STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2016-10

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 15-049**
	:	**15-T-0071**
	:	**cigarette and sales tax**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter initially came for hearing pursuant to an Order to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer issued on July 15, 2015 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing. Prior to hearing, the parties settled the matter by stipulation dated September 25, 2015. The Division now alleges that the Respondent violated said stipulation and issued a new Order to Show Cause, Notice of Hearing, and Appointment of Hearing Officer ("Second Order") dated January 22, 2016 to the Taxpayer. The parties were represented by counsel and agreed that a decision would be rendered on the Second Order on an agreed statement of facts and exhibits.

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

The parties agreed that the issue is whether the Division may recover the full payment of the deficiency determination, as originally issued, on the account of the Taxpayer's failure to meet the payment deadlines agreed to in the stipulation.

IV. MATERIAL FACTS AND TESTIMONY

The parties agreed to the following facts and exhibits:[1]

1. The Taxpayer is a domestic corporation chartered under the laws of Rhode Island on July 16, 2013. Exhibit One (1) (articles of incorporation). For a period of time running through tax year 2015 up until October 15, 2015, the Taxpayer held a Rhode Island sales tax permit, was a licensed dealer under the Rhode Island Cigarette Tax, R.I. Gen. Laws § 44-20-1 *et seq.*, and operated a convenience store business ("Business Location") in Rhode Island.

2. The Division is a state agency charged with the administration and enforcement of all State taxes.

3. On May 4, 2015, agents of the Tax Administrator conducted an inspection of the Business Location, during which the agents found and seized untaxed tobacco products.

4. On June 26, 2015, the Tax Administrator caused a Notice of Deficiency Determination for Other Tobacco Products Tax with Civil Penalties ("Deficiency Determination") and a Notice of License Suspension ("Suspension Notice") to be served upon the Taxpayer. The Deficiency Determination assessed the Taxpayer inclusive of tax, interest, and penalty. The Suspension Notice imposed a license suspension period of sixty (60) days. Exhibits Three (3) (Deficiency Determination) and Four (4) (Suspension Notice). The Taxpayer timely protested the Deficiency Determination and Suspension Notice.

5. To resolve the issues arising out of the May 4, 2015 seizure, the Taxpayer and the Division entered into a settlement stipulation dated September 25, 2015 ("Stipulation"). Exhibit Six (6) (Stipulation).

6. Under paragraph five (5) of the Stipulation, the Taxpayer agreed to pay a total sum of in five (5) monthly installments of ("Monthly Installments").

7. Under the Stipulation, the Taxpayer agreed to surrender its Cigarette Tax dealer's license from October 15, 2015 through at least February 1, 2016, and likewise to cease all activity related to the sale of tobacco products in the State of Rhode Island through any means, whether it be through the Taxpayer's principals, employees, or other agents such as family members, as contemplated in R.I. Gen. Laws § 44-20-4.1(b).

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[1] See stipulation of facts and exhibits filed March 11, 2016 for the complete agreement. The parties agreed that the statutes at issue are R.I. Gen. Laws § 44-20-50, R.I. Gen. Laws § 44-20-51.1, and R.I. Gen. Laws § 44-20-4.1(b).

8. Under paragraph five (5) of the Stipulation, the Monthly Installments were due on the following dates: (1) October 5, 2015; (2) November 2, 2015; (3) December 7, 2015; (4) January 4, 2016; and (5) February 1, 2016.

9. As of January 17, 2016, the Taxpayer's Monthly Installments due December 7, 2015 and January 4, 2016 remained unpaid.

10. The Division did not receive payment for the Monthly Installment due December 7, 2015 until January 19, 2016, or 43 days after the payment was due. Exhibit Seven (7) (check).

11. Notwithstanding the Taxpayer's payment of January 19, 2016, the Taxpayer's Monthly Installment due January 4, 2016 remained unpaid at that time and 15 days delinquent.

12. On January 22, 2016, the Tax Administrator issued the Taxpayer the Second Order that has resulted in the instant proceedings.

13. The Division did not receive payment for the Monthly Installment due January 4, 2016 until January 26, 2016, or 22 days after the payment was due. Exhibit Nine (9) (check).

14. Paragraph nine (9) of the Stipulation states that "[t]he Tax Division's acceptance of any late payment due as to the Settlement Sum . . . shall not be deemed a waiver or estoppel with regard to its right to seek full payment of the Deficiency Notice, as originally issued[.]"

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 Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998).

B. Whether the Taxpayer Violated the Stipulation and if so, What Should be the Sanction

The Taxpayer agreed it made two (2) late payments. Its third payment of the five (5) payments due was 43 days late and its fourth payment of the five (5) payments due was 22 days late. The fourth payment was only made after the institution of these proceedings by the issuance of the Second Order. The fifth and last payment was timely made.[2] The Division has requested that the Taxpayer pay the remaining Deficiency Determination which had been reduced by the Stipulation.[3]

R.I. Gen. Laws § 44-20-51.1 was amended effective June 23, 2014. The amendment changed penalties from specific amounts to be "not more than five (5) times" a certain amount. R.I. Gen. Laws § 44-20-51.1 provides for a penalty in sections (a) and (b), but the only penalty applied to the other tobacco products like this matter is pursuant to R.I. Gen. Laws § 44-20-51.1(b).[4] See Rule 11 of Division's *Tax on Other Tobacco Product's Regulation* 14-01. 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

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[2] By emails dated March 15 and 16, 2016, the parties confirmed the timely payment of the fifth and last payment due.

[3] The Division in writing indicated that it was prepared if this matter had gone to hearing to show other violations of the Stipulation, but in the interests of efficiency proceeded with the limited facts agreed to in the agreed statement of facts. This alleged violation related to activities by the Taxpayer's owner's spouse. In response, the Taxpayer argued that it would have refuted any issues involving said spouse at hearing and that it is now closed and has surrendered its license. It should be noted that the only issue for this decision relates to the agreed statement of facts and what is an appropriate penalty for late payments in this situation so that the issue of the spouse is irrelevant.

[4] R.I. Gen. Laws § 44-20-51.1 provides in part as follows:

> Civil penalties. –
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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.
>
> (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.

discipline based on the history of offenses with the penalties becoming greater based on aggravating factors.

The Deficiency Determination was for in tax and as a penalty. The penalty imposed in the Deficiency Determination represents five (5) times the amount of tax owed so the highest amount that can be imposed under the statute. The Division had settled this matter for payment of the tax and approximately as a penalty. Now the Division seeks the payment of the maximum penalty.

In this matter, the Taxpayer paid the entire settlement amount prior to the due date of the last payment. The Taxpayer no longer is in business and no longer holds a cigarette dealer's license as provided in the Stipulation. There was no evidence that the Stipulation did not represent the Taxpayer's first offense. This is not a situation where a taxpayer settled a matter and agreed to a tobacco license suspension, but then breached the settlement by selling tobacco during the suspension period. Nor is this is a matter where a taxpayer stopped making payments under a payment plan and did not respond to the Division. Rather the Taxpayer paid the entire amount due by the last payment due date, but was late with the third and fourth payment with the fourth payment only being made after the Second Order was issued. (Obviously, the timely fifth and last payment was then made after the issuance of the Second Order).

Based on above, the only aggravating factor is the late payments which is offset by the other enumerated factors above. In light of these circumstances, the imposition of the full deficiency is not appropriate. However, as the Taxpayer was late with its third payment and then the Division had to issue the Second Order to receive the fourth payment, it is appropriate that some kind of penalty is imposed that is proportionally related the stipulated sum to be paid. Therefore, a penalty of shall be imposed pursuant to R.I. Gen. Laws § 44-20-51.1(b).

VI. FINDINGS OF FACT

1. The Stipulation was entered into on September 25, 2015 between the Division and the Taxpayer providing that the Taxpayer make five (5) Monthly Installments payments in order to pay an agreed to sum of money representing tax and penalty owed by the Taxpayer.

2. The Taxpayer was late with is third payment by 43 days. The Taxpayer was late with its fourth payment by 22 days which was paid after the Second Order in this matter was issued. The Taxpayer timely made its fifth and last payment.

3. The Taxpayer is no longer licensed as a cigarette dealer and its retail store is no longer open as provided for in the Stipulation.

4. The Taxpayer fully paid all sums to be paid pursuant to the Stipulation prior to the due date for the fifth and last Monthly Installment.

5. 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 the Stipulation by making two (2) late Monthly Installment payments.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-20-1 *et seq*. and R.I. Gen. Laws § 44-20-51.1(b), an administrative penalty of shall be paid by the Taxpayer for its violation of the Stipulation and said penalty is due 30 days from the signing of this Decision.

Date: 3/28/16

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: 4/21/16

Neena S. Savage
Acting 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 22nd day April, 2016 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 hand delivery to Matthew Cate, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.