cigarettes sold. R.I. Gen. Laws § 44-20-13.2 imposes tax on "other tobacco products."[4] Inspections of cigarette dealers are allowed by R.I. Gen.

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[3] R.I. Gen. Laws § 44-20-12 states as follows:

> Tax imposed on cigarettes sold. – A tax is imposed on all cigarettes sold or held for sale in the state. The payment of the tax to be evidenced by stamps, which may be affixed only by licensed distributors to the packages containing such cigarettes. Any cigarettes on which the proper amount of tax provided for in this chapter has been paid, payment being evidenced by the stamp, is not subject to a further tax under this chapter. The tax is at the rate of one hundred seventy-five (175) mills for each cigarette.

[4] R.I. Gen. Laws § 44-20-13.2 provides as follows:

> Tax imposed on other tobacco products, smokeless tobacco, cigars, and pipe tobacco products. (a) A tax is imposed on all other tobacco products, 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 revenue. The tax imposed by this section shall be as follows:
>
> (1) At the rate of eighty percent (80%) of the wholesale cost of other tobacco products, 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

Laws § 44-20-40.1. R.I. Gen. Laws § 44-20-51.1[5] provides for administrative penalties for the violation of the tax laws. In addition, R.I. Gen. Laws § 44-20-8[6] provides for the suspension or revocation of a cigarette dealer's license.

D. Whether Tax is Owed on the Other Tobacco Products

The Taxpayer did not appear at hearing. It is undisputed that the Division seized other tobacco products from Taxpayer for which Rhode Island tax had not been paid. R.I. Gen. Laws § 44-20-13.2 provides that tax is imposed on other tobacco products so that the Division properly assessed tax on the seized other tobacco products. See Division's Exhibit O.

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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 other 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 other tobacco products 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.

[5] R.I. Gen. Laws § 44-20-51.1 provides as follows:

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) When determining the amount of a penalty sought or imposed under this section, evidence of mitigating or aggravating factors, including history, severity, and intent, shall be considered.

[6] 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.

E. What Sanctions Should be Imposed

R.I. Gen. Laws § 44-20-51.1(a) provides that penalties are to be imposed at "not more than five (5) times" or not more than 25 times the retail value of cigarettes depending on the circumstances. R.I. Gen. Laws § 44-20-51.1(b) provides that a penalty of not more than five (5) times the tax owed may be imposed. R.I. Gen. Laws § 44-20-51.1(c) 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 envisions progressive discipline based on the history of offenses with the penalties becoming greater based on aggravating factors.

The Division seeks penalties for the unpaid other tobacco products tax pursuant to R.I. Gen. Laws § 44-20-51.1(a) and (b). The Division seeks a penalty of 11 times the retail value of the other tobacco products and a penalty of four (4) times the tax due. See Division's Exhibits O (notice of deficiency) and N (audit report indicating penalties imposed). R.I. Gen. Laws § 44-20-51.1(a)(2) provides that for a second offense in 24 months, a penalty of not more than 25 times the retail value or $5,000 whichever is greater can be imposed. The Taxpayer's first violation was on December 6, 2016 and its second violation was September 20, 2017. See Division's Exhibits D and H (seizure and compliance reports for those dates respectively). Those violations were settled by stipulation. The Taxpayer's third violation on February 6, 2019 was within 24 months of the Taxpayer's second violation. Thus, the Division properly imposed greater penalties due to the Taxpayer's licensing history and prior violations. The Division initially sought suspension of the Taxpayer's cigarette dealer's license for 20 days pursuant to R.I. Gen. Laws § 44-20-8, but at hearing, it indicated that the Taxpayer's cigarette dealers' license would expire on June 30, 2019. The Division requested that said license be suspended from date of the hearing to its expiration for a total 12 days.

VI. FINDINGS OF FACT

1. Other tobacco products for which no tax was paid were seized from the Taxpayer on February 16, 2019.

2. A Notice of Hearing was issued on April 1, 2019 and May 15, 2019. A hearing was held on June 18, 2019. The Taxpayer did not appear at the hearing. As the Taxpayer was adequately notified of hearing, a hearing was held. 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 violated R.I. Gen. Laws § 44-20-13.2 on February 16, 2019.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-20-1 *et seq*., R.I. Gen. Laws § 44-20-51.1, and R.I. Gen. Laws § 44-20-13.2, the Taxpayer owes the tax and penalties assessed by the Division as set forth in Division's Exhibit O. Pursuant to R.I. Gen. Laws § 44-20-8, the Taxpayer's cigarette dealer's license shall be considered suspended for 12 days from the date of hearing to its expiration (June 18, 2019 to June 30, 2019).

Date: July 10, 2019

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: 7/10/19

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 11th day July, 2019 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 hand delivery to Michael Brady, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco