STATE OF RHODE ISLAND

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2020-07

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

IN THE MATTER OF:	:	
	:	**SC 19-075; 19-T-100**
	:	**cigarette tax**
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 October 9, 2019 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). The parties were represented by counsel. The parties agreed that a decision could be made on an agreed statement of facts and exhibits and the filing of briefs. Briefs were timely filed by June 25, 2020.

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.*, 280-RICR-20-00-2, Division of Taxation's *Administrative Hearing Procedures*, and 220-RICR-50-10-2, Department of Administration's *Rules of Procedure for Administrative Hearings.*

III. ISSUE

The parties agreed that the issue is whether the hemp cigarettes seized on August 14, 2019 by the Division meet the statutory definition of a "cigarette" contained in R.I. Gen. Laws § 44-20-1(2), and thus require a Rhode Island cigarette tax stamp pursuant to R.I. Gen. Laws § 44-20-12.

IV. MATERIAL FACTS

The parties agreed to the following facts:[1]

1. The Taxpayer is a domestic for profit corporation that operates a convenience store and gas station in Rhode Island.

2. The Division is a State agency charged with the administration and enforcement of all State taxes including R.I. Gen. Laws 44-20-1 *et seq*.

3. The Taxpayer offers cigarettes and other tobacco products for sale at its store and holds a cigarette dealer's license issued pursuant to R.I. Gen. Laws § 44-20-2.

4. On August 14, 2019, agents of the Division conducted a cigarette and other tobacco products compliance inspection of the Taxpayer's store pursuant to R.I. Gen. Laws § 44-20-40.

5. During the inspection, the agents found the Taxpayer to be in possession of hemp cigarettes on display for sale that did not have Rhode Island cigarette tax stamps affixed to them. The agents seized the unstamped hemp cigarettes as contraband pursuant to R.I. Gen. Laws § 44-20-15(a).

6. The Division issued the Taxpayer a 40 day cigarette dealer's license suspension notice pursuant to R.I. Gen. Laws § 44-20-8 dated September 12, 2019 as this constituted the Taxpayer's fourth offense under R.I. Gen. Laws §§ 44-20-1 *et seq*. and 44-20.2-1 *et seq*.

7. The Division also issued the Taxpayer a notice of deficiency determination dated September 12, 2019 seeking $ in cigarette tax and penalties imposed pursuant to R.I. Gen. Laws § 44-20-51.1.

8. The Taxpayer timely requested a hearing on said notices pursuant to R.I. Gen. Laws § 44-20-47.

9. A November 4, 2019 and a January 21, 2020 pre-hearing conference were held, and the parties were not able to reach a settlement. The Taxpayer asserted at the pre-hearing conferences that since the products seized on August 14, 2019 by the Division contained no tobacco, they are not subject to the cigarette tax stamp.

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[1] See parties' agreed to statement of facts and agreed to exhibits filed with the undersigned. The parties also agreed that the statutes and/or regulations at issue in this matter are R.I. Gen. Laws § 44-20-1(2), R.I. Gen. Laws § 44-20-8, R.I. Gen. Laws § 44-20-12, R.I. Gen. Laws § 44-20-51.1, and 280-RICR-20-15-1 *Cigarette Tax* 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 imposes a tax on cigarettes sold. Cigarettes are defined in R.I. Gen. Laws § 44-20-1 which provides in part as follows:

> Definitions. Whenever used in this chapter, unless the context requires otherwise: ***
>
> (2) "Cigarettes" means and includes any cigarettes suitable for smoking in cigarette form, and each sheet of cigarette rolling paper, including but not limited to, paper made into a hollow cylinder or cone, made with paper or any other material, with or without a filter suitable for use in making cigarettes.

R.I. Gen. Laws § 44-20-12 provides 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 two hundred twelve and one-half (212.5) mills for each cigarette.

C. Arguments

The Division argued the statutory definition of cigarette is plain and unambiguous and encompasses rolling papers in any form and made of "any material." The Division argued it is irrelevant whether the rolling paper is filled with tobacco, hemp, or another substance because it is the rolling paper, hollow cylinder, or cone itself and not the filler that makes the product taxable. The Division argued that while the definition is plain and unambiguous, if the definition was found to be ambiguous, deference should be given to the agency's reasonable interpretation of its statute.

The Taxpayer argued that the definition does not include non-tobacco products especially since many of the other statutes in R.I Gen. Laws § 44-20-1 *et seq*. refer to tobacco. The Taxpayer argued that hemp cigarettes do not include tobacco and are not made from the same paper used to make cigarettes and are not shaped like cigarettes so are not cigarettes. The Taxpayer also argued that hemp is separately regulated by the Department of Business Regulation ("DBR"), and if the legislature wanted to expand the definition of cigarette to include this new product, it would have amended the relevant statutes.

D. Whether Hemp Cigarettes fall under the Statutory Definition of Cigarettes

The statutory definition of cigarettes has two (2) parts: the first part speaks of smoking and the second part speaks of papers (material) used to make cigarettes.

i. <u>Any cigarette suitable for smoking in cigarette form</u>

While it usually is considered poor drafting to include the term being defined in the definition, the statutory definition of cigarettes first speaks of "any" cigarette suitable for smoking in a cigarette form. The Taxpayer relies on the fact that hemp is not tobacco to argue that it cannot be a cigarette. However, the definition of cigarette does not contain the word tobacco. While the Taxpayer referred to definitions of cigarettes as being a paper cylinder-like product used to smoke

tobacco, that is not the statutory definition.[2] Instead, the definition does not include tobacco which is similar to the definition of smoking in the Public Health and Workplace Safety Act. That statutory definition of smoking includes the inhaling, exhaling, burning or carrying of any heated cigar, pipe, weed, plant, plant product, or other combustible substance in any manner or form intended for inhalation in any manner or form.[3]

The Taxpayer argued that R.I. Gen. Laws § 44-20-1 *et seq.* makes several references to tobacco so that tobacco must be part of the definition of cigarettes and in particular cites to R.I. Gen. Laws § 44-20-28.1, the Cigarette and Other Tobacco Products Tax Act. In that act, R.I. Gen. Laws § 44-20-28.1(2) provides "'that tobacco product manufacturer' has the same meaning as that term is defined in § 23-71-2." R.I. Gen. Laws § 23-71-2 is part of the Tobacco Product Manufacturers' Escrow Funds Act. Interestingly in that act, the definition of cigarettes includes tobacco and nicotine. See R.I. Gen. Laws § 23-71-2(d).[4]

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[2] In its brief, the Taxpayer referred to definitions of cigarettes found by a Google search as universally being one of a small tube of paper filled with tobacco; however, those definitions are not the statutory definition of cigarettes at issue.

[3] R.I. Gen. Laws § 23-20.10-2(1(19) provides as follows:

> Definitions.
> (19) "Smoking" or "smoke" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, pipe, weed, plant, other tobacco product or plant product, or other combustible substance in any manner or in any form intended for inhalation in any manner or form. "Smoking" or "smoke" also includes the use of electronic cigarettes, electronic cigars, electronic pipes, electronic nicotine delivery system products, or other similar products that rely on vaporization or aerosolization; provided, however, that smoking shall not include burning during a religious ceremony.

[4] R.I. Gen. Laws § 23-71-2(d) provides as follows:

> "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll your own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll your own" tobacco constitutes one individual "cigarette."

In discussing a statutory definition in a banking licensing matter and how the General Assembly defined the term at issue in the case, the Supreme Court pointed out that the General Assembly had different options in defining the term at issue including that it could have chosen to limit its definition for the purposes of that banking statute or referred to another statute for a definition. *Labor Ready v. McConaghy*, 849 A.2d 340 (R.I. 2004). Similarly, here, the legislature chose not to limit the definition of cigarettes to those that contained tobacco.

R.I. Gen. Laws § 23-71-2 dates from 1999. The R.I. Gen. Laws 44-20-1(2) statutory definition of cigarette without including tobacco pre-dates that statute,[5] and the legislature chose to define cigarette in R.I. Gen. Laws § 23-71-2 as one consisting of tobacco. In contrast, R.I. Gen. Laws § 44-20-12.1 (floor stock tax on cigarettes and stamps) was enacted in 1989 (so subsequent to R.I. Gen. Laws § 44-20-1(2)) and initially used the R.I. Gen. Laws § 44-20-1(2) definition of cigarettes from 1978 ("shall mean and include any cigarette suitable for smoking in cigarette form). P.L. 1989, ch. 138, art. 17 § 2. In 1997, R.I. Gen. Laws § 44-20-12.1 was amended so that its definition of cigarettes would be defined as defined in R.I. Gen. Laws § 44-20-1(2). P.L. 1997, ch. 30 art. 12 § 1.

In addition, the Taxpayer argued that the Division's notice of license suspension speaks of the inspection being for cigarette and other tobacco products inventory so that the only conclusion from the Division's own communication is that a cigarette is part of the tobacco family. Joint Exhibit Six (6). The same reference about the purpose of the inspection is included in the agreed statement of facts (above) and the inspectors' inspection report. Joint Exhibit Four (4). The

[5] The definition of cigarettes without including or referring to tobacco has existed since at least 1978. The 1978 definition reads, "[t]he word 'cigarettes' shall mean and include any cigarettes suitable for smoking in cigarette form." P.L. 1978 ch. 167 § 1. In 1988, P.L. 1988 ch. 129 Art. 13 § 1 added to the definition of cigarettes, ", and each sheet of cigarette rolling paper." In 2017, the rest of the second part of the definition, ", including but not limited to, paper made into a hollow cylinder or cone, made with paper or any other material, with or without a filter suitable for use in making cigarettes" was added. P.L. 2017 ch. 302 art. 8, § 15.

inspection report indicated that the hemp cigarettes are considered cigarettes under R.I. Gen. Laws § 44-20-1(2). The inspection report also indicated that the product could also be considered as other tobacco products ("OTP").[6] The type of inspection being conducted does not change the statutory meaning of cigarettes.

The clear and plain language of the statute does not include the term, "tobacco" so that the cigarette can be used to smoke other substances besides tobacco. The definition clearly is not limited to only tobacco cigarettes because it does not include such a limitation. The above discussion about other statutes merely confirms the broad definition, and that the Taxpayer's argument that other statutory provisions limit the definition to tobacco cigarettes is in error.

ii. Each sheet of cigarette rolling paper, including but not limited to, paper made into a hollow cylinder or cone, made with paper or any other material, with or without a filter suitable for use in making cigarettes.

The second part of the definition includes rolling papers made of any kind of material. Rolling paper ("each sheet") can be flat like those traditionally used to roll one's own tobacco cigarette or they can be prefabricated shapes like a cone or cylinder made with paper or any other material used to make cigarettes. Obviously, rolling papers in any form are not expected to just be used to make tobacco cigarettes because cigarettes are not defined as just those used to smoke

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[6] The statutory definition of OTP is found in R.I. Gen. Laws § 44-20-1(8) and provides as follows:

> (8) "Other tobacco products" (OTP) means any cigars (excluding Little Cigars, as defined in § 44-20.2-1, which are subject to cigarette tax), cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or otherwise), chewing tobacco (including Cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), any and all forms of hookah, shisha and "mu'assel" tobacco, snuff, and shall include any other articles or products made of or containing tobacco, in whole or in part, or any tobacco substitute, except cigarettes.

Cigarettes are excluded from the definition of OTP. The definition of OTP includes non-tobacco products. It includes "shisha" and "mu'assel" which is the molasses-like part of hookah tobacco but is not tobacco. The definition also includes tobacco substitutes which would be a product used in place of tobacco. It follows that if hemp cigarettes do not fall under the definition of a cigarette then they would fall under OTP as a tobacco substitute. While the issue of hemp cigarettes and OTP is not before the undersigned, it is helpful to understand that taxable smoking products are not just limited to tobacco smoking products.

tobacco.[7] The definition of rolling papers is consistent with the definition of smoking which includes smoking tobacco, weed, plants, plant products, etc. The tax for rolling papers is to be paid for any type of material used to make a cigarette to smoke whether the filler is tobacco or not.

The Taxpayer argued that the hemp cigarettes do not look like traditional cigarettes but are star shaped. The shape of the hemp cigarettes was not in evidence; though, a photograph of a hemp cigarette pack was included as Joint Exhibit Nine (9). While the pack of hemp cigarettes looked like a "regular" pack of cigarettes, the shape of something to use to make cigarettes is not limited to a cone or cylinder but rather is of material of any shape to be used to make a cigarette. Thus, flat rolling paper or any type of paper or material made into a shape by which they could be used to make cigarettes (with or without a filter) in order to smoke a substance are defined as cigarettes.

While the Division argued that it did not matter what the filler was because the statute was speaking of the rolling paper being made of any material and not the filler, the second part of the definition is for rolling papers that would be bought that are suitable for use in making cigarettes. In other words, if a person purchases empty cone shaped cylinders made out of any type of paper for use to make them to smoke tobacco, a plant, marijuana, or any combustible substance, that "rolling paper" is defined as a cigarette (as opposed to being OTP). Here, the hemp cigarettes were already made so they fall under the first part of the definition. However, the second part of the definition clearly does not limit the papers being taxed to only those used to make tobacco cigarettes. If cigarettes were only to be tobacco cigarettes, those entities selling rolling papers could argue that they were only selling them for non-tobacco products which would defeat the purpose of defining the materials that can be used to make cigarettes as cigarettes.

[7] For example, flat rolling papers could be used to roll what would traditionally be known as a marijuana "joint."

E. DBR's Regulation of Hemp

The Hemp Growth Act, R.I. Gen. Laws 2-26-1 *et seq*. provides for the regulation of industrial hemp. R.I. Gen. Laws § 2-26-2 provides in part as follows:

> Legislative findings. The general assembly finds and declares as follows:
> (1) The cannabis sativa plant used for the production of hemp is separate and distinct from forms of cannabis used to produce marijuana.
> (2) Hemp is used for products such as building materials, cloth, cordage, fiber, food, floor coverings, fuel, industrial chemicals, paint, paper, particle board, plastics, seed meal, seed oil, and yarn.
> (3) Industrial hemp production has remained legal throughout most of the world and hemp has the capacity to grow in a multitude of different climates, altitudes, soils, and weather conditions.

R.I. Gen. Laws § 2-26-3 provides in part as follows:

> Definitions. When used in this chapter, the following terms shall have the following meanings:
> ***
> (4) "Department" means the office of cannabis regulation within the department of business regulation.
> (5) "Division" means the division of agriculture in the department of environmental management.
> ***
> (8) "Hemp" or "industrial hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths percent (0.3%) on a dry weight or per volume basis regardless of moisture content, and which satisfies the requirements of this chapter.
> ***
> (10) "Hemp products" or "industrial hemp products" means all products made from the plants, including, but not limited to, concentrated oil, cloth, cordage, fiber, food, fuel, hemp-derived consumable CBD products, paint, paper, construction materials, plastics, seed, seed meal, seed oil, and seed certified for cultivation, which satisfy the requirements of this chapter.

R.I. Gen. Laws § 2-26-4 provides as follows:

> Hemp an agricultural product. Hemp is an agricultural product that may be grown as a crop, produced, possessed, distributed, sold at retail, and commercially traded pursuant to the provisions of this chapter. Hemp is subject to primary regulation by the department. The division may assist the department in the regulation of hemp growth and production.

R.I. Gen. Laws § 2-26-5 provides that DBR has authority over the licensing and sales for hemp growers, handlers, and licensed CBD distributors and retailers. R.I. Gen. Laws § 2-26-10 provides that DBR is to enforce violations of the Hemp Growth Act.

The Taxpayer argued that DBR's regulatory authority includes all hemp and since only DBR regulates hemp, it cannot be taxed. All growers, handlers, and licensed CBD distributors and retailers must have a hemp license issued by DBR. However, a statutory licensing scheme does not preclude the taxing of products resulting from such an industry. Hemp products include cordage, fiber, paper, and construction materials, all of which could be subject to sales tax. While hemp cigarettes are not listed as an example of a hemp product that does not exclude it from a product that can be taxed. The power to tax products is found in the taxing statute. The power to tax does not need to be included in either a statute relating to safety requirements for the production of taxable products or in the licensing statute of those entities that make or sell a taxable product.[8] R.I. Gen. Laws § 44-18-30 provides a list of products exempt from sales tax.

As the statute provides, hemp is an agricultural product that may be grown as a crop, produced, possessed, distributed, sold at retail, and commercially traded pursuant to statute. DBR with the assistance of the Department of Environmental Management (division of agriculture) regulates the growth and production of hemp. Hemp may be used in the production of different types of products some of which could fall under the taxing statute. In this matter, hemp cigarettes fall under the taxing authority of the Division since they fall under the definition of cigarettes.

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[8] For example, R.I. Gen. Laws § 5-38-1 *et seq*. regulates automobile body repair shops and provides for State licensing of the same. R.I. Gen. Laws § 5-38-18 provides that records of transactions must be maintained for the purchase of used vehicle parts so that the records show for every vehicle, the charge made for parts or services. R.I. Gen. Law § 44-18-7 defines sales to include the sale of tangible personal property and R.I. Gen. Laws § 44-18-18 imposes tax on sales made at retail. Presumably, tax is paid on automobile parts that are sold but that is not mentioned in the automobile body repair shop licensing statute. R.I. Gen. § 5-14-1 *et seq*. provides for certain requirements for hotels but R.I. Gen. Laws § 44-18-18 impose sales tax on rental of hotel rooms.

F. Deference

By not limiting the definition of cigarettes to those with tobacco, the definition plainly includes "any cigarettes;" in other words, the smoking of substances that may or may not be tobacco. This is consistent with the second part of the definition of cigarettes that is concerned with paper or any material used to make a cigarette of any shape to smoke and is not concerned with what kind of filler is put in the material used to make the cigarette.

While the statute is plain and unambiguous, the statutory interpretation is consistent with the regulation and the statutory definition of OTP that includes non-tobacco products. In addition, pursuant to R.I. Gen. Laws § 44-20-50,[9] regulations promulgated to enforce this statute are *prima facie* evidence of its proper interpretation. The statutory definition of cigarettes is consistent with the definition in the applicable regulation as it does not limit cigarettes to tobacco only. The regulatory requirement for tax stamps also refers to the statute and reiterates it.[10]

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[9] R.I. Gen. Laws § 44-20-50 provides as follows:

> Administration – Forms – Rules and regulations. The administration of this chapter is vested in the tax administrator and all forms necessary and proper for the enforcement of this chapter are prescribed and may be furnished by the tax administrator. The tax administrator may prescribe regulations and rulings, not inconsistent with law, to carry into effect the provisions of this chapter, which regulations and rulings, when reasonably designed to carry out the intent and purpose of this chapter, are prima facie evidence of its proper interpretation.

[10] 280-RICR-20-15-1, *Cigarette Tax provides in part as follows:*

> 1.5 Definitions
> ***
> D. "Cigarettes" means and includes any cigarettes suitable for smoking in cigarette form, and each sheet of cigarette rolling paper, including but not limited to paper made into a hollow cylinder with or without a filter for use in making cigarettes.
> ***
> 1.18 Tax Rate on Cigarettes and Little Cigars
> Under R.I. Gen. Laws § 44-20-12 a tax is imposed on all cigarettes and little cigars sold or held for sale in the state. The payment of the tax is to be evidenced by stamps, which may be affixed only by licensed distributors to the packages containing such cigarettes and/or little cigars. Any cigarettes and/or little cigars on which the proper amount of tax has been paid, payment being evidenced by the stamp, is not subject to a further tax.

Furthermore, in determining an ambiguous term in a taxing statute, the Rhode Island Supreme Court has followed constructional aids that say property is not to be taxed unless clearly the subject of a taxing statute and that doubts as to the scope and meaning of a tax law are to be resolved in favor of the taxpayer and taxing legislation will not be extended by implication or conjecture to cover subjects not expressly included within their plain meaning. *Newport Gas Light Co. v. Norberg*, 338 A.2d 536 (R.I. 1975). In *Newport*, there was an issue of whether the proceeds from an eminent domain seizure was to be considered part of "gross earnings" and therefore, taxed. In other words, in that matter the issue was whether the condemnation award to be taxed. However, here there is no doubt that cigarettes as broadly defined by statute are to be taxed.

Nonetheless, while the statutory meaning is unambiguous, the Department argued that if the term was deemed ambiguous, deference should be given to an agency's interpretation, even when it is not the only permissible interpretation. When a statute is susceptible of multiple reasonable meanings, deference must be given to a reasonable agency interpretation. *Labor Ready v. McConaghy*, 849 A.2d 340 (R.I. 2004). See also *Auto Body Association of Rhode Island v. Department of Business Regulation*, 996 A.2d 91 (R.I. 2010) and *Unistrut Corp. v. State DOL and Training*, 922 A.2d 93 (R.I. 2007).

It is reasonable to conclude that the definition of cigarettes was broadly defined to include smoking various substances and not only for smoking tobacco when the definition does not include tobacco (and other statutes defining cigarettes do only include tobacco). It is reasonable to conclude that the definition encompasses cigarettes and those materials used to make cigarettes to smoke various substances including but not only tobacco (like the Public Health Act broadly defines smoking). Indeed, if hemp cigarettes were not included under the statutory definition of cigarettes, they could be considered a tobacco substitute under OTP.

G. Conclusion

Since the hemp cigarettes fall under the statutory definition of cigarettes, said cigarettes fall under R.I. Gen. Laws § 44-20-12 so that payment of tax must be evidenced by a tax stamp which is only affixed by licensed distributors to packages containing such cigarettes.[11]

The parties agreed that the issue before the undersigned was whether the hemp cigarettes were considered cigarettes pursuant to the tax statute's definition of cigarettes and thus require a tax stamp pursuant to R.I. Gen. Laws § 44-20-12. The answer is yes and yes.

The parties apparently saw this as a threshold issue prior to reaching the issue of whether taxes and a penalty should be assessed or the cigarette dealer license suspended as indicated in the Division's notice of deficiency and notice of license suspension. *Infra*. Thus, while the Taxpayer in its brief referenced that the issue before the undersigned was the assessed penalty and proposed suspension of its license, the parties had not agreed that was an issue. With a determination that hemp cigarettes are cigarettes, they would presumably be subject to tax. R.I. Gen. Laws § 44-20-13 (tax imposed on unstamped cigarettes). Thus, the issue of the assessed tax and penalty and suspension can be resolved by the parties via a stipulation or if the parties are unable to resolve the issue of the assessed tax and penalty and suspension, a further hearing can be held in this matter.[12]

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[11] The Taxpayer asserted in its brief that it believed that the statutory definition of cigarette to be unconstitutionally vague. The determination of unconstitutionality of a statute is a not an issue that is properly before an administrative agency. *Easton's Point Association et al v. Coastal Resources Management Council et al.,* 522 A.2d 199 (R.I. 1987). Therefore, this argument is not addressed in this decision.

[12] In its brief, the Taxpayer represented that Division inspectors had three (3) times prior to August 14, 2019 inspected the Taxpayer and had not seized any hemp cigarettes and that the inspectors had stated to the Taxpayer that no decision had been made on hemp. While those representations were not included in the agreed statement of facts, such facts (if they exist) would not and could not change the statutory definition of cigarettes. 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." *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island,* 767 A.2d 35, 40 (R.I. 2001).

VI. FINDINGS OF FACT

1. Hemp cigarettes were seized from the Taxpayer on August 14, 2019.

2. The Notice was issued on October 9, 2019 to the Taxpayer. The parties were represented by counsel who agreed a decision could be made on an agreed statement of facts and exhibits and briefs. Briefs were all timely filed by June 25, 2020.

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. Hemp cigarettes are cigarettes pursuant to the definition of cigarettes contained in R.I. Gen. Laws § 44-20-1(2). They require a Rhode Island cigarette tax stamp pursuant to R.I. Gen. Laws § 44-20-12.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-20-1(2), hemp cigarettes are cigarettes so that pursuant to R.I. Gen. Laws § 44-20-12, they require a Rhode Island cigarette tax stamp. Therefore, the seized hemp cigarettes in this matter were cigarettes and required a tax stamp.

/s/ Catherine R. Warren

Date: July 27, 2020

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: 8/3/2020

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 3rd day ~~July~~ August, 2020 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail to the Taxpayer's attorney's address on record with the Division and by electronic delivery to Michael Brady, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco