STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2016-17

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 15-080** **16-T-007** **cigarette and sales tax**
Taxpayer.	

DECISION

I. INTRODUCTION

The above-entitled matter initially came for a hearing pursuant to an Order to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer ("First Order") issued on January 6, 2016 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 ("Stipulation") dated January 28, 2016. 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 March 8, 2016 to the Taxpayer. This matter came for hearing on April 13, 2016. The Taxpayer was *pro se* and the Division was represented by counsel. 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 said Stipulation, and if so, what should be the sanction.

IV. MATERIAL FACTS AND TESTIMONY

Tax Investigator, Special Investigation Unit, testified on behalf of the Division. He testified that pursuant to the Stipulation entered in by the Division and the Taxpayer, the Taxpayer's cigarette dealer's license ("License") was suspended for five (5) days beginning on Monday, February 8, 2016 and ending on February, 13, 2016. See Division's Exhibit F (Stipulation). He testified that he inspected the Taxpayer's location on February 8 and 9, 2016 in order to verify compliance with the Stipulation. He testified there were no tobacco products in the store on either day and on both days he overheard patrons asking for cigarettes and being sent away. He testified that he inspected the store on February 11, 2016[1] and there was no tobacco in the store and again he overheard patrons asking for cigarettes and being sent away. He testified that on that third inspection, he saw a car parked next to the store which had not been parked there during the other two (2) inspections. He testified that he could see through the car window that it was full of cigarettes. He testified that he called the Division to check the car's registration and ascertained it belonged to the Taxpayer's owner ("Owner"). He testified he called another investigator and when that inspector arrived, they went in the store and spoke to the Owner who agreed to let them look in the car. He testified that they seized from the car about four (4) boxes of cigarettes that were all properly stamped. He testified that the Owner was cooperative. See Division's Exhibits L (compliance report). See also Division's Exhibits I, J, K (photographs of the parked car and cigarettes inside). He testified that he seized the cigarettes because the Taxpayer was in violation of the Stipulation because the cigarettes were on the Taxpayer's premises during

[1] He testified that he did not inspect the store of February 10, 2016 as he had a scheduled day off.

the suspension. He testified that some of the cigarette cartons had been ripped open so the "assumption"[2] was that the Owner had sold some cigarettes from the cartons. He also testified that on February 11, 2016, he did not see the Owner bring cigarettes from the car into the store.

The Owner testified on the Taxpayer's behalf. He testified that there had been a break-in next to the house where he lives and his family was away and since no one was home during the day, he decided to keep the cigarettes in his car. He testified that he had the cigarettes at home on Monday and Tuesday (the days of the first and second inspection). On cross-examination, he testified that the break-in was about 12 or 13 days prior to February 11, 2016. He testified that the cigars were stale so they were stored at his house.

was called in rebuttal. He testified that on February 11, 2016, he asked the Owner about cigars and was told they were old and kept at home, but when he opened the car's trunk of the car, there were old and stale premium cigars in the trunk. In response, the Owner testified that the cigars in the trunk were not of good quality, but there were even worse ones at his house.

Under the Stipulation, two (2) payments of were to be made by the Taxpayer, one by February 28, 2016 and the other by March 29, 2016. The Division represented that both payments were timely made. The payments represented the total amount of the initial deficiency issued to the Taxpayer that caused the First Order to be issued. See Footnote Three (3).

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

[2] At approximately 20 minutes of hearing recording.

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. Statutes

While the Stipulation does not recite the violations of law which the Division alleged or the Taxpayer agreed it violated, the Second Order indicates that the Taxpayer was in possession of untaxed other tobacco products on September 8, 2015 in violation of R.I. Gen. Laws § 44-20-13.2 and as a result, the Division issued a notice of deficiency assessing the Taxpayer the tax owed and a penalty pursuant to R.I. Gen. Laws § 44-20-51.1 and issued a notice of suspension of License. The Taxpayer resolved the initial notices of deficiency and suspension by entering into the Stipulation.

C. Arguments

The Division argued that the Taxpayer violated the Stipulation and requested a 60 day suspension of the License and a $ administrative penalty.[3] The Taxpayer objected.

[3] The Taxpayer received a notice of deficiency and notice of license suspension in relation to the initial violation. Neither of these documents were introduced into evidence at hearing. The Taxpayer's letter requesting a hearing in response to these two (2) notices included said notices as attachments. Said letter was included in the undersigned's file despite not being in evidence, but since the parties all have copies and since the letter is the document that initiated the request for hearing, I will take administrative notice of the letter requesting a hearing and the attached two (2) notices. The notice of deficiency was issued on December 4, 2015 and was for $ hich was the total of the tax owed as well as a penalty. The Stipulation recited the total amount of the notice of deficiency as being $ The notice of license suspension sought a 60 day suspension of License. In the Stipulation, the Taxpayer agreed to pay the full deficiency. In the Stipulation, the parties agreed to a five (5) day suspension of License. Thus, the Division in its Second Order is seeking a 60 day suspension which is what it sought in the initial First Order and is also seeking an additional $ penalty.

D. The Stipulation

In the Stipulation, the Taxpayer agreed not to sell or offer to sell or display any cigarettes or tobacco products "at the premises located at [street number], [street], [town], RI." The Taxpayer further agreed to remove all cigarettes and tobacco products "from the premises at [street number], [street], [town], RI . . . and these items shall be **stored off-site** during the period of suspension." (bold in original).

E. Whether the Taxpayer Violated the Stipulation

The Division argued that the Taxpayer violated the Stipulation since the Owner stored the properly taxed cigarettes in his car parked in the parking lot next to the store during the Taxpayer's suspension of License.[4] The Division argued that the term "premises" in the Stipulation included the store's parking lot.[5] Premises is not defined in the Stipulation but when it is used in the Stipulation, it is used in conjunction with the Taxpayer's street address, in other words, the building in which the store is located.

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. While the definition at issue is not a question of statutory construction, but rather of the meaning of a term in a settlement agreement, it is helpful to consider the dictionary definition of premises as it was not specifically defined for the Stipulation.

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[4] The Division did not allege that there had been any sales of the cigarettes found in the car.

[5] Presumably if the Owner had parked his car on the street, the Division would not argue that the street was part of the premises of the Taxpayer's store. Additionally, if the Taxpayer had been found in possession of untaxed cigarettes or untaxed other tobacco products that would be a statutory violation and presumably a violation of the Stipulation.

In looking at the dictionary definitions of "premises," the definitions mostly include the land and building, but not all definitions. *Mirriam-Webster* defines premises as "[from its being identified in the premises of the deed] *a*: a tract of land with the buildings thereon *b*: a building or part of a building usually with its appurtenances (as grounds)."[6] The *Free Dictionary* defines premises as "a. Land, the buildings on it, or both the land and the buildings on it. b. A building or particular portion of a building. c. *Law* The part of a deed that states the details of the conveyance of the property."[7] The *Oxford Dictionary* defines premises as "[a] house or building, together with its land and outbuildings, occupied by a business or considered in an official context."[8]

In *Rice v. Board of License Com's of Central Falls*, 36 R.I. 50 (1913), the Court discussed the meaning of premises in relation to schools. It found that "[t]he term 'premises' as it refers to real estate, is usually held to include appurtenances. As applied to a school, it will properly include, in addition to the room or building . . . such portion, if any, of the land whereon it stands as may be apportioned . . . by the proper authority, for use of the school." Certainly the dictionary definitions of premises when used in relation to a deed includes the land with the building. E.g. *Mirriam-Webster* and *Free*.

While premises usually includes the land with the building, not all definitions include the land with the building. E.g. *Mirriam-Webster* and *Free*. This raises the issue of whether the parking lot is actually part of the Taxpayer's building (e.g. the store). It apparently was assumed by the Division that the parking lot was part of the Taxpayer's store in that it is owned either by the Taxpayer or the Taxpayer's landlord. However, there was no evidence that the parking lot was for the sole use of the Taxpayer's store and was owned either by the Taxpayer's landlord or by the

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[6] http://www.merriam-webster.com/dictionary/premise.
[7] http://www.thefreedictionary.com/premises.
[8] http://www.oxforddictionaries.com/us/definition/american_english/premises.

Taxpayer. The parking lot could be used not only by the Taxpayer's store, but by other stores, if there are any in the vicinity. There was no evidence either way. Additionally, since the Stipulation referred to the premises at the store address, it could be thought that the address only referred to the building especially if the parking lot was shared with other buildings/stores.

Finally, all cigarettes and tobacco products were to be stored "off-site" by the Taxpayer during the License suspension. In the context of the Stipulation, off-site would be in opposition to premises so would mean not on the premises (however premises is defined). The dictionary definitions agree as follows: "[t]aking place or situated away from a particular site or premises;"[9] "not located or occurring at the site of a particular activity,"[10] or "away from the principle area of activity."[11]

Arguably keeping the properly taxed tobacco in a car parked next to the store does not appear to be off-site unless the building is the premise and the parking lot is not the premise. It most likely would behoove any similarly situated taxpayer to keep (e.g. store) tobacco in another building (e.g. home, storage facility) rather than in a car next to its store.[12] It would also behoove the Division to draft its stipulations to ensure that it is clear that premises could include a store's parking lot (whether owned by a taxpayer or landlord or shared with other stores) (or if desired, any out-building).[13]

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[9] http://www.oxforddictionaries.com/us/definition/american_english/off-site?q=off+site.
[10] http://www.merriam-webster.com/dictionary/off%e2%80%93site.
[11] http://www.thefreedictionary.com/off-site.
[12] In this matter, the Owner testified as to concern over a break-in in his neighborhood that had happened 12 or 13 days prior to the suspension period.
[13] Construing the meaning of premises in the Stipulation is similar to interpreting a question of contract. If the Stipulation was a deed or real estate conveyance, there would be no doubt that in common usage, premises would include any out-buildings and land attached to an address. When a term in a contract is not ambiguous, the court is to interpret the contract as a matter of law. However, when a contract term is ambiguous the term is to be construed against the drafter. See *Judd Realty, Inc. v. Tedesco*, 400 A.2d 952 (R.I. 1979). In this matter, the Taxpayer was *pro se* and the Division would have drafted the Stipulation. However, not only is there the question of construing the term premises, there is an issue over whether the parking lot belongs to the store.

In light of the question as to the meaning of premises and the lack of clarity over the usage and ownership of the parking lot, the undersigned does not find that the Taxpayer violated the Stipulation.

VI. FINDINGS OF FACT

1. The Taxpayer holds a cigarette dealer's license.

2. By Stipulation dated January 28, 2016, the Taxpayer settled cigarette tax violations allegations by the Division contained in the First Order by agreeing to pay the total amount of the notice of deficiency and for a five (5) days suspension of License.

3. On February 8 and 9, 2016, the first and second day of the suspension of License, no violations were found during the Division inspections. The Owner was heard sending patrons away who had sought to purchase cigarettes.

4. On February 11, 2016, the fourth day of the suspension of License, no violations were found in the store during the third Division inspection. The Owner was heard sending patrons away who had sought to purchase cigarettes.

5. On February 11, 2016, the fourth day of the suspension of License, the Division investigator found properly taxed cigarettes in the Owner's car parked next door to the store in the parking lot.

6. Pursuant to the Stipulation, the Taxpayer was to pay the total deficiency in two (2) equal parts which were due after the License suspension. The Taxpayer timely paid both payments so paid the amount owed under the Stipulation on time. That amount represented the amount of the total deficiency issued initially to the Taxpayer.

7. The term premises in terms of conveyances and deeds includes the land and out-buildings. However, in this matter, the term premises could mean only the building or the building

and land. At the same time, it is unclear whether the parking lot was owned either by the Taxpayer's landlord or the Taxpayer and/or whether the parking lot was used by only the Taxpayer store or other stores.

8. 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. There was no violation of the Stipulation by the Taxpayer.

VIII. RECOMMENDATION

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

Since the Taxpayer did not violate the Stipulation, this matter is dismissed.

Date: May 9, 2016

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: 7/21/16

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 25th 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 Matthew Cate, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco