

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2011-14

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

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IN THE MATTER OF:

Taxpayer.

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Case No.: 11-T-0011  
Sales/Use

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Hearing and Appointment of Hearing Officer (“Notice”) that was issued on March 16, 2011 to the above-captioned (“Taxpayer”)<sup>1</sup> by the Division of Taxation (“Division”) in response to the Taxpayer’s request for hearing filed with the Division dated December 22, 2009. A hearing was held on May 9, 2011 at which time the Taxpayer did not appear. The Division was represented by counsel. The Taxpayer had adequate notice of the hearing since the Notice was sent by certified mail and received by the Taxpayer. See Division’s Exhibit 14 (United States Post Office tracking sheet showing Taxpayer’s receipt of Notice). As the Taxpayer chose not to appear at 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 § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, the *Division of*

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<sup>1</sup> The Division’s Notice’s case-caption indicated that this was a responsible officer matter. At the Division’s request at hearing, the “responsible officer” notation in the case-caption was struck.

*Legal Services Regulation 1 – Rules of Procedure for Administrative Hearings, and the Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01.*

### **III. ISSUE**

Whether the Taxpayer owes the tax, interest, and penalties assessed by the Division.

### **IV. MATERIAL FACTS AND TESTIMONY**

Senior Revenue Agent, testified on behalf of the Division. She testified that she performed a special investigation sales and use audit of the Taxpayer for the period of May 1, 2005 through August 31, 2008 which was when the Taxpayer ceased doing business. She testified that the Taxpayer was a convenience store that sold gas, lottery tickets, etc. She testified she reviewed the corporate records, minimal vendor invoices, and spreadsheets and the records were incomplete and the 2008 records were non-existent. She testified that she did not use a test period and the Taxpayer signed a statute of limitations waiver. See Division's Exhibit Six (6).

testified that there two (2) areas of tax liability: 1) additional taxable sales; and 2) ex-tax purchases by the Taxpayer. See Division's Exhibit Eight (8). She testified that for the additional taxable sales, she reviewed the general ledger accounts and made an estimate for each year based on the total cost of goods sold minus any Western Union sales and then added a mark-up of 30% which is an industry average to determine the estimated sales and deducted 10% to account for non-taxable sales and gave credit for any pre-paid taxes or taxes paid that year. She testified that for the ex-tax purchases, she reviewed the general ledgers for items that were not for resale and if the Taxpayer had no back-up proof that they were ex tax, she assessed tax. She testified that

for both 2008 assessments, she used the 2007 records as there were no 2008 records. See Division's Exhibit Nine (9) (general ledger accounts). She testified that a Notice of Deficiency was issued December 10, 2009 and statutory interest was assessed and a penalty imposed. See Division's Exhibits Ten (10) (interest calculation) and 11 (Notice of Deficiency). She testified that the Taxpayer provided further information so that revisions were made to the Notice of Deficiency. See Exhibit 13 (proposed audit revisions).

## 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 Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

## 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. Pursuant to R.I. Gen. Laws § 44-18-20, a use tax is imposed on the storage, use or consumption of tangible personal property. As explained in *Dart Industries, Inc. v. Clark*, 696 A.2d 306, 309 (RI 1997), “[t]he use tax . . . is a complement to Rhode Island's sales tax . . . The sales tax applies to ‘sales at retail in this state.’ (citation omitted). The use tax, in contradistinction, is imposed on ‘the storage, use, or other consumption in this state of tangible personal property.’”

## C. Whether the Taxpayers Owes Sales and Use Taxes

R.I. Gen. Laws § 44-19-27<sup>2</sup> requires every person storing or using tangible personal property in this State to keep books, records, receipts, etc. The Division’s *Sales and Use Tax Regulation* SU 89-91 further details what records must be kept and that such records must be maintained so that the Division may conduct audits and the failure to keep such records is evidence of negligence. R.I. Gen. Laws § 44-19-27.1<sup>3</sup> authorizes the

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<sup>2</sup> 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.

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(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

<sup>3</sup> 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

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

The Division conducted an audit based on the Taxpayer's available records. It is the Taxpayer's statutory and regulatory obligation to maintain all appropriate records. The Taxpayer provided further information after the initial Notice of Deficiency was issued so that revisions were made to the Notice of Deficiency. However, the Taxpayer has not provided any other evidence. Based on the records produced, the Division made an estimate of the sales and use tax owed by the Taxpayer. There has been no showing by the Taxpayer that the methodology used by the Division was improper or incorrect. See *Tax Division Decision 2000-17* (March 29, 2000) and *Tax Division Decision 2000-9* (February 15, 2000).

Pursuant to R.I. Gen. Laws § 44-18-25,<sup>4</sup> the Taxpayer has the burden to demonstrate that the Division should not impose sales and use tax. The Taxpayer did not appear at hearing and presented no evidence that the Division should not impose the sales and use tax assessment. Therefore, the Division properly assessed the Taxpayer the

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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 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.

<sup>4</sup> R.I. Gen. Laws § 44-18-25 states as follows:

Presumption that sale is for storage, use, or consumption – Resale certificate. – It is presumed that all gross receipts are subject to the sales tax, and that the use of all tangible personal property is subject to the use tax, and that all tangible personal property 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.

additional sales tax owed and the use tax owed on the ex-tax purchases. See Division's Exhibit 11 and 13 (initial Notice of Deficiency and revisions thereto).

In addition, the Division properly imposed interest on the tax assessment pursuant to R.I. Gen. Laws § 44-19-11.<sup>5</sup> The Division also properly imposed a 10% penalty on the sales tax deficiency pursuant to R.I. Gen. Laws § 44-19-12 and R.I. Gen. Laws § 44-19-14.<sup>6</sup> The statutes clearly provide that if a taxpayer does not pay a tax because of

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<sup>5</sup> 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 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.

<sup>6</sup> R.I. Gen. Laws § 44-19-12 states as follows:

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.

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.

negligence (e.g. poor records) 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.” See *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977).

## VI. FINDINGS OF FACT

1. The Notice was issued on March 16, 2011 to the Taxpayer in response to the Taxpayer’s request for hearing.
2. The hearing was held on May 9, 2011.
3. The Taxpayer received adequate notice of hearing and chose not to appear at hearing.
4. An audit was conducted by the Division on the Taxpayer for the period of May 1, 2005 through August 31, 2008.
5. The Division assessed the Taxpayer additional sales tax and use tax on ex tax purchases.
6. The Taxpayer did not make a showing that the Taxpayer did not owe sales or use tax and the Division properly assessed the Taxpayer the taxes and interest and penalties owed as set forth in the Notice of Deficiency (Division’s Exhibit 11) as revised by Division’s Exhibit 13.

## 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.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-18-1 *et seq.*
2. Pursuant to R.I. Gen. Laws § 44-18-18, R.I. Gen. Laws § 44-18-20, and R.I. Gen. Laws § 44-1-1 *et seq.*, the Taxpayer owes the sales and use tax deficiencies as




assessed by the Division in its initial Notice of Deficiency (Division Exhibit 11) and revised by Division's Exhibit 13. Pursuant to R.I. Gen. Laws § 44-19-11, R.I. Gen. Laws § 44-19-12, and R.I. Gen. Laws § 44-19-14, the Taxpayer owes the interest and penalties assessed on said deficiency.

**VIII. RECOMMENDATION**

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

Pursuant to R.I. Gen. Laws § 44-18-18, R.I. Gen. Laws § 44-18-20, and R.I. Gen. Laws § 44-1-1 *et seq.*, the Taxpayer owes the sales and use tax deficiencies as assessed by the Division in its initial Notice of Deficiency (Division's Exhibit 11) and revised by Division's Exhibit 13. Pursuant to R.I. Gen. Laws § 44-19-11, R.I. Gen. Laws § 44-19-12, and R.I. Gen. Laws § 44-19-14, the Taxpayer owes the interest and penalties assessed on said deficiency.

Date: June 28, 2011


  
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: July 23, 2011

  
David Sullivan  
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 § 44-19-18 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 28<sup>th</sup> day of July, 2011 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid and return receipt requested to the Taxpayer's address on record and by hand delivery to Linda Riordan, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

  
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