STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2016-16

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

IN THE MATTER OF:	:	**cigarette tax and dealer's license**
	:	**SC 15-061; 15-T-0091**
	:	**SC 15-066; 15-T-0100**
	:	**SC 15-017; 15-T-0033**
Taxpayer.	:	**SC 15-016; 15-T-0032**
	:	**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 issued on April 2, September 18, and September 25, 2015 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). These matters are consolidated. A hearing was held on February 25, 2016. 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 February 1, 2016 notifying the Taxpayer of the hearing date after the Taxpayer's attorney withdrew from representation.

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

Special Investigation Unit Supervisor, testified on behalf of the Division. He testified that the Taxpayer holds a temporary tax permit and a cigarette dealer's license. The evidence was undisputed that the Division seized untaxed cigarettes on December 22, 2014 from the Taxpayer and that a notice of license suspension and notice of deficiencies for cigarette tax and other tobacco products ("OTP") were issued to the Taxpayer in relation to that seizure. See Division's Exhibits A (seizure report); B (work papers); C (notice of cigarette dealer's license suspension dated February 16, 2015); D (notice of deficiency dated February 16, 2015 for cigarette tax); and E (notice of deficiency for OTP dated February 16, 2015). It was undisputed that the Division seized untaxed OTP on May 21, 2015 from the Taxpayer and that a notice of license suspension and a deficiency for OTP tax were issued to the Taxpayer in relation to that seizure. See Division's Exhibits G (seizure report); H (work papers); I (notice of cigarette dealer's license suspension dated July 20, 2015); and J (notice of deficiency for OTP dated July 20, 2015). It was undisputed that the Division seized untaxed OTP on July 2, 2015 from the Taxpayer and a notice of license revocation and a deficiency for OTP tax were issued to the Taxpayer in relation to that seizure. See Division's Exhibits K (seizure report); L (work papers); M (notice of deficiency for OTP dated August 19, 2015) and N (notice of revocation of cigarette dealer's license dated August 19, 2015). It was undisputed that the Division seized untaxed OTP on August 24, 2015 from the Taxpayer and a notice of license revocation and an OTP deficiency for OTP tax were issued to the Taxpayer in relation to that seizure. See Division's Exhibits P (seizure report); Q (work papers);

R (notice of cigarette dealer's license revocation dated September 2, 2015); and S (notice of OTP deficiency dated September 2, 2015). It was undisputed that these seizures represented the fourth, fifth, sixth, and seventh seizures of untaxed tobacco/OTP by the Division from the Taxpayer.

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. DEM*, 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[2] 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

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[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.

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 § 44-20-40.1 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"[3] 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:
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> (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.
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> (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

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[3] Rule 5 of the Division of Taxation's *Tax on Other Tobacco Products Regulation* – OTP 14-01 defines other tobacco products as follows:

> (h) "Other Tobacco Product/s" (OTP) means any cigars (excluding Little Cigars which are subject to cigarette tax), cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or otherwise), chewing tobacco (including Cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), any and all forms of hookah and shisha tobacco, snuff, and shall include any other articles or products made of tobacco or any substitute therefore, except cigarettes.

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.

C. The Taxpayer Owes the Assessed Tax and Penalties

At hearing, the Division represented that it believed that the Taxpayer may have left the country; however, the Division sought revocation of the Taxpayer's cigarette dealer's license and a judgement on the deficiencies.

It is undisputed that the Division seized tobacco for which Rhode Island tax had not been paid. R.I. Gen. Laws § 44-20-13 provides that tax is imposed on unstamped cigarettes so that the Division properly assessed tax on the seized tobacco products.

It is undisputed that the Division seized OTP for which tax had not been paid. R.I. Gen. Laws § 44-20-13.2 provides that tax is to be paid on OTP so that the Division properly assessed tax on the seized other tobacco products.

The penalties for the unpaid cigarette tax were imposed by the Division pursuant to R.I. Gen. Laws § 44-20-51.1(a) and (b). See Division's Exhibit D. The penalties on the unpaid OTP tax were imposed by the Division pursuant to R.I. Gen. Laws § 44-20-51.1(b) and Rule 11 of *Division's Tax on Other Tobacco Products Regulation* – OTP 14-01. See Division's Exhibits E, J, M, and S. Pursuant to R.I. Gen. Laws § 44-20-8, the Department sought revocation of the Taxpayer's cigarette dealer's license after its sixth seizure. See Division's Exhibit N and R.

The Taxpayer did not appear at hearing and did not dispute any of the assessed penalties or the requested revocation of its cigarette dealer's license. No reason has been shown to vary the penalties requested by the Division. These seizures represent the fourth, fifth, sixth, and seventh violations by the Taxpayer.

VI. FINDINGS OF FACT

1. Unstamped cigarettes and/or other tobacco products were seized from the Taxpayer on December 22, 2014, May 21, 2015, July 2, 2015, and August 24, 2015.

2. A hearing was held on February 25, 2016. The Taxpayer did not appear. The Division was represented by counsel and rested on the record.

3. 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 22, 2014, May 21, 2015, July 2, 2015, and August 24, 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 § 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 D, E, J, M, and S and the Respondent's cigarette dealer's license shall be revoked.

Date: 3/3/16

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: 7/20/16

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 20th day July 2016 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 Bernard Lemos, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Lori Belasco