

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2012-02

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

IN THE MATTER OF: :
 :
 : **08-T-0042 (sales and use)**
 : **08-T-0043 (litter)**
 : **consolidated**
 :
Taxpayers. :

 :

DECISION

I. INTRODUCTION

On or about November 14, 2007, a Notice of Deficiency (“Notice”) relating to sales and use tax and a litter assessment was issued to (“Taxpayer”) and (“Officer”) as responsible officer by the Division of Taxation (“Division”). See Division’s Exhibit Two (2). By letter dated November 15, 2004 (sic),¹ the attorney for the Taxpayer and Officer submitted a request for hearing. On August 5, 2008, a Notice of Hearing and Appointment of Hearing Officer was issued for Taxpayer in the sales and tax matter and on same the day a Notice of Hearing and Appointment of Hearing Officer was issued to the Taxpayer on the litter assessment.

Prior to the matter going to a full hearing, the Taxpayer went into receivership. See Division’s Exhibit One (1) (February 22, 2011 Order Appointing Temporary Receiver by Superior Court). On or about September 16, 2011, the Taxpayer’s and Officer’s attorney informed the Division that he no longer represented the Taxpayer or the Officer. While tax collections activities were stayed by operation of law with the

¹ Clearly, the letter was sent in 2007 in response to the Notice.

bankruptcy proceedings, the Division informed the undersigned that the Division would still be proceeding against the Officer as a responsible officer. Thus, on September 30, 2011, a Notice of Hearing and Appointment of Hearing Officer ("RO Notice") was issued to the Officer regarding the responsible officer assessment. The RO Notice was mailed to the Officer's last known address on record with the Division and to an Enrolled Agent who had previously entered a Power of Attorney ("POA") for the Officer with the Division that had never been withdrawn. See Division's Exhibit Four (4) (said POA).

The matter was scheduled for hearing on November 3, 2011 with the RO Notice being given to the Officer at the known last known addresses. The hearing was scheduled for 9:30 a.m. and by 10:35 a.m. no one had appeared for the Officer. As there had been adequate notice of hearing, the hearing was held with the Division being represented by counsel and resting 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 § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-19-35, the *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 Officer is a responsible officer for the Taxpayer and thus, whether he is liable for the sales tax assessment issued by the Division to the Taxpayer.

IV. MATERIAL FACTS

Based on the exhibits submitted at hearing, an audit was conducted of the Taxpayer for the period April, 2001 through June, 2006. The audit found that the

Taxpayer operated a convenience store and that the Officer was the responsible officer because he filed the sales tax reports and signed the checks for the Taxpayer. See Division's Exhibit Five (5) (field audit report). The Officer also was the Taxpayer's president, vice president and treasurer. See Division's Exhibit Three (3) (Taxpayer's application for Permit to Make Sales at Retail). The audit found that the Taxpayer under-reported the sales tax it collected and that its records were unavailable for the additional three (3) year period requested so that the parties agreed to a test period. Credit was given to the Taxpayer for amounts filed with the Division. The amount billed the Taxpayer was billed as a trust fund due since the Taxpayer provided supporting documents of the sales tax it collected but remitted to the Division less than those calculations totaled. See Division's Exhibit Five (5).

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 Statute

R.I. Gen. Laws § 44-19-35 addresses the issue of who is responsible for sales and use tax trust funds. It states in part as follows:

Tax collection as property held in trust for the state. – All taxes collected by any retailer from purchasers in accordance with the provisions of chapter 18 of this title, and all taxes collected by any retailer from purchasers under color of those provisions, constitutes a trust fund for the state until paid to the tax administrator. That trust is enforceable against:

- (1) The retailer;
- (2) Any officer, agent, servant, or employee of any corporate retailer responsible for either the collection or payment, or both, of the tax.

C. The Officer is a Responsible Officer

Pursuant to R.I. Gen. Laws § 44-19-35, retailers and any officer, agent, servant, or employee of a corporate retailer responsible for either collection or payment or both of sales tax is liable for said tax. The Officer was president, vice president, and treasurer of the Taxpayer. The Officer made the sales tax reports and signed checks. The issue of a responsible officer under R.I. Gen. Laws § 44-19-35 was recently before the undersigned and was the subject of a long discussion in *Tax Administrative Decision 2011-3 (2/11/11)*.² In determining whether an individual is a responsible officer, that person's knowledge and/or involvement in a business including whether he or she could exercise authority is reviewed. In this matter, the evidence is that the Officer had a significant ownership interest in the Taxpayer and had the authority and exercised the authority to

² See <http://www.tax.ri.gov/AdministrativeDecisions/2011/2011-03.pdf>.

sign business checks and tax returns. There was no evidence introduced to demonstrate that the Officer was not a responsible officer.

D. Penalties

The Division properly imposed interest on the sales tax assessment pursuant to R.I. Gen. Laws § 44-19-11.³ In addition, the Division properly imposed a 10% penalty on the sales tax deficiency pursuant to R.I. Gen. Laws § 44-19-12.⁴ The statute 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." See *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977).

VI. FINDINGS OF FACT

1. This matter came before the undersigned as a result of a Notices of Hearing and Appointment of Hearing Officer issued to the Taxpayer as well as to the Officer as responsible officer for the Taxpayer.

³ 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.

⁴ 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.

2. A hearing was held on November 3, 2011 on the issue of whether the Officer was a responsible officer of the Taxpayer. The Officer did not appear at hearing despite being adequately noticed of hearing. The Division rested on the record.

3. The sales tax assessment against the Taxpayer was not disputed.

4. 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.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-19-35.

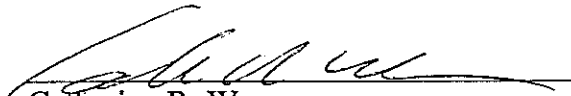
2. Pursuant to R.I. Gen. Laws § 44-19-35, R.I. Gen. Laws § 44-19-11, and R.I. Gen. Laws § 44-19-12, the Officer is a responsible officer and is liable for the assessed sales taxes and the assessed interest and penalties against the Taxpayer. See Division's Exhibit Two (2) (Notices of Deficiency).

VIII. RECOMMENDATION

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

The Taxpayer did not make a showing that he was not a responsible officer. Pursuant to R.I. Gen. Laws § 44-19-35, the Taxpayer is a responsible officer and is liable for the assessed sales tax in the Notice of Deficiency and pursuant to R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-12, the assessed interest and penalty. See Division's Exhibit Two (2).

Date: 12/1/11

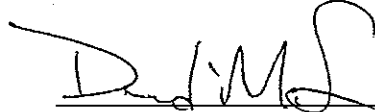

Catherine R. Warren
Hearing Officer

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: Jan 19, 2012



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 19th day of January, 2012 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 Taxpayers' address on file with the Division of Taxation and by hand delivery to Bernard Lemos, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

