

STATE OF RHODE ISLAND
DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2022-17

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

IN THE MATTER OF:

**SC 21-072; 21-T-129
cigarette tax**

Taxpayer.

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 issued on June 17, 2021 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”). A hearing was scheduled for October 3, 2022 at which time the Taxpayer did not appear at the hearing. Since the Taxpayer was adequately noticed of hearing,¹ a hearing was held on October 3, 2022 before the undersigned. Pursuant to Section 2.7(G)(3) of the 280-RICR-20-00-2 *Administrative Hearing Procedures* (“Hearing Regulation”), a default judgment may be entered against the party not appearing at hearing.² The Department was represented by counsel who rested on the record.

¹ Division’s Exhibit 12 is the initial notice of hearing. An attorney entered his appearance on behalf of the Taxpayer. Division’s Exhibit 11 (attorney’s May 18, 2021 letter requesting a hearing). By email, the undersigned discussed convenient hearing dates with the parties using the attorney’s email address. An email scheduling the hearing for October 3, 2022 was sent by the undersigned to both parties’ attorneys. In addition, the scheduling email was forwarded to the Taxpayer’s attorney by facsimile. Division’s Exhibit 14 (scheduling email with facsimile cover sheet to attorney and facsimile confirmation sheet).

² The Hearing Regulation provides that the defaulted party be given notice of the default by mail and may request reinstatement of the matter pursuant to a motion for reconsideration as set forth in the Hearing Regulation.

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.*, and the Hearing Regulation.

III. ISSUE

Whether the Taxpayer owes other tobacco products tax and if so, should any sanctions be imposed.

IV. MATERIAL FACTS

Principal Tax Auditor, testified on behalf of the Division. He testified that the Taxpayer was a convenience store, and this matter involved the seizure of other tobacco products (“OTP”) from the Taxpayer store. He testified that the Taxpayer had a prior violation in 2019 related to unpaid cigarette and OTP tax for which the Taxpayer entered into a settlement. Division’s Exhibit Eight (8) (audit workpapers and report dated May 11, 2021). He testified that on May 3, 2021, Division inspectors inspected the Taxpayer and seized game grape OTP. He testified that on that date, the Taxpayer had a permit to make sales at retail and a cigarette dealer’s permit, but now is out of business. He testified that the Division issued a notice of deficiency for the tax owed on the seized product as well as for penalties. He testified that penalty “A” was calculated as a second offence and penalty “B” was calculated as the statutory minimum of \$ Division’s Exhibit Three (3) (2020-2021 cigarette dealer’s license); Four (4) (2020-2021 retail at sales permit); and Ten (10) (notice of deficiency determination dated May 14, 2021).

Tax Investigators, both testified on behalf of the Division. They both testified that they conducted the compliance inspection of the Taxpayer on May 3, 2021 during which time the Taxpayer’s employee provided some invoices. They testified that the Taxpayer also provided some invoices after the inspection. They testified that none of the

provided invoices corresponded with the seized product in that the product was manufactured in February, 2021, and there were no invoices for that product after the date of manufacture. Division's Exhibit 13 (invoices). They testified that they left a seizure report at the Taxpayer store and issued a compliance report. Division's Exhibits Six (6) (May 3, 2021 compliance report) and Seven (7) (May 3, 2021 seizure report).

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 imposes a tax on cigarettes sold. R.I. Gen. Laws § 44-20-13.2 imposes tax on "other tobacco products."³ Inspections of cigarette dealers are allowed by R.I. Gen.

³ R.I. Gen. Laws § 44-20-13.2 provides in part as follows:

(a) A tax is imposed on all other tobacco products, 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 revenue. The tax imposed by this section shall be as follows:

(1) At the rate of eighty percent (80%) of the wholesale cost of other tobacco products, cigars, pipe tobacco products, and smokeless tobacco other than snuff.

Laws § 44-20-40.1. R.I. Gen. Laws § 44-20-51.1⁴ provides for administrative penalties for the violation of the tax laws. In addition, R.I. Gen. Laws § 44-20-8⁵ provides for the suspension or revocation of a cigarette dealer's license.

C. Whether Tax is Owed on the Other Tobacco Products

The Taxpayer did not appear at hearing. It is undisputed the Division seized other tobacco products from Taxpayer for which Rhode Island tax had not been paid. R.I. Gen. Laws § 44-20-13.2 provides that tax is imposed on other tobacco products, so the Division properly assessed tax on the seized other tobacco products. Division's Exhibits Eight (8) and Ten (10).

(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.

⁴ R.I. Gen. Laws § 44-20-51.1 provides as follows:

(a) Whoever omits, neglects, or refuses to comply with any duty imposed upon him/her by this chapter, or to do, 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 ten (10) times the retail value of the cigarettes and/or other tobacco products involved; and

(2) For a second or subsequent offense in a twenty-four-month (24) period, a penalty of not more than twenty-five (25) times the retail value of the cigarettes and/or other tobacco products involved.

(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 one thousand dollars (\$1,000) or not more than five (5) times the tax due but unpaid, whichever is greater.

(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.

⁵ R.I. Gen. Laws § 44-20-8 provides in part as follows:

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 or purchase of cigarettes or other tobacco products. The tax administrator may also suspend or revoke any license for failure of the licensee to comply with any provision of chapter 19 of title 44 and chapter 13 of title 6. *** Any person aggrieved by the suspension or revocation may apply to the administrator for a hearing as provided in § 44-20-47, and may further appeal to the district court as provided in § 44-20-48.

D. What Sanctions Should be Imposed

R.I. Gen. Laws § 44-20-51.1(a) provides that penalties are to be imposed at “not more than five (5) times” or not more than 25 times the retail value of cigarettes depending on the circumstances. R.I. Gen. Laws § 44-20-51.1(b) provides that a penalty of not more than five (5) times of the tax owed or \$1,000 whichever is greater may be imposed. R.I. Gen. Laws § 44-20-51.1(c) 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 progressive discipline based on the history of offenses with the penalties becoming greater based on aggravating factors.

The Division seeks monetary penalties for the unpaid other tobacco products tax pursuant to R.I. Gen. Laws § 44-20-51.1(a) and (b). The Division seeks a penalty of 11 times the retail value of the other tobacco products and the statutory minimum penalty of \$1,000. Division’s Exhibits Ten (10) and Eight (8) (audit workpapers indicating penalties imposed). R.I. Gen. Laws § 44-20-51.1(a)(2) provides that for a second offense in 24 months, a penalty of not more than 25 times the retail value or \$5,000 whichever is greater can be imposed. The Taxpayer’s first violation was in 2019. The 2019 violation was settled by stipulation. The Taxpayer’s 2021 violation was within 24 months of the Taxpayer’s 2019 violation. Thus, the Division properly imposed greater penalties due to the Taxpayer’s prior violation. The Taxpayer did not appear. No mitigating factors were shown in relation to the monetary penalties requested.

The Division initially sought a suspension of the Taxpayer’s cigarette dealer’s license; however, it was represented at hearing that the Taxpayer is now out of business so no suspension can be imposed.

VI. FINDINGS OF FACT

1. Other tobacco products for which no tax was paid were seized from the Taxpayer on May 3, 2021.
2. A notice of hearing was issued on June 17, 2021. A hearing was scheduled for October 3, 2022, and all parties were notified. The Taxpayer did not appear at the hearing. As the Taxpayer was adequately notified of hearing, a hearing was held. The Division was represented by counsel and rested on the record. The Taxpayer is in default for failing to appear at the hearing.
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 § 44-20-13.2 on May 3, 2021.

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, and R.I. Gen. Laws § 44-20-13.2, the Taxpayer owes the tax and penalties assessed by the Division as set forth in Division's Exhibit Ten (10). Payment shall be made by the 31st day from the date of execution of this decision.

Date:

October 17, 2022



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: 10/19/22

Msavage
Neena S. Savage
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 of October, 2022 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid and certified mail, return receipt requested to the Taxpayer's address on record with the Division and by first class mail, postage prepaid and certified mail, return receipt requested to the Taxpayer's attorney and by electronic delivery to Amanda Valentino, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasce