

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2015-18

**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 15-011; 14-T-0024**
: **SC 15-012; 15-T-0025**

Taxpayer.

:
: **consolidated**
:

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to Orders to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer (“Notice”) both issued on March 3, 2015 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”). The matters are consolidated. A hearing was held on May 18, 2015. The Division was represented by counsel. No one appeared for the Taxpayer. The Taxpayer did not contact either the undersigned or the Division. The Taxpayer received notice of the hearing.¹ As the Taxpayer received notice of the hearing, the undersigned held the hearing. The Division 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*.

¹ A letter was sent to Taxpayer on April 9, 2015 notifying the Taxpayer of the hearing date after the Taxpayer did not appear at the pre-hearing conference.

III. ISSUE

Whether the Taxpayer owes the assessment issued by the Division in relation to cigarette and other tobacco products tax and if so, what should be the sanction.

IV. MATERIAL FACTS AND TESTIMONY

Tax Investigator, testified on behalf of the Division. He testified that the Taxpayer holds a cigarette dealer's license ("License") and a permit to make sales at retail. See Division's Exhibits C (sales permit) and D (License). He testified that he is responsible for cigarette tax compliance inspections and he inspected the Taxpayer on December 2, 2014. He testified that he seized eleven (11) packs of Newport cigarettes since eight (8) packs had no Rhode Island tax stamps and three (3) packs had counterfeit Rhode Island tax stamps. He testified that he also seized "other tobacco products" as the Taxpayer did not have invoices on-site as required by statute to indicate where the items were purchased. See Division's Exhibit E (seizure report for cigarettes; seizure report for other tobacco products).

Revenue Agent, testified on behalf of the Division. She testified that based on the two (2) seizure reports, she performed an audit for the contraband cigarettes and the other tobacco products and issued and calculated the tax and the penalty due. See Division's Exhibits E (seizure reports); and F (audit worksheets for cigarette tax and other tobacco products). She testified that based on her audit review, a Notice of Deficiency was issued for the cigarette tax and penalties due and a Notice of Deficiency was issued for the other tobacco product tax and penalty due. See Division's Exhibit G (the two (2) Notices of Deficiency). She testified that Notice of Suspension was also issued for 60 days because the Taxpayer had been previously suspended for 30 days for cigarette tax violations.

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 § 44-20-12² 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.

² 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 § 44-20-33 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.

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:

(1) For a first offense in a twenty-four month (24) period, a penalty of not more than one thousand dollars (\$1,000), or not more than five (5) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action;

(2) For a second or subsequent offense in a twenty-four-month (24) period, a penalty of not more than five thousand dollars (\$5,000), or not more than twenty-five (25) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action.

(b) Whoever fails to pay any tax imposed by this chapter at the time prescribed by law or regulations, shall, in addition to any other penalty provided in this chapter, be liable for a penalty of not more than five (5) times the tax due but unpaid.

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

B. The Taxpayer Owes the Tax Assessed

It is undisputed that the Division seized 11 cigarette packs for which Rhode Island tax had not been paid. None of the cigarette packs had Rhode Island tax stamps. R.I. Gen. Laws § 44-20-13 provides that tax is imposed on unstamped cigarettes so that the Division properly assessed tax on those 11 cigarette packs.

It is undisputed that the Taxpayer was unable to provide invoices to demonstrate that the Taxpayer had paid tax on the seized other tobacco products. R.I. Gen. Laws § 44-20-13.2(b) and Rule 8 of the *Division's Tax on Other Tobacco Products Regulation* – OTP 14-01 (“OTP 14-01”) require that other tobacco products’ dealers³ keep on-site complete and accurate records of all tobacco products purchased and those records must contain the date and identity of the person selling the tobacco, the distributor license, the dealer’s identity, etc. Rule 10 of the OTP 14-01 provides that any other tobacco products that are possessed, stored, retained, or otherwise brought in the State in contradiction of R.I. Gen. Laws § 44-20-13.2 and said regulation shall be considered untaxed contraband. In this matter, the Taxpayer failed to have the records on-site as required by statute and regulation so that the other tobacco products were considered contraband pursuant to Rule 10 as the other tobacco products were being possessed, stored, and retained in the State in violation of the statute and the regulation. R.I. Gen. Laws § 44-20-13.2 provides for the amount of tax that is assessed on other tobacco products and Rule 11 of OTP 14-01 provides that the Division shall issue a Notice of Deficiency for the amount of tax due on seized contraband and that a penalty may be imposed for the failure to pay tax on contraband other tobacco products. Therefore, the Division properly assessed the tax owed on the other tobacco products.

³ The Taxpayer is included in the definition of dealer for the regulation as a seller of other consumer products to a consumer of other tobacco products.

C. What are the Appropriate Penalties

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.⁴ 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 § 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

⁴ 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.

\$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 Notice of Deficiency issued for the cigarettes seized on December 2, 2014 assessed 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).

There was testimony that the Taxpayer’s License had been suspended for 30 days for a prior cigarette tax violation. There was no testimony as to when this occurred. For a cigarette tax violation to be considered a second offense, it is to take place within 24 months of the first violation. The Taxpayer’s License was issued on April 9, 2013 so that the first violation would have taken place sometime between April 10, 2013 and December 2, 2014. See Division’s Exhibit B (business application and registration for Taxpayer). Thus, it can be concluded that the December 2, 2014 violation took place within 24 months of the first violation. Therefore, the seizure on December 2, 2014 of the 11 packs is within 24 months of the first violation so is the Taxpayer’s second violation.

The testimony was that Penalty A in the amount of _____ was derived from the statute and the seizure reports. Penalty A is not to be greater than \$5,000 or not greater than 25 times the retail value for a second and subsequent offense. The audit work paper indicated that the average retail price for the 11 packs of cigarettes was _____ See Division’s Exhibit F.

25 times equals The penalty imposed is The Division may have based its decision to go higher than 25 times but lower than \$5,000 on the fact it was the second offense and only consisted of 11 packs but that three (3) of those packs had counterfeit tax stamps and not just other state tax stamps. The Division argued that a penalty should be imposed as this was a second offense. A history of violations is an aggravating factor under the statute. It is unclear if any other aggravating or if any mitigating factors were considered in calculating Penalty A. However, it is within the range for a second or subsequent offense.

The Notice of Deficiency for the December 2, 2014 seizure of other tobacco products assessed the Taxpayer the tax owed and penalty B. The Division's position is that only the statutory Penalty B can be applied to other tobacco products and that position is set forth in Rule 11 of OTP 14-01. The penalty B assessed by the Division on the other tobacco products was the maximum allowed which is 5 times the tax due.

Pursuant to R.I. Gen. Laws § 44-20-8, the Division requested a 60 day suspension of the License as this was a second offense since the Taxpayer had a prior 30 day suspension of License.

The Taxpayer did not appear at hearing and did not dispute any of the assessed penalties or requested suspension. No reason has been shown to vary the penalties requested by the Division. This is a second offense by the Taxpayer.

VI. FINDINGS OF FACT

1. Unstamped cigarettes and other tobacco products were seized from the Taxpayer on December 2, 2014.
2. The Taxpayer previously violated R.I. Gen. Laws § 44-20-1 *et seq.* within 24 months prior to December 2, 2014.

3. A hearing was held on May 18, 2015. The Taxpayer did not appear. The Division was represented by counsel and rested on the record.

4. 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 December 2, 2014.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-20-1 *et seq.*, R.I. Gen. Laws § 44-20-51.1, 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 Exhibit G and the License shall be suspended for 60 days starting on the 31st day after the execution of this decision.

Date:

MAY 28, 2015



Catherine R. Warren
Hearing Officer

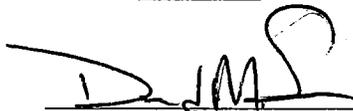
ORDER

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:

June 9, 2015



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 9th day June 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 Anne Marie Maccarone, Esquire, and Meaghan Kelly, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

