STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2015-09

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 14-025; 14-T-0058**
	:	**SC 14-052; 15-T-0002**
	:	**SC 15-002; 15-T-0012**
	:	**SC 15-003; 15-T-0013**
Taxpayer.	:	**consolidated**

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 February 11, 2015 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). The Notice was issued in reference to four (4) notices of deficiency and four (4) notices of revocation of cigarette dealer's license that were consolidated for the purposes of the Notice. A hearing was held on March 13, 2015 at which the Division was represented by counsel and the Taxpayer was *pro se*. The parties 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.*

III. ISSUE

Whether the Taxpayer violated its settlement stipulation dated September 16, 2014 and if so, what is the appropriate sanction.

IV. MATERIAL FACTS AND TESTIMONY

Tax Investigator, Special Investigations Unit, testified on behalf of the Division. He testified he retired as a Deputy Chief of the Police Department and now is employed by the Division and was responsible for confirming the Taxpayer's compliance with its settlement stipulation with the Division dated September 16, 2014 ("September Stipulation"). See Division's Exhibit B. He testified that said stipulation provided that the Taxpayer's cigarette dealer's license ("License") be suspended for 90 days from November 1, 2014 through January 30, 2015. He testified that on January 15, 2015, he and his partner parked in the Taxpayer's parking lot and observed ("Owner") walk from the store to his car and open the trunk and take out two (2) packs of cigarettes and walk into the store with the two (2) packs of cigarettes. He testified that the car was registered to the Owner's wife. See Division's Exhibit C (said car registration). He testified that he and his partner went into the store and asked the Owner if they could search the car and the Owner initially refused so he and his partner called the Police and eventually obtained permission to search the car and in the car trunk they found unstamped cigarette packs and other unstamped tobacco products. See Division's Exhibits D (1/15/15 seizure report for cigarettes); and E (1/15/15 seizure report for "other tobacco products"). On questioning from the undersigned, he testified that one (1) cigarette pack was seized from the store and the others that were seized were in the car. He testified that the Owner brought in two (2) packs of cigarettes but one (1) pack was sold to a customer before the seizure. He testified that the seized "other

tobacco products" were found in the car trunk. He testified that it looked like the Owner had taken the tobacco display from the store and put it in the car's trunk.

testified that on October 11, 2014, he was performing routine compliance checks and a concerned citizen approached him and complained that they should make sure that they inspected stores that violated the law and told him that the Taxpayer's store kept out-of-state unstamped cigarettes in the cash register drawer or on the Owner's person or in the lottery machine. He testified that he went into the store and found two (2) New Hampshire cigarette packs in the cash register drawer. He testified he requested that the Owner open the lottery machine, but the Owner denied being able to access the lottery machine. He testified that about an hour later he spoke to his partner who told him that an owner would be able to open a lottery machine. He testified that they went to the Taxpayer's and asked the Owner to open the lottery machine which he did, but there were no cigarettes in the machine; though there would be space to keep cigarettes there. See Division's Exhibit F (10/11/14 seizure report).

Revenue Officer I, Special Investigations Unit, testified on behalf of the Division. She testified that she is responsible for preparing notices of deficiency and calculates penalties and taxes owed based on the investigators' seizure reports. She testified that she used the Taxpayer's seizure reports to calculate notices of deficiency with penalties. See Division's Exhibits G (notices for 10/11/14 seizure report); H (notices for 1/15/15 cigarette seizure); and I (notices for 1/15/15 other tobacco product seizure). She testified that other tobacco products are taxed differently under R.I. Gen. Laws § 44-20-13.2. She testified that notices of license revocation were issued because these were the Taxpayer's fourth and fifth offenses and the Taxpayer was hiding cigarettes and violating the September Settlement.

The Owner's son who had power of attorney, testified on behalf of Taxpayer. He testified that he is the son of the Owner. He testified that the Taxpayer agreed that they were in violation on May 20, 2014 from which the September Stipulation arose. He testified that the two (2) packs found on October 11, 2014 and the 52 packs found on January 15, 2014 were for the Owner's and his wife's personal use. He testified that the Taxpayer cannot pay its rent and is in credit card debt so cannot afford to have its License revoked. See Taxpayer's Exhibits One (1) (rent checks); Two (2) (written explanation); Three (3) (credit card bills).

On-cross examination, the Owner's son was asked about a new corporation that was set up by the Owner and his wife and which filed a BAR (business application registration) with the Division on November 25, 2014. See Division's Exhibit K (BAR). He testified that that was because they were trying to get permission to offer Western Union and Western Union said they needed a different corporation. He was asked about the Taxpayer's filing to dissolve itself filed with the Secretary of State's office on January 2, 2015. See Division's Exhibit L. The Owner's son testified that the dissolution was also for Western Union.

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).

B. Relevant Statutes

R.I. Gen. Laws § 44-20-12[1] imposes a tax on cigarettes sold. R.I. Gen. Laws § 44-20-13 provides that a tax at the same rate as R.I. Gen. Laws § 44-20-12 is imposed on unstamped cigarettes as follows:

> Tax imposed on unstamped cigarettes. – A tax is imposed at the rate of one hundred seventy-five (175) mills for each cigarette upon the storage or use within this state of any cigarettes not stamped in accordance with the provisions of this chapter in the possession of any consumer within this state.

R.I. Gen. Laws § 44-20-33 provides as follows:

> Sale of unstamped cigarettes prohibited. – No distributor shall sell, and no other person shall sell, offer for sale, display for sale, or possess with intent to sell any cigarettes, the packages or boxes containing which do not bear stamps evidencing the payment of the tax imposed by this chapter.

R.I. Gen. Laws § 44-20-37 provides as follows:

> Seizure and destruction of unstamped cigarettes. – Any cigarettes found at any place in this state without stamps affixed as required by this chapter are declared to be contraband goods and may be seized by the tax administrator, his or her agents, or employees, or by any deputy sheriff, or police officer when directed by the tax administrator to do so, without a warrant. Any cigarettes seized under the provisions of this chapter shall be destroyed. The seizure and/or destruction of any cigarettes under the provisions of this section does not relieve any person from a fine or other penalty for violation of this chapter.

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[1] 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.

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 § 44-20-13.2 applies to "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 § 44-20-8 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.

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:
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> (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;
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> (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.
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> (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.
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> (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.

C. Arguments

The Division argued for the penalties and revocation of the License because the Taxpayer has had several opportunities to comply with the statute but instead has continuously disregarded the statutory mandates. The Division argued that the personal exemption claim is not credible. The Division argued that the Taxpayer violated the September Stipulation by bringing in the cigarettes to sell on the premises.

The Taxpayer argued that the cigarettes were the Owner's personal cigarettes because of stress and that the packs in the car were for the Owner and his wife as personal exemptions. The Taxpayer argued that it cannot afford to have its License revoked and penalties imposed because business is slow and it cannot afford to lose its License.

B. Whether the Taxpayer Violated the Stipulation

While there is a personal use exemption,[2] the statute limits it to ten (10) packs brought into the state by the person claiming the exemption. The Taxpayer argued that the 52 packs were for personal use of the Owner and his wife. There was no evidence that either the Owner or his wife brought in the cigarettes on his or her person to the State and the number of packs exceeds the limit allowed for the personal exemption. The personal exemption claim is not credible. Nor can it be found that the two (2) packs found hidden in a cash register drawer on October 14, 2014 fall under the personal exemption. Not only had the Owner hidden them in a drawer rather than keeping them at home or in his pocket, he also misled the inspector and pretended that he could not open the lottery machine. The conclusion to draw from the Owner misleading the inspector about the lottery machine was that there had been cigarettes for sale hidden in there as well.

The Settlement Stipulation prohibited the Taxpayer from keeping and selling tobacco on the premises during the suspension. On January 15, 2015, the Owner was seen taking unstamped cigarettes out of his wife's car trunk and taking them into the store where he sold one (1) pack. At the time, the Taxpayer had been suspended from selling tobacco. Thus, the Taxpayer tried to circumvent the terms of the Settlement Stipulation by keeping unstamped cigarettes and other tobacco products in a car in order to bring them into the store to sell in violation of said stipulation. The Taxpayer violated the September Stipulation.

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[2] R.I. Gen. Laws § 44-20-16

Exemptions from use tax. – The provisions of §§ 44-20-13 – 44-20-17 do not apply to cigarettes imported into the state on which the tax imposed by § 44-20-12 has been paid, and the provisions of §§ 44-20-13 – 44-20-17 do not apply to the use or storage of cigarettes to an amount not exceeding ten (10) packages as ordinarily defined by the practice of the trade, which have been brought into this state on the person.

C. What is the Appropriate Sanction

The Taxpayer possessed unstamped cigarettes on January 25, 2013 and March 20, 2013 and signed a settlement stipulation. See Division's Exhibit M (April 9, 2013 stipulation settling violations of January 25, 2013 and March 20, 2013). The Taxpayer possessed unstamped cigarettes on February 28, 2014 and signed a settlement stipulation. See Division's Exhibit M (May 19, 2014 stipulation settling violation of February 28, 2014). Just three (3) months later the Taxpayer was in violation again with the May 14, 2014 violation for which the Taxpayer entered into the September Stipulation. After signing the September Stipulation, the Taxpayer was in violation again on October 11, 2014. The Taxpayer then violated its suspension of License on January 15, 2015. The Taxpayer has had six (6) violations within 24 months. The Taxpayer signed its third settlement in September, 2014 and one (1) month later was selling unstamped cigarettes. It then sold unstamped cigarettes during the suspension of its License.

R.I. Gen. Laws § 44-20-51.1 was amended effective June 23, 2014. It now differentiates for penalties for the first offense and for a second or subsequent offense within 24 months. Thus, for a first offense within 24 months, R.I. Gen. Laws § 44-20-51(a)(1) provides that a penalty of not more than $1,000 or five (5) times the retail value of the cigarettes involved, whichever is greater, shall be imposed. R.I. Gen. Laws § 44-20-51(a)(2) provides that if there is a second offense or subsequent offense within 24 months of the first offense, a penalty of not more than $5,000 or not more than 25 times the retail value of the cigarettes involved whichever is greater shall be recovered.[3] The prior law set the penalty at $1,000 or five (5) times the retail value of cigarettes. The new law differentiates on first and second and subsequent offenses within 24 months and now provides that the penalty be not more than a certain amount. R.I. Gen. Laws §

[3] Thus, if there is a violation on January 1, 2010 and there had been no violations in the preceding 24 months, that violation would be a first offense in 24 months. If there was another violation on January 1, 2013, again that would be the first offense within 24 months.

44-20-51.1(b) also provides that another penalty based on the tax due shall be imposed and that this penalty not be more than five (5) times the tax due. The prior R.I. Gen. Laws § 44-20-51.1(b) provided that the penalty was to be five (5) time the tax due.

Since the new statute is now providing 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 envisions some kind of progressive discipline based on the first offense and the second and subsequent offenses with the penalties becoming greater based on aggravating factors. The statute provides a standard penalty for the first offense – not more than $1,000 or not more than five (5) times the retail value of the cigarettes, whichever is greater. Thus, if the value of the cigarettes totaled $100, the penalty for the first offense would be not more than $1,000 as that is greater than $500. However, subsection (c) provides that aggravating factors and mitigation factors to be considered. Thus, the higher penalty would be for those with aggravating factors and a lower penalty for those with mitigating factors. For the second and subsequent offenses within 24 months, the statute again sets a standard penalty and again provides for mitigating and aggravating factors to be considered. However, second and subsequent offenses within 24 months already would have an aggravating factor as there would now be a history of violations.

The notices of deficiencies issued for the cigarettes seized on October 11, 2014 and January 15, 2015 assess the Taxpayer the tax owed and penalties pursuant to R.I. Gen. Laws §44-20-51.1(a)(2) and (b) (termed "penalty A" and "penalty B" respectively). The notice of deficiency for the January 15, 2015 seizure of other tobacco products assesses the Taxpayer the tax owed and penalty B. See Division's Exhibits G, H, and I. Other tobacco products are

assessed pursuant to R.I. Gen. Laws § 44-20-13.2. The Division is seeking the highest monetary penalties.

For the two (2) packs seized on October 11, 2014, that violation was within 24 months of the previous violations so would be considered a subsequent offense within 24 months. October 11, 2014 was the fifth violation in less than two (2) years and happened less than a month after the signing of the September Stipulation. The Taxpayer then was in violation for a sixth time less than three (3) months later on January 15, 2015 at which time its License was also suspended. The Taxpayer's history of violations is continuous and ongoing and the Taxpayer is clearly flouting the statutory mandates which would support the imposition of the highest penalties pursuant to R.I. Gen. Laws § 44-20-51.1. The Taxpayer's explanation that the seized cigarettes fell under the personal exemption was not credible. The Taxpayer argued that it cannot afford to pay the penalties. However, licensees cannot continuously violate their statutory obligations, mislead inspectors, and try to circumvent a suspension of License. The Taxpayer presented aggravating factors of history, severity, and intent since it engaged in several violations within 24 months, misled investigators, and even violated the statute when the License was suspended.

Finally, the Taxpayer's history of violations and continuous violations are so egregious that instead of relying solely on the monetary penalty statute, the License should also be revoked pursuant to R.I. Gen. Laws § 44-20-8.

VI. FINDINGS OF FACT

1. The Taxpayer violated R.I. Gen. Laws § 44-20-1 *et seq.* on January 25, 2013, March 20, 2013, and February 28, 2014. The Taxpayer violated R.I. Gen. Laws § 44-20-1 *et seq.* on May 20, 2014 and as a result entered into the September Stipulation.

2. Unstamped cigarettes were seized from the Taxpayer on October 11, 2014 and January 15, 2015. Unstamped other tobacco products were seized from the Taxpayer on January 15, 2015.

3. Pursuant to the September Stipulation, the Taxpayer's License was suspended on January 15, 2015 and the Taxpayer was prohibited on that day from offering tobacco products. The Taxpayer tried to circumvent this prohibition by keeping tobacco products in a car in its parking lot in order to bring in the unstamped tobacco products to sell to customer.

4. The Taxpayer has six (6) violations of R.I. Gen. Laws § 44-20-1 *et seq.* within 24 months.

5. A hearing was held on March 3, 2015 with the Taxpayer being *pro se* and the Division represented by counsel. The parties rested on the record.

6. 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 § 44-20-1 *et seq.* on October 11, 2014 and January 15, 2015 and violated its License suspension on January 15, 2015.

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 § 33-20-33, R.I. Gen. Laws § 44-20-51.1, R.I. Gen. Laws § 44-20-13.2, R.I. Gen. Laws § 44-20-8, the tax owed and penalties were properly assessed on the Taxpayer's unstamped cigarettes and other tobacco

products as set forth in Division's Exhibits G, H, and I and the License shall be revoked immediately.

Date: 4/3/15

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:

__X__ ADOPT
_____ REJECT
_____ MODIFY

Dated: 4/17/15

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 § 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 17th day April, 2015 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 Meaghan Kelly, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Balasco