STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2015-08

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.: 14-T-0068**
	:	**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 September 18, 2014 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 December 18, 2014. The parties were represented by counsel. A briefing schedule was set with briefs timely filed by February 27, 2015.

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 Taxpayer is eligible for historic preservation tax credits.

IV. MATERIAL FACTS AND TESTIMONY

, Principal Revenue Agent, testified on behalf of the Division. She testified that in 2013, the General Assembly passed a limited historic preservation tax program and she administers said program. She testified that the Taxpayer applied for in historic preservation tax credits and since the law only provided that a certain amount of money was available for said credits, the Division held a drawing for the credit applicants and the Taxpayer did not meet the cut. See Division's Exhibit B (Taxpayer's July 25, 2013 application for said 2013 credits); C (Division's August 9, 2013 letter to Taxpayer explaining drawing process); and D (Division's August 30, 2013 letter to Taxpayer stating that in the drawing held for tax credits, the Taxpayer's number was past the amount of money available).

testified that money for credit did become available for the Taxpayer's project. She testified that tax credit money can become available several ways including projects dropping out, payment of processing fees, projects being abandoned, and deadlines being missed. She testified that she notified the Taxpayer that a credit became available for its project by telephone call, letter, and e-mail. She testified that she sent a letter of notification by regular mail dated June 26, 2014 to the Taxpayer. See Division's Exhibit F (June 26, 2014 letter). She testified that credits became available on June 26, 2014 which is the date the Taxpayer was notified. She testified that on June 26, 2014, she telephoned and spoke to ("Owner"), applicant and a member of the Taxpayer LLC, and he told her that the project had been placed into service the day before. She testified that the project was not eligible for credits as it had been placed into service prior to the credits becoming available as provided for by Rule 9(b) of the Division's *Historic Preservation Tax Credits Regulation* CR 14-16 ("CR 14-16").[1] She testified that the

[1] This regulation was effective February 27, 2014. Prior to this regulation becoming effective an emergency regulation with the same provisions came into effect on August 1, 2013.

Taxpayer was notified that the project was not eligible for the 2013 credit by letter dated July 8, 2014. See Division's Exhibit G (July 8, 2014 letter). She testified that the Division verified the Taxpayer's representation that the project had gone into service by obtaining a copy of the project's certificate of occupancy ("CO") which was issued for the entire building on December 30, 2013 by the City of Warwick. See Division's Exhibit E. She testified that the Division relied on the statute and the applicable regulation's definition of "placed in service" to determine that the project was placed in service prior to the credit becoming available. She testified that the Owner told her the Taxpayer obtained the CO to move a tenant.

On cross-examination, testified that it would not make a difference if the CO was issued on December 30, 2013 or June 25, 2014. She testified that notification is when she notifies a Taxpayer which could include leaving a telephone message. She testified she keeps a reconciliation spreadsheet for the available credits and uses the spreadsheet to see if money is available and when it is available, she notifies the next application. She testified that could have performed the reconciliation a couple of days or a week prior to her telephone call but not a month. On re-direct, she testified the credits were not available on December 30, 2013.

The Owner testified on the Taxpayer's behalf. He testified that he told the Division that the building was not available for occupancy until June 25, 2014 because 55% of the building was not available until that date or even past that date because windows were still being finished. He testified that he obtained the CO to move a tenant into part of the first floor but the remainder of the first floor and the second and third floor were not occupied until June 25, 2014. He testified that despite the CO being issued, the building was not completely habitable so was not occupied.

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 2013 historic preservation tax credits statute. R.I. Gen. Laws § 44-33.6-2(9) defines "place in service" as follows:

> (9) "Placed in service" means that substantial rehabilitation work has been completed which would allow for occupancy of the entire structure or some identifiable portion of the structure, as established in the Part 2 application.

Rule 6 of CR 14-16 defines placed in service as follows:

> "Placed in Service" means that Substantial Rehabilitation work has been completed which would allow for occupancy of the entire structure or some identifiable portion of the structure, as established in the Part 2 Application or the Owner has commenced depreciation of the QREs, whichever occurs first. Issuance of a certificate of occupancy or similar permit authorizing occupancy of the entire

building or some identifiable portion by the municipal authority having jurisdiction shall constitute sufficient evidence for purposes of the Act that the building or the identifiable portion thereof that is the subject of the certificate of occupancy has been placed in service. However, a building or identifiable portion thereof may be treated as placed in service without a certificate of occupancy if the building or identifiable portion thereof is placed in a condition or state of readiness and availability for a specifically defined function, or upon the commencement of the period for depreciation with respect to the building under the Owner's depreciation practice, whichever occurs earlier.

Rule 9 of CR 14-16 provides in part as follow:

> Queuing Process
> ***
> (b) In the event funds become available, the Division of Taxation may notify a project in the queue credits are available to them, provided the project has not been Placed in Service. In the case of a Phased Project, credits may become available only to those phases not yet Placed in Service.
> Example 1: Project not Placed in Service
> An Applicant in the Queue for which credits were not initially available decides to rehabilitate the building even though credits are not available to the project. Subsequently, credits became available and the project had not yet been Placed in Service. The project would be eligible to receive tax credits.
> Example 2: Project Placed in Service
> An Applicant in the Queue for which credits were not initially available decides to rehabilitate building even though credits are not available to the project. The project was Placed in Service before credits become available. The Applicant is not eligible to receive tax credits.
> Example 3: Phased Project
> An Applicant in the Queue for which credits were not initially available decides to rehabilitate building even though credits are not available to the project. Subsequently, credits are available to the project and the Applicant has completed Phase 1 and that phase has been Placed in Service. Accordingly, Phase 1 is not eligible for credits. The other two phases of the project have not yet been completed and have not been Placed in Service. The remaining phases of the project would be eligible to receive tax credits.

C. Arguments

The Taxpayer argued that CR 14-16 does not define "available" so that it is void for vagueness and is unconstitutional since it is arbitrary when the credits become available and also violates the equal protection clause of the 14th amendment of the United States Constitution. The Taxpayer disagreed with CR 14-16's provision that projects which were not granted credits but

built anyway cannot receive credits if those credits become available after the project was placed in service. The Taxpayer argued that a CO is a rebuttable presumption of completion.

The Division argued that the statute and regulation are presumed valid but argued that constitutional arguments are not within the jurisdiction of an administrative hearing. The Division argued that tax benefits such as credits exist solely as a matter of legislative grace and discretion so must be established by express statutory provisions and the Taxpayer failed to comply with the statutory provisions needed to be entitled to the credit. The Division argued that the project was placed in service pursuant to CR 14-16 when the CO was obtained and therefore the project was placed in service prior to notification of the credits being available.

C. The Constitutionality of a Statute is not Determined at the Administrative Hearing Level

The general law within the country is that administrative agencies do not have the authority to determine the constitutional challenges but rather an administrative agency is limited to the jurisdiction given it by statute. See *Petruska v. Gannon University*, 462 F.3rd 294 (3rd Cir. 2006); *Finnerty v. Cowen*, 508 F.2nd 979 (2nd Cir. 1974). The Rhode Island Supreme Court has agreed in taxation cases. See *International Packaging Corporation v. Mayer*, 715 A.2d 637 (RI. 1998); *Dart Industries v. Clark*, 657 A.2d 1062 (R.I. 1995); *Seibert v. Clark*, 619 A.2d 1108 (R.I. 1993); and *Owners-Operators Independent Drivers Association of America v. Rhode Island*, 541 A.2d 69 (R.I. 1988). In these tax cases, the Rhode Island Supreme Court has never found that the initial determination of constitutionality of a statute should be made at the administrative level. Rather as *Owners-Operators* found, the proper procedure is that claims must begin at the administrative level and on appeal, the District Court has jurisdiction to decide all claims related to the underlying matter such as the constitutionality of a statute.

D. Neither of the Challenged Statutes are Vague or Ambiguous

The Taxpayer argued that since CR 14-16 did not define available, the regulation is void because of vagueness. However, even if a statute does not define every term, that does not make that statute ambiguous. In *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the "ordinary meaning" of "must." *Id.*, at 674. As the Court has found, "[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary." *Defenders of Animals, Inc.*, at 543.

Random House Webster's Unabridged Dictionary, 2nd Edition (2001) defines "available" as "suitable or ready for use; of use or service; at hand . . . readily obtainable; accessible" It defines "notify" as "to inform (someone) or give notice to." Clearly, the credits were available once the Division determined they were ready for use. notified the Taxpayer of the availability of the tax credit on June 26, 2014 by letter and by telephone call.

E. When was the Project was Placed in Service

Tax benefits such as exemptions or credits do not arise by implication but must be established by express statutory provisions. *R.I. Recreational Bldg. Authority v. East Greenwich*, 505 A.d 1139 (R.I. 1986). The Division promulgated CR 14-16 to implement the 2013 statutory tax credits. The regulation provides that a CO "shall constitute sufficient evidence" that the project or a phase identified by the CO has been placed in service. The Taxpayer argued that there is a rebuttable presumption to the CO. However, the regulation provides that the CO is enough evidence that a project was placed in service, but also provides that it can be found that a project was placed in service without a CO. It does not provide that a taxpayer can rebut the CO with evidence of when tenants moved in, etc. The regulation does allow that a CO can either be

issued for part of a building or the entire building, but the portion it covers is sufficient evidence that the project was placed in service. In other words, the Division does not need to obtain any other information except for the CO in order to determine when a project was placed in service unless it finds that a building was placed in service without a CO. Here, a CO was obtained for the entire building rather than a portion of the building so that is evidence that the CO was placed in service on December 30, 2013.

The Owner told that the tenants had moved in the day before she notified him of the availability of the credits. However, the date that tenants moved in does not make the project placed in service that day. Pursuant to CR 14-16, the CO is the only evidence needed (e.g. sufficient evidence) of when the project was placed in service. The CO for the entire building was issued on December 30, 2013 so that is when the project was placed in service.

The tax credit became available and notified the Taxpayer on June 26, 2014. The Taxpayer's argument that the credits could have been available a week earlier is irrelevant as the project was placed in service on December 30, 2014.[2] The CO provides the only evidence needed to determine when the project was placed in service.

VI. FINDINGS OF FACT

1. A Notice was issued on September 18, 2014 by the Division to the Taxpayer in response to its request for a hearing.

2. A hearing was held on December 18, 2014. Both parties were represented by counsel and briefs were timely filed by February 27, 2015.

[2] The Division brought up whether the Taxpayer complied with other requirements needed to obtain the credit such as 1) affidavit of commencement pursuant to Rule 13 of CR 14-16; 2) filing of a restrictive covenant pursuant to R.I. Gen. Laws § 44-33.6-4(c); and 3) meeting the substantial rehabilitation test pursuant to R.I. Gen. Laws § 44-33.6-2(16) and R.I. Gen. Laws § 44-33.6-3(b). The Owner's testimony was that the affidavit was being submitted and that he did not know about the filing of a restrictive covenant. The Taxpayer argued that those requirements could be met after the award of the credit and that testimony supported that position. Since the CO is determinative of the issue in this matter – when the project was place in service – there is no need to address these other statutory requirements.

3. The CO for the entire building was issued on December 30, 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 § 44-33.6-1 *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.*

2. Pursuant to Rule 6 of CR 14-16, the project was placed in service on December 30, 2013.

VIII. RECOMMENDATION

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

Based on R.I. Gen. Laws § 44-1-1 *et seq.* and R.I. Gen. Laws § 44-33.6-1 *et seq.*, the Taxpayer's claimed credit is denied.

Date: 3/30/15

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: 4/7/15

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 § 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 7th day of April, 2015 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 attorney at the address on file with the Division of Taxation and by hand delivery to Meaghan Kelly, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.

Gail Belasco