STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2014-23

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

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| **IN THE MATTER OF:** | : | |
| | : | **Case No. 14-T-0016** |
| | : | **Sales and Use** |
| **Taxpayer.** | : | |

## DECISION

## I. INTRODUCTION

The above-entitled matter came before the undersigned as a result of a Notice of Hearing and Appointment of Hearing Officer ("Notice") dated February 18, 2014 issued to the above captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing filed with the Division. The hearing was held on August 28, 2014. The Division was represented by counsel and the Taxpayer by a certified public accountant. The parties rested on the record.

## II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *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

The parties agreed that the only issue in dispute is whether the rental fees for the pump truck services during the audit period are includible in the taxable sales price of the concrete sold and thus subject to the Rhode Island sales tax.

## IV. MATERIAL FACTS AND TESTIMONY

The parties agreed to the following facts:[1]

1. The Taxpayer is a Rhode Island corporation authorized to do business in Rhode Island since January of 2001. The Taxpayer has held a permit to make sales at retail since February of 2001. Exhibits One (1) and Two (2).

2. The Taxpayer is a retailer in the business of selling ready mix concrete and delivering the concrete to various sites throughout Rhode Island and Southeastern Massachusetts.

3. In June of 2010, the Division commenced a sales and use tax field audit of the Taxpayer. The period (audit period) being audited by the Division was June 1, 2010 through May 31, 2013 inclusive; however during the course of the audit the Division secured a statute of limitations waiver. Exhibit 5 (statute of limitations waiver).

4. During the course of this tax examination, the auditor reviewed corporate returns, sales and use tax returns, bank statements, the 2012 general ledger, sales invoices for April through June 2012, and payroll records. Exhibit Six (6) (field audit report at p. 2). The Taxpayer's business records were reviewed on the basis of representative samplings. Exhibit Seven (7) (test period agreement).

5. As a result of the audit, the Division determined two (2) areas of sales and use tax liability: one agreed and one disagreed. The Taxpayer paid the liability associated with the agreed audit and that portion of the audit is not at issue here. The disagreed portion included additional sales for disallowed exempt service revenue and disallowed service income. Specifically, the auditor included, as taxable sales, amounts the Taxpayer charged for the use of a pumping truck to aid on certain job sites. Exhibits 10 (Schedule 1-1); 11 (summary of differences); and Six (6) at p. 1 (summary of taxable measures).

6. On October 18, 2013, the Division issued a Notice of Deficiency against the Taxpayer for the audit period. Exhibit 13 (Notice of Deficiency).

7. As a result of a preliminary conference, the Division revised the Notice of Deficiency. Exhibits 16 and 17 (revised audit workpapers). On February 3, 2014, the Taxpayer

[1] See parties agreed to statement of facts and agreed to exhibits filed with the undersigned.

agreed with the revised sales tax assessment, but continued to disagree with the assessment regarding the taxability of the pump truck rental charges. Exhibit 18.

8. During the audit period, the Taxpayer sold ready mix cement to customers throughout Rhode Island and Southeastern Massachusetts.

9. During the audit period, the Taxpayer collected and remitted sales tax on the sales of its concrete to customers.

10. Some of the Taxpayer's sales of concrete included the Taxpayer delivering the concrete to a desired location in a mixer truck and pouring the concrete from the mixer truck directly into a designated area to accomplish the job description (i.e. patio, sidewalk, etc.).

11. The mixer truck was not sufficient for a portion of the Taxpayer's jobs. These sales of concrete required the customer to rent a pump truck where the job location was inaccessible ("pump truck jobs"). The pump truck does not hold or store concrete; therefore, the customer needed to purchase the concrete, have it delivered to the site in the mixing truck, and have the rented pump truck pump the concrete into the specified forms.

12. Approximately five percent 5% of Taxpayer's sales required the rental of a pump truck.

13. The customer is not required to rent the pump truck from the Taxpayer, and has the option of selecting a different company to pump the concrete to the inaccessible location; however, a pump truck was necessary to pour the concrete purchases at these inaccessible locations.

14. During the audit period, the Taxpayer separately stated and charged its customers fees for the rental of the pump truck on the sales of its own concrete, but did not charge, collect, nor remit sales tax on the rental receipts of pump trucks.

15. The only criterion for renting the pump truck from the Taxpayer was whether the site location where the concrete was to be poured was inaccessible by the mixer truck.

At hearing, , Senior Revenue Agent, testified on behalf of the Division. He testified that he conducted the audit of the Taxpayer. He testified that the pump truck is a necessary element for making the sale since the mixer truck cannot reach a location specified by the customer so that the pump truck transports the concrete to the location or over obstacles to where the concrete is needed. Thus, he testified that the pump truck is necessary to make a sale.

## 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 and Regulation

Pursuant to R.I. Gen. Laws § 44-18-18, the State of Rhode Island imposes a sales tax of 7% on gross receipts of a retailer. Pursuant to R.I. Gen. Laws § 44-18-19, the retailer is responsible for the collection of sales tax.

R.I. Gen. Laws § 44-18-12 defines "sales price" in part as follows:

> "Sale price" defined. – (a) "Sales price" applies to the measure subject to sales tax and means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for the following:
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> (iii) Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(iv) Delivery charges, as defined in § 44-18-7.1(i);
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R.I. Gen. Laws § 44-18-7.1 states in part as follows:

Additional definitions.
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(i) "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing.

**C. Arguments**

The Taxpayer argued that the concrete delivery by pump truck rental is not taxable under R.I. Gen. Laws § 44-18-12 and R.I. Gen. Laws § 44-18-7.1 which both reference the taxability of delivery and transportation charge as part of the selling price. The Taxpayer argued that the concrete pump truck simply pumps concrete but not to a fixed location which is determined by the customer. The Taxpayer argued that the pump truck pumps concrete into a form and the Taxpayer has no control over the final destination so there is not a fixed location beyond where the mixer arrives so it is a service which is excluded by R.I. Gen. Laws § 44-18-12 and R.I. Gen. Laws § 44-18-7.1. The Taxpayer argued that the form company determines the delivery location and the Taxpayer does not so that the pump truck is not making a delivery as part of a sale.

The Division argued that the concrete delivery by pump truck rental is taxable pursuant to R.I. Gen. Laws § 44-18-12(a)(iii) because the pump truck is necessary to complete the sale of the concrete since but for the inaccessible location, the customer would not need to rent the pump truck and would only need the mixer truck. The Division argued it is also taxable pursuant to R.I. Gen. Laws § 44-18-12(a)(iv) and R.I. Gen. laws § 44-18-7.1(i) as a delivery charge because the pump truck transports the concrete from the mixer truck to the ultimate location where the purchaser wants the concrete poured.

### D. Whether the Taxpayer Owes the Assessments

The burden is on a taxpayer to demonstrate that tax is not owed. See R.I. Gen. Laws § 44-18-25.[2] The Taxpayer argued that the sale ends when the mixer truck delivers it to the pump truck. The Division argued that the sale ends at the concrete's final destination.

If the Taxpayer's customer chooses to have a company other than the Taxpayer provide a pump truck, the other company's pump truck would not be considered under the statute to be completing the Taxpayer's sale of concrete. Thus, in that situation, the sale would be completed by the Taxpayer when the Taxpayer's mixer truck delivers the concrete to a pump truck rented by the customer. The Division is arguing that as long as the Taxpayer's vehicles are transporting the concrete the sale is not completed until the Taxpayer's pump truck brings the concrete to the desired location. Based on the Division's argument the sale completes based on whose truck makes the delivery: the Taxpayer's pump truck if the customer chooses the Taxpayer's pump truck or when the Taxpayer delivers the concrete to another company's pump truck.[3] However, this argument need not be considered as the Division has a different statutory basis to tax the pump truck deliveries.

Pursuant to R.I. Gen. Laws § 44-18-7.1(i), the charges by the Taxpayer for the pump truck are delivery charges to deliver the concrete. Delivery charges are defined to include

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[2] 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.

[3] In *Interstate Traffic Signs, Inc. v. Commissioner of Revenue*, 845 N.W. 550 (Minn. 2014), the Minnesota Supreme Court found that a mandatory pick-up charge of rental property was part of the consideration for the rental transaction as the return of the rental equipment was mandatory and customers were unable to opt-out of the pick-up service. Thus, the pick-up service was necessary to complete a sale. The Minnesota definition of "sales price" is almost identical to Rhode Island's.

transportation charges for a seller to deliver personal property to a location designated by the purchaser. The Taxpayer (seller) transports – by mixer and then by its pump truck - the concrete to a location designated by the purchaser. While the Taxpayer argued that it had no control over the final destination of the concrete once the concrete is poured into the pump truck, the delivery charge definition defines the delivery location as one designated by the purchaser.[4]

**E. Interest**

The Division properly imposed interest on the assessment pursuant to R.I. Gen. Laws § 44-19-11.[5] See Exhibits 13 and 16. (Notice of Deficiency and revisions).[6]

**F. Conclusion**

The Division properly assessed the Taxpayer on the rental fees for its pump truck services during the audit period.

## VI. FINDINGS OF FACT

1. On or about February 18, 2014, the Division issued a Notice in response to the Taxpayer's request for hearing filed with the Division.

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[4] See *Ticketmaster, LLC v. Commissioner of Revenue*, 2008 WL 650294 (Minn. Tax Regular Div.) finding that Ticketmaster's charge for the delivery of a ticket by United Parcel Service or courier to a location designated by the purchaser of a ticket was a delivery charge under an almost identical delivery charge definition to Rhode Island's. Minnesota's definition only refers to a "seller" and omits the clarification of "of personal property or services."

[5] R.I. Gen. Laws § 44-19-11 states as follows:

> Deficiency determinations – Interest. – If the tax administrator is not satisfied with the return or returns or the amount of tax paid to the tax administrator by any person, the administrator may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information in his or her possession or that may come into his or her possession. One or more deficiency determinations may be made of the amount due 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 day (15th) after the close of the month for which the amount, or any portion of it, should have been paid until the date of payment.

[6] The undersigned does not have the authority to abate a penalty but a penalty may be abated by the Tax Administrator pursuant to R.I. Gen. Laws § 44-1-10. In this matter, the Tax Administrator agreed to abate the penalty that would have been imposed pursuant to R.I. Gen. Laws § 44-19-12. See agreed statement of facts.

2. A hearing in this matter was held on August 28, 2014. The parties rested on the record.

3. A sales and use tax field audit was conducted by the Division on the Taxpayer for the period of June 1, 2010 through May 31, 2013.

4. 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.*, R.I. Gen. Laws § 44-18-1 *et seq.*, and R.I. Gen. Laws § 44-19-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 44-18-12 and R.I. Gen. Laws § 44-18-7.1, the Taxpayer owes sales tax as set forth in the Notice of Deficiency and revisions admitted as the Division's Exhibits 13 and 16. Pursuant to R.I. Gen. Laws § 44-19-11, the Taxpayer owes the assessed interest in the Notice of Deficiency.

## VIII. RECOMMENDATION

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

The Taxpayer did not make a showing that sales tax and interest should not be assessed. Thus, pursuant to R.I. Gen. Laws § 44-18-12, R.I. Gen. Laws § 44-18-7.1, and R.I. Gen. Laws § 44-18-11, the Taxpayer owes the assessed sales tax and interest on the rental fees for its pump truck services as set forth in the Notice of Deficiency and revisions. See Exhibits 13 and 16.

Date: October 6, 2014

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: 10/8/14

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 8th day of October, 2014 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid to the Taxpayer's representative at the address on file with the Division of Taxation and by hand delivery to Meaghan Kelly, Esquire, Department of Administration, One Capitol Hill, Providence, RI 02908.