

STATE OF RHODE ISLAND

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2022-12

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

IN THE MATTER OF:

Taxpayer.

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SC 16-046; Case No. 16-T-082
tobacco

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to an Order to Show Cause, Notice of Hearing, and Appointment of Hearing Officer (“Notice”) issued on October 7, 2016 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”). After several status conferences and attempts at settlement, this matter was scheduled for hearing for April 29, 2022. By letter dated March 18, 2022, the Taxpayer was notified that a full hearing would be held on April 29, 2022. A hearing was held on April 29, 2022 at which time the Taxpayer did not appear. Since the Taxpayer was adequately noticed of hearing,¹ a hearing was held before the undersigned on April 29, 2022. 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. The Division was represented by counsel who rested on the record.

¹ Notice of the April 29, 2022 hearing was sent to the Taxpayer by letter dated March 18, 2022, and it was sent by first class and certified mail to the Taxpayer’s address on record with the Division. Division’s Exhibits 23 (said letter along with print out of the United States Post Office certified mail tracking sheet showing delivery); and Exhibits One (1) (secretary of state’s articles of incorporation by Taxpayer showing address); Three (3) (Taxpayer’s 2021 sales permit showing Taxpayer’s address); and Four (4) (Taxpayer’s 2021 cigarette dealer’s license showing Taxpayer’s address). Prior to the scheduling of the hearing, a certified public accountant emailed that he would be representing the Taxpayer, but despite numerous requests to provide a power of attorney, none was received by the Division or undersigned prior to the scheduling of the hearing.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-20-1, R.I. Gen. Laws § 44-1-1 *et seq.*, and 280-RICR-20-00-2 *Administrative Hearing Procedures* regulation.

III. ISSUES

Whether the Taxpayer owes the assessed sales tax, interest, and penalty for 2015 and 2016.

III. MATERIAL FACTS AND TESTIMONY

On October 7, 2016, the Notice was issued to the Taxpayer. Exhibit 22. It sought to revoke the Taxpayer's sales tax permit and cigarette dealer's license for failure to comply with a summons issued on September 16, 2016 and served on the Taxpayer on September 19, 2016 seeking certain records in relation to an audit being performed by the Division on the Taxpayer. While the Taxpayer produced some records in response to the summons, the Division found them to be nonresponsive. Exhibits Five (5) (April 1, 2014 letter from Division to Taxpayer notifying Taxpayer of upcoming audit and requesting certain records be available); Six (6) (May 9, 2014 letter from Division to Taxpayer); Seven (7) (email dated July 12, 2016 requesting certain records for the audit); Eight (8) (August 22, 2016 email from Division to Taxpayer); Nine (9) (original summons for records served on the Taxpayer on September 19, 2016); and Ten (10) (records produced by Taxpayer in response to original summons).

As a result of the Notice, a prehearing conference was held along with several status conferences. At hearing, the undersigned took administrative notices of various emails among the parties indicated that the matter would be re-audited. As a result of this re-audit, a sales and use field audit was conducted for 2015 and 2016 and a Notice of Deficiency was issued for each year. Exhibits 11 (December 3, 2018 field audit report for the year 2015 for Taxpayer); 12 (Notice of

Deficiency for sales tax, interest, penalty owed for 2015); 13 (February 7, 2019 field audit report for the year 2016); and 14 (Notice of Deficiency for sales tax, interest, penalty owed for 2016). The Taxpayer contested the 2015 and 2016 Notices of Deficiency, and further status conferences were held. Further records were provided by the Taxpayer in relation to those two (2) Notices of Deficiency that caused a recalculation of the taxes owed (and interest and penalty). See testimony below. Administrative notice was taken of discussion with the Taxpayer's prior attorney in relation to fuel records being produced.²

It was undisputed that the 2015 and 2016 Notices of Deficiency were a result of the agreed to audit during the hearing process and were contested by the Taxpayer. It was undisputed that the disputed audits for 2015 and 2016 were agreed by the parties to be issues for this hearing.

Principal Tax Auditor, testified on behalf of the Division. He testified that he is a supervisor and has been an auditor for eight (8) years. He testified that he was not the original auditor on this matter as that auditor was no longer with the State, but he did review the audit papers and calculations for this matter. He testified the audit was acceptable and was performed the way he would conduct an audit.

testified that the Taxpayer is a gas station with a convenience store. He testified that he reviewed the original auditor's report, and the only records that she had to review were the corporate tax returns, so the audit was based on gross receipts, assets, and expense deductions. He testified that without proof of any sales tax, all receipts are considered taxable. He testified that an auditor deducts any sales tax already remitted for that year by a taxpayer, and if a taxpayer can show that there were gas purchases or prepaid cigarette tax that would be deducted from the taxable

² As part of this further audit, the Division also issued Notices of Deficiency in 2018 in relation to withholding tax, business corporation tax, and corporate tax. Exhibits 15, 16, 17, 18, 19, 20 (field audit reports, Notices of Deficiency, certain tax returns). The Division represented that the Taxpayer paid those deficiencies.

measure. However, he testified that gross receipts would be considered taxable unless a taxpayer could show otherwise. He testified that interest and penalty would be assessed per statute.

testified that based on further information received from the Taxpayer, the taxable measures for 2015 and 2016 were revised. He testified that the revisions are shown in Exhibit 24 which indicate that fuel sales, milk sales as well as sales tax already remitted were deducted from the gross receipts to come up with a revised taxable measure for both years. He testified that based on the new taxable measures, he calculated the tax, interest, and penalties owed as of April 2022. Exhibit 24.

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 and Regulation**

Pursuant to R.I. Gen. Laws § 44-18-18, Rhode Island imposes a sales tax of 7% on gross receipts of a retailer. Pursuant to R.I. Gen. Laws § 44-18-19, the retailer is responsible for the

collection of sales tax. R.I. Gen. Laws § 44-18-25³ presumes that all gross receipts are subject to sales tax and that the burden of proving otherwise falls on the taxpayer. R.I. Gen. Laws § 44-19-27⁴ requires every person storing or using tangible personal property in this State to keep books, records, receipts, etc. R.I. Gen. Laws § 44-19-27.1⁵ authorizes the Division to examine taxpayers'

³ R.I. Gen. Laws § 44-18-25 provides as follows:

It is presumed that all gross receipts are subject to the sales tax, and that the use of all tangible personal property, or prewritten computer software delivered electronically or by load and leave, or vendor-hosted prewritten computer software, or specified digital products, or services as defined in § 44-18-7.3, are subject to the use tax, and that all tangible personal property, or prewritten computer software delivered electronically or by load and leave, or vendor-hosted prewritten computer software, or specified digital products, or services as defined in § 44-18-7.3, sold or in processing or intended for delivery or delivered in this state is sold or delivered for storage, use, or other consumption in this state, until the contrary is established to the satisfaction of the tax administrator. The burden of proving the contrary is upon the person who makes the sale and the purchaser, unless the person who makes the sale takes from the purchaser a certificate to the effect that the purchase was for resale. The certificate shall contain any information and be in the form that the tax administrator may require

This is the current version of this statute. The statute was amended in 2018 and 2019 in relation to vendor-hosted prewritten computer software which is not relevant to this audit. P.L. 2018, ch. 47, art. 4, § 10; P.L. 2019, ch. 88, art. 5, § 9.

⁴ R.I. Gen. Laws § 44-19-27 states in part as follows:

Records required – Users – Collectors of taxes – Promoters – Inspection and preservation of records. – (a) Every person storing, using, or consuming in this state tangible personal property purchased, leased, or rented from a retailer, or from a person other than a retailer in any transaction involving a taxable casual sale, shall keep books, records, receipts, invoices, and other pertinent papers in the form the tax administrator may require. Those books, records, receipts, invoices, and other papers shall at all reasonable times be open to the inspection of the tax administrator and his or her agents.

(b) Every person required to collect tax shall keep records of every sale or occupancy and of all amounts paid, charged, or due and of the tax payable, in forms the tax administrator may by regulation require. The records shall include a true copy of each sales slip, invoice, receipt, statement, or memorandum upon which § 44-19-8 requires that the tax be stated separately.

(d) The records shall be available for inspection and examination at any time upon demand by the tax administrator or his or her authorized agent or employee and preserved for a period of three (3) years, except that the tax administrator may consent to their destruction within that period or may require that they be kept longer.

⁵ R.I. Gen. Laws § 44-19-27.1 states as follows:

Examination of taxpayer's records – Witnesses. – The tax administrator and his or her agents for the purpose of ascertaining the correctness of any return, report, or other statement required to be filed under chapters 18 or 19 of this title or by the tax administrator under those chapters, or for the purpose of determining the amount of any tax imposed under the provisions of those chapters, may examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, report, or other statement, and may require the attendance of the person executing the return, report, or other statement, or of any officer or employee of any taxpayer, or the attendance of any other

records in order to determine the correctness of any tax return filed or the amount of any tax imposed.

The Division's current regulation relating to the keeping of records was promulgated on June 18, 2021 and is 280-RICR-20-70-12 *Records Requirement*. However, the pertinent record regulation in 2015 and 2016 is the Division's *Sales and Use Tax Regulation SU 13-91 Records Requirements* ("SU 13-91") which delineated the type of records required to be kept. Rule 5 and Rule 6 of SU 13-91 state in part as follows:

Rule 5 Records

(a) Each retailer as defined in RIGL §44-18-15 shall keep adequate and complete records of the business entity showing:

1. The gross receipts from the sales of tangible personal property and services, including both taxable and nontaxable items and any services necessary to complete a sale.

2. All deductions allowed by law and claimed in filing returns.

3. Total purchase price of all tangible personal property or services purchased for resale and the total purchase price of all such property or services purchased for use or consumption in this state.

(b) These records, but not limited to, shall include the normal books of account ordinarily maintained by the average prudent business person engaged in the activity in question, together with all bills, receipts, invoices, cash register tapes, all data collected or stored by means of electronic or magnetic media, or other documents of original entry supporting the entries in the books of account as well as all schedules or working papers used in connection with the preparation of tax returns.

Rule 6 Requirement for Record Retention

(b) Failure to maintain such records will be considered evidence of negligence or intent to evade the tax, and will result in the imposition of appropriate penalties as provided by statute.⁶

person, and may examine the person under oath respecting any matter which the tax administrator or his or her agent deems pertinent or material in determining the liability of any person to a tax imposed under the provisions of chapters 18 or 19 of this title.

⁶ SU 13-91 was effective to June 18, 2018 so until after the audit period ended.

C. Arguments

Initially, the Division sought revocation of the Taxpayer's sales permit and cigarette dealer's license in its Notice. However, at hearing, the Division represented that it was not seeking such revocation but rather to uphold the 2015 and 2016 deficiencies of tax owed, interest, and penalties.

D. Whether the Taxpayer Owes Sales Tax

Pursuant to R.I. Gen. Laws § 44-18-25, the burden of proof is on the Taxpayer rather than the Division since the statute provides for a statutory presumption that all items purchased or sold are subject to tax unless the "contrary" is established by a taxpayer to the satisfaction of the Tax Administrator. The purpose of this hearing was to provide the Taxpayer with an opportunity to rebut the presumption of taxability. The burden of proof for the Taxpayer is the preponderance of the evidence. R.I. Gen. Laws § 8-8-28 and *DeBlois v. Clark*, 764 A.2d 727 (R.I. 2003).

As stated above, by statute, a taxpayer is liable for sales and by statute, a taxpayer must keep certain records. The Division has promulgated regulations⁷ that detail the type of records that must be maintained, and the tax liability if such records are failed to be maintained. When a taxpayer cannot produce records demonstrating its sales and/or taxes collected, the Division will use the available evidence to make an assessment as provided for in R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-14.⁸ Such audits where there were few or no records have been the

⁷ R.I. Gen. Laws § 44-19-33 specifically states that the Tax Administrator may prescribe regulations that are not inconsistent with the law and are reasonably designed to carry out the intent and purposes of the law and are *prima facie* evidence of the proper interpretation of statutes.

⁸ R.I. Gen. Laws § 44-19-11 states as follows:

Deficiency determinations – Interest. – If the tax administrator is not satisfied with the return or returns or the amount of tax paid to the tax administrator by any person, the administrator may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information in his or her possession or that may come into his or her possession. One or more deficiency determinations may be made of the amount due for one or for more than one month. The amount of the determination, exclusive of penalties, bears interest at the annual rate

subject of prior administrative decisions which have found that assessments are to be made on the available evidence.⁹

It is the Taxpayer's statutory and regulatory obligation to maintain all appropriate records. The Division gave the Taxpayer an opportunity to produce additional records. Based on the records produced, pursuant to R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-14, the Division made an estimate of the sales tax owed by the Taxpayer as set forth in Exhibit 24.

E. Interest and Penalty on the Sales Tax Assessment

The Division properly imposed interest on the sales tax assessment pursuant to R.I. Gen. Laws § 44-19-11. In addition, the Division properly imposed a 10% penalty on the sales tax deficiency pursuant to R.I. Gen. Laws § 44-19-12¹⁰ and R.I. Gen. Laws § 44-19-14. R.I. Gen.

provided by § 44-1-7 from the fifteenth day (15th) after the close of the month for which the amount, or any portion of it, should have been paid until the date of payment.

R.I. Gen. Laws § 44-19-14 states as follows:

Determination without return – Interest and penalties. – If any person fails to make a return, the tax administrator shall make an estimate of the amount of the gross receipts of the person or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this state is subject to the use tax. The estimate shall be made for the month or months in respect to which the person failed to make a return and is based upon any information, which is in the tax administrator's possession or may come into his or her possession. Upon the basis of this estimate, the tax administrator computes and determines the amount required to be paid to the state, adding to the sum arrived at a penalty equal to ten percent (10%) of that amount. One or more determinations may be made for one or for more than one month. The amount of the determination, exclusive of penalties, bears interest at the annual rate provided by § 44-1-7 from the fifteenth (15th) day after the close of the month for which the amount or any portion of the amount should have been paid until the date of payment. If the failure of any person to file a return is due to fraud or an intent to evade the provisions of this chapter and chapter 18 of this title, a penalty of fifty percent (50%) of the amount required to be paid by the person, exclusive of penalties, is added to the amount in addition to the ten percent (10%) penalty provided in this section. After making his or her determination, the tax administrator shall mail a written notice of the estimate, determination, and penalty.

⁹ In a 2003 Division administrative decision (2003 WL 23105231), an audit found *ex tax* purchases by a taxpayer of supplies and expenses. There were no records of any sales or use tax paid on the purchase invoices or of any tax paid and based on that information, the conclusion was tax was owed. A 1994 Division administrative decision (1994 WL 143289) found that the taxpayer was able to apply some invoices showing when taxes were paid so that the assessment was reduced but when that taxpayer could not show such information, the assessment was not reduced. The decision concluded that “[o]nly scrupulous recordkeeping could verify the claims of nontaxability.” (p. 4 of decision).

¹⁰ R.I. Gen. Laws § 44-19-12 provides as follows:

Laws § 44-19-12 clearly provides that if a taxpayer does not pay a tax because of negligence or does not pay, a 10% penalty is imposed. That penalty is not discretionary because the statute provides that the penalty “is” to be added rather than “may be added.” *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977).

VI. FINDINGS OF FACT

1. The Division commenced an audit of the Taxpayer in 2016. The Taxpayer did not provide all of its records to the Division for said sales and use audit.
2. As a result of the Taxpayer’s noncompliance with the summons request for records related to the audit, the Notice was issued on October 7, 2016 to the Taxpayer by the Division.
3. After the commencement of the hearing process, it was agreed that this matter would be re-audited.
4. In 2018 and 2019, the Division issued Notices of Deficiency for sales tax owed, interest, and penalties for 2015 and 2016. The Taxpayer contested those deficiency notices.
5. The audit dispute arose as part of the hearing process and was an issue at hearing. It was agreed that the re-audit and disputed results were an issue at hearing.
6. The Taxpayer later provided further information about its sales in 2015 and 2016 and the taxable measures were recalculated as set forth in Exhibit 24.
7. The Division based its audit on the information it had in its possession.
8. The facts contained in Section IV and V are incorporated by reference herein.

Pecuniary penalties for deficiencies. If any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the provisions of this chapter and chapter 18 of this title, a penalty of ten percent (10%) of the amount of the determination is added to it. If any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade the provisions of this chapter or chapter 18 of this title, a penalty of fifty percent (50%) of the amount of the determination is added to it.

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 § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-20-1, and R.I. Gen. Laws § 44-1-1 *et seq.*
2. The Taxpayer owes the sales tax assessment and the assessed interest and penalties as set forth in Exhibit 24.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends as follows: Pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-19-11, R.I. Gen. Laws § 44-19-12, R.I. Gen. Laws § 44-19-14, the Taxpayer owes the assessed tax and assessed interest and penalties as set forth in Exhibit 24.

The tax, penalties, and interest shall be paid by the 31st day after the execution of this decision.

Date: May 23, 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: 5/23/22


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 STATUTES WHICH STATES AS FOLLOW:

R.I. Gen. Laws § 44-19-18 Appeals Appeals from administrative orders or decisions made pursuant to any provisions of this chapter are to the sixth (6th) division district court pursuant to chapter 8 of title 8. The taxpayer's right to appeal under this chapter is expressly made conditional upon prepayment of all taxes, interest, and penalties, unless the taxpayer moves for and is granted an exemption from the prepayment requirement pursuant to § 8-8-26.

CERTIFICATION

I hereby certify that on the 31st day May, 2022 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail and certified mail to the Taxpayer's address on record with the Division and by electronic delivery to Michael Brady, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.