STATE OF RHODE ISLAND

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2021-09

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

IN THE MATTER OF:	:	**Case No. 18-T-016**
	:	**sales and other tobacco products**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Pre-Hearing Conference and Appointment of Hearing Officer ("Notice") issued on February 16, 2018 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to a request for hearing in relation to a sales tax audit. On May 1, 2019, the Division issued a notice of deficiency to the Taxpayer in relation to other tobacco products ("OTP") tax. The Taxpayer requested a hearing on the 2019 notice of deficiency, and that matter was consolidated with the initial matter. A hearing was held on May 19 and June 8, 2021. The parties were represented by counsel. The parties timely filed briefs by October 4, 2021.

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 and assessed other tobacco products tax.

III. MATERIAL FACTS AND TESTIMONY

The parties filed a partial agreed stipulation of facts and exhibits which is summarized as follows:[1]

1. The Taxpayer is a for profit domestic corporation that was incorporated under the laws of Rhode Island and qualified to do business in Rhode Island in 2009 with its principal place of business in Rhode Island. It is a convenience store where it makes retail sales of both taxable and non-taxable items, including cigarettes, other tobacco products, and accessories. It has continually held a permit to make sales at retail and a cigarette dealer's license since 2010. Exhibits One (1) (secretary of state filings-annual corporate reports); Two (2) (business application and registration from 2010); and Three (3) (permit and dealer's license).

2. During calendar years 2011 through 2014 inclusive, the Taxpayer had a history of routinely filing sales tax returns with the Division. Exhibit Six (6) (transcript of filing history and sample sales tax returns, diverse dates from 2012 and 2013). The Taxpayer has no history of filing or remitting taxes to the Division on Form OTP-4 (the OTP Tax) during the taxable period March 31, 2011 through June 30, 2014, inclusive.

3. On January 21, 2014, the Division notified the Taxpayer that it had been selected for verification and audit of all taxes for which it had a filing requirement. This audit notice originally requested various records for periods ranging from March 1, 2011 through current date (then January, 2014) (initial contact letter dated 1/21/14 with original record request).

4. In July, 2014, a sales and use tax audit of the Taxpayer commenced for the period March 1, 2011 through June 30, 2014 ("Audit Period"). A statute of limitations waiver was secured for this audit on July 21, 2014. Exhibit Eight (8) (sales and use tax waiver). The field work for this audit was conducted at the offices of the Taxpayer's accountant ("CPA") and authorized power of attorney ("POA") in Rhode Island. Exhibit Nine (9) (POA for CPA dated 4/28/14).

5. Due to the volume of records, portions of the audit, specifically purchases of supply and expense items plus sales data, were reviewed on the basis of test sampling using a test period of October 1, 2012 through December 31, 2012. Exhibit Ten (10) (revised record request list seeking 10/1/12 through 12/31/12). Additionally, portions of the Taxpayer's records were provided to the auditor for review at the Division. Exhibit 11 (receipt/return of records dated 11/24/15 for receipt).

6. Record production was slow, piecemeal and intermittent. The Taxpayer had sustained several casualty and theft losses to its business premises during the Audit Period and in the years thereafter. Exhibit 12 (insurance policies and claim documents, diverse dates).

7. As a result of this examination, the Division's auditor originally derived a total taxable measure as contained in Exhibit 13 (summary of differences-original) which was

[1] For the entire partial stipulation, see partial stipulation of facts and exhibits filed June 8, 2021.

comprised of a single area of sales tax liability (additional taxable sales). Exhibit 14 (schedule 1: additional taxable sales-original).

8. The following documentary exhibits were used, referenced, or reviewed in the computation of additional taxable sales: Exhibit 14 at columns A, E, F, G, and J; Exhibit 15 (2012 dome book); Exhibit 16 (memo 1: cigarette sales analysis); Exhibit 17 (HLA statements from March 2011 to June 2014); Exhibit 18 (memo 2: purchase analysis); Exhibit 19 (memo 2A: taxable percent of non-cigarette purchases); Exhibit 20 (memo 2B: percentage of EBT sales); Exhibit 21 (memo 2C: clerks' register summaries); Exhibit 22 (memo 2D: Z tape register report); Exhibit 23 (memo 3: sales tax remitted); Exhibit 24 (memo 4: bank deposit analysis); Exhibit 26 (memo 6: analysis of corporate returns); and Exhibit 27 (memo 7: gross receipts analysis).

9. A closing conference was held on November 2, 2016. A signed audit workpaper receipt and the signed return of records were obtained. Exhibits 28 (audit workpaper receipt) and 11 (return of records). The Taxpayer did not sign a test period agreement at the closing conference.

10. On December 6, 2016, a sales and use tax deficiency notice issued against the Taxpayer seeking additional sales tax of , statutory interest of , a negligence penalty of , for a total assessment of Exhibits 31 (interest calculation worksheet) and 32 (sales tax notice of deficiency determination).

11. By letter dated November 8, 2016, the Taxpayer filed a written request for an administrative hearing to dispute the audit findings. On March 2, 2017, the Taxpayer retained attorneys to represent it before the Division. A preliminary conference was held but no resolution was reached so it was referred for a formal hearing in January, 2018. Exhibits 30, and 33 to 36.

12. As a result of the prehearing conferences, additional records were produced by the Taxpayer to the Division during April, May, and June of 2018. Exhibit 37 (receipt/return of records). The Taxpayer produced, *inter alia*, an additional dome book (Exhibit 38 (2014 dome book)); additional statements from licensed cigarette distributors (Exhibit 39); additional sales tax returns (Exhibit 40 (2014 sales tax returns)); samples of the clerks' daily register reports showing lottery receipts and cash payouts (Exhibit 41); and the 2014 federal corporate return (Exhibit 42 (2014 US Form 1120)).

13. Insofar as most of the above original records related to 2014 and the Taxpayer requested an expansion of test period sampling, the original audit findings were re-examined and recomputed by incorporating findings from an additional test period of January 1, 2014 through June 30, 2014 inclusive. Exhibits 43 (undated/unsigned test period agreement) and 44 (schedule 1: additional taxable sales-comparison of two test period results)

14. On June 12, 2019, the Division revised its schedule 1: analysis of additional taxable sales, which showed a new total taxable measure. Exhibit 45 (schedule 1 revised).

15. The sales and use tax deficiency was revised on June 12, 2019 to seek additional sales tax , statutory interests of and negligence penalty of for a total assessment of . Exhibit 46 (interest calculation worksheet-revised).

16. The auditor also conducted a review of the Taxpayer's records for compliance with the Other Tobacco Products (OTP) tax during the Audit Period and determined a taxable measure of in tax. Exhibit 47 (schedule 1: OTP tax).

17. The parties agreed the following documentary exhibits were used, referenced, or reviewed in the computation of the OTP tax measure: Exhibit 47 at columns A, B, C, and D; Exhibit 48 (memo 1A: OTP tax assessment from dome books); Exhibit 49 (Taxpayer checks payable to Exhibit 50 (email from POA to auditor dated 4/4/08); Exhibit 51 (press releases of 1/14/16 and 7/14/17 from U.S. Attorney for Massachusetts); Exhibit 52 (final order of forfeiture in *United States v. Raza, et al.*); Exhibit 53 (memo 1B: tobacco purchases assessed from invoices); and Exhibit 54 invoices with payment annotations, diverse dates).

18. On May 1, 2019, an OTP tax deficiency notice issued against the Taxpayer seeking additional OTP tax of , statutory interest of for a total assessment of Exhibits 55 (interest calculation worksheet dated 4/23/19) and 56 (OTP deficiency).

19. On May 23, 2019, the Division provided the Taxpayer with audit workpapers relating to the OTP audit. By letter dated May 23, 2019, the Taxpayer filed a written request with the Division for administrative hearing to dispute the OTP tax audit findings. Exhibits 57 and 58.

20. Previously, on December 21, 2012, the Taxpayer was issued a deficiency notice for additional tax and penalties under the cigarette tax law which was upheld after an administrative hearing but upon appeal to the District Court, one penalty was abated. Exhibits 59 (deficiency) and 60 (stipulation of dismissal entered by District Court on 6/1/15).

("Auditor"), Senior Revenue Agent, testified on behalf of the Division. He testified that he initially audited the Taxpayer for sales and use tax and then the audit was expanded to cover all taxes that applied to the Taxpayer. He testified the Taxpayer routinely filed sales tax with the Division but usually reported zero for a month or negative credit. He testified the audit was a special investigation since the Taxpayer was reporting monthly that it was collecting less sales tax than the Taxpayer's prepaid cigarette tax (which is designed to cover sales tax for cigarettes sold each month). He testified that based on that difference, it looked as if the Taxpayer could be understating its sales tax. Exhibit Six (6) (sales tax filing history).

The Auditor testified that a dome book is a business' ledger of its sales and expenses and pay-outs, and includes receivables, sales tax, and purchases of items that are being sold for re-sale and expenditures for utilities and insurance, etc. He testified that for the audit he reviewed the

Taxpayer's dome books and its entries against register receipts and the clerk's daily summaries. He testified the clerk's summaries show the taxable sales and sales tax collected and how much money was in the drawer. He testified that for example the 2012 dome book (Exhibit 15) has the expenditures for materials and wages in the back for each week and sales and purchases. He testified that he obtained the sales' figures from the dome book and also looked at expenditures and what was purchased during the audit period. He testified that the register tapes show pay-outs and sometimes those could be reconciled with vendor slips and cash notations in the dome book. He testified that he reviewed various items and based on the dome book and the register tapes, he was able to correlate some of the payments from the dome book and who they went to.

The Auditor testified that for his initial analysis of additional taxable sales for the Audit Period (Exhibit 14), he included the sales from the dome book. He testified that electronic benefit transfers ("EBT") are not taxable, and he was able to determine EBT sales from the register tapes and clerk summaries. He testified that he determined what percentage of sales represented EBT sales and then applied that percentage to each month's sales in order to deduct EBT sales from sales as EBT sales are not taxable. He testified that he determined cigarette sales from the Taxpayer's purchases from cigarette vendors (Exhibit 16). He testified that he calculated the sales tax owed for cigarettes and gave credit for prepaid cigarette tax. He testified that he analyzed other sales such as food products which are not taxable and other items that could be taxable. He testified that he came up with a percentage of 60% of taxable sales which he applied against the dome book sales less the EBT and cigarettes and that represents the total taxable amount. He testified cigarette sales were then added back in and that was multiplied by seven (7) percent which is the tax due. He testified credit was given for any tax paid already and prepaid cigarette tax so that overall total represented the additional sales tax due. Exhibit 14, column J.

The Auditor testified that the dome book sales pretty much matched the Taxpayer's 1120. He testified that since the bank records were incomplete, he could not do a complete gross sales analysis, so he relied on the dome book. He testified there was for which there were no records so that was assumed to be all taxable. Exhibit 19. He testified that after the hearing started, the Taxpayer asked to extend the test period, so he did an analysis for six (6) months in 2014 and he had better information in that he had the actual EBT sales and the actual prepaid cigarette tax from the vendors. He testified the same calculations were done for the second period as the first period and the two (2) test periods were merged together and those percentages were then applied to the rest of the Audit Period and that represents the additional sales tax due. Exhibit 45.

The Auditor testified that he also performed an OTP audit. Exhibit 47. He testified that the dome book showed payments to but there were no invoices from them. He testified the Division received information from Massachusetts that were convicted in Massachusetts for an illegal, untaxed tobacco operation that sold to convenience stores under the name of . He testified that there were payments in the dome book to them; though, there were also payments to another individual named He testified that the Taxpayer was able to provide invoices for the connected to . from which taxable but not tobacco related purchases were made by the Taxpayer. He testified the was ruled out. He testified that the Taxpayer never provided invoices for He testified that the Taxpayer made out many checks to during the Audit Period. Exhibit 49. He testified that Exhibit 53 is a summary of the products that were bought from a vendor that the parties referred to as the invoices. Exhibit 54 (invoices). He testified that there were records of pay outs in the register tapes, checks, and dome books. He testified that Exhibit

47 lists the payments made separately to and the total amount of OTP purchased.

On cross-examination, the Auditor testified that the Taxpayer did not have a taxable list of items sold, and items were just rung up by the clerk at the register. He testified that the register tapes were available to him but do not show what was sold but only if the sale was taxable or not. He testified that he looked at the Taxpayer's purchases and took a percentage of taxable and non-taxable purchases and applied it to the Taxpayer's sales. He testified that he was able to expand on the EBT sales with the revised audit. He testified that he used test periods but did not obtain test period agreements from the Taxpayer. He testified his knowledge about came from a press release. He testified that the only OTP invoices he had were the invoices. He testified that the Division requested invoices from the Taxpayer about but never received any invoices or any substantial information from the Taxpayer about any of them. He testified that he assumed all those payments were for OTP because there was no information to think otherwise. On re-direct examination, he testified that he checked whether held Rhode Island tobacco licenses, and they did not and none of them remitted OTP tax to Rhode Island.

Tax Investigator, testified on behalf of the Division. He testified that he reviewed the invoices to identify OTP items and identified OTP such as various cigarillos and roll ups. There was no cross-examination. The Taxpayer agreed that the invoices contained OTP.

("Owner") testified on behalf of the Taxpayer. He testified that he has owned the Taxpayer since 2010. He testified that during the Audit Period, he worked at the store as well as another employee, and they both bought products such as cigarettes, bread, milk, and candy that

were sold at the store. He testified that for tobacco products, they would buy from tobacco distributors. He testified sometimes they would buy tobacco products from closed stores. He testified that he collected sales tax on items and kept his business records in the basement.

The Owner testified that he keeps a daily report and a dome book. He testified that the daily reports are used to prepare other records such as dome books. He testified that the 2012 dome book shows the wages, deposits, sales, and payments to tobacco vendors. Exhibit 15. He testified that he lost business records for the Audit Period due to a flood. Exhibit 12 (various insurance claims). He testified Exhibit 19 lists various products that he has purchased. He testified that that are listed represent telephone cards that he purchased. He testified that he bought pipes such as hookahs and bongs from who owns [2] He testified that sold pipes, hookahs, bongs, toilet paper, and plastic plates, etc. He testified that it is his signature on the checks and that some checks have a notation for groceries or pipes, but not all checks have a notation of what was bought. He testified that he bought products from a because his store had closed so he could get a deal from him. He testified that the invoices are a list of purchases from closed store. He testified that most of Exhibit 49 are checks to , but he was not buying tobacco products from there but rather other products such as pipes, groceries, candy, and toilet paper. He testified that he had tobacco seized [in 2012] by the Division, but since then, he has not had any other seizures.

On cross-examination, the Owner testified that his CPA filed his sales tax returns and he, the Owner, would sign them. He testified that the invoices represent items that he bought and paid for by check or cash. He testified that the items included tobacco products for which he did not pay tax as he bought them from a closed store and the store had already paid the tax. He

[2] The Division represented that various tobacco pipes would not be taxable as OTP.

testified that he bought items from closed stores because he can obtain them at a discount. He testified owned more than one (1) closed store. He testified that he did not buy tobacco from and that he did not know the owner and principals were convicted of trafficking cigarettes until he read about it on social media and in the newspaper. He testified that he had invoices for products, but they got destroyed in the flood on March 30, 2015, and he knows that the Division only assessed for the checks. He testified that the Division requested records for the audit by letter dated January 21, 2014, and he gave his records to his CPA. Exhibit Seven (7). He testified that he gave whatever records he had to his CPA. He testified that most of the records are from 2012-2013 so before the 2015 flooding.

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 § 44-18-25[3] 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 § 44-19-27[4] requires every person storing or using tangible personal property in this State to keep books,

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[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. It was amended in 2011 and 2012 during the Audit Period. Neither amendments were relevant to the issues in this matter. The 2011 amendment related to pre-written code and inserted a provision regarding scenic tours which was deleted by the 2012 amendment. The 2012 amendment also added the provision regarding R.I. Gen. Laws § 44-18-7.3. See P.L. 2011, ch. 151, art. 19, § 24; and P.L. 2012, ch. 241, art. 21, § 3. The statute was further amended in 2018 and 2019 in relation to vendor-hosted prewritten computer software. 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.
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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.

records, receipts, etc. R.I. Gen. Laws § 44-19-27.1[5] authorizes the 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'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 records regulation at the time of the Audit Period includes 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.
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> 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.
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> (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.
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[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 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.

Rule 6 Requirement for Record Retention
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(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]

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." At the start of the Audit Period, R.I. Gen. Laws § 44-20-13.2 provided as follows:

> Tax imposed on smokeless tobacco, cigars, and pipe tobacco products. —(a) A tax is imposed on all 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 administration. Any tobacco product on which the proper amount of tax provided for in this chapter has been paid, payment being evidenced by a stamp, is not subject to a further tax under this chapter. The tax imposed by this section shall be as follows:
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> (1) At the rate of eighty percent (80%) of the wholesale cost of cigars, pipe tobacco products and smokeless tobacco other than snuff.
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> (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.
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> (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.
>
> (b) The proceeds collected are paid into the general fund.
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> P.L. 2009, ch. 5, art. 9, § 8,

By P.L. 2012, ch. 241, art. 21, § 6 (effective July 1, 2012), R.I. Gen. Laws § 44-20-13.2 was amended to add the following as section (b) (with (b) becoming (c)):

> Any dealer having in his or her possession any tobacco, cigars, and pipe tobacco products with respect to the storage or use of which a tax is imposed by this section shall, within five (5) days after coming into possession of the tobacco, cigars, and pipe tobacco in this state, file a return with the tax administrator in a form prescribed by the

[6] SU 13-91 was amended during the audit period. Prior to SU 13-91 which became effective on May 1, 2013, the Division had *Sales and Use Tax Regulation* SU 11-91 *Records Requirements* which replaced the Division's *Sales and Use Tax Regulation* SU 89-91 *Records Requirements* on December 1, 2011. Consistent with the statutory requirements, the three (3) versions of this regulation in effect during the Audit Period all require the keeping of bills, receipts, invoices, cash register tapes, and documents of original entry supporting the entries in the books of account. All versions include the provision in Rule 6 of SU 13-91 that the failure to maintain such records will be considered evidence of negligence or intent to evade tax and will result in the imposition of appropriate penalties as provided by statute, and that the records shall be maintained for three (3) years.

tax administrator. The return shall be accompanied by a payment of the amount of the tax shown on the form to be due. Records required under this section shall be preserved on the premises described in the relevant license in such a manner as to ensure permanency and accessibility for inspection at reasonable hours by authorized personnel of the administrator.

C. Arguments

The Division argued that the sales tax assessment should be upheld since the Taxpayer did not sustain its burden of proof to rebut the resumption of taxability under R.I. Gen. Laws § 44-18-25, and that it has the statutory authority to determine the amount of tax owed on the basis of any information in the Division's possession. The Division argued that it was not credible that a flood that occurred more than one (1) year after the initial request by the Division for business records from the Taxpayer for the audit caused the Taxpayer to lose its invoices.

The Taxpayer argued that the Division included non-taxable items like telephone cards in its audit calculation. The Taxpayer argued that the Owner credibly testified that its purchases from were not for taxable tobacco products but were groceries and various types of non-taxable pipes. The Taxpayer argued that the Owner turned his records over to the Taxpayer's CPA, and it is credible that he lost the relevant records in the basement flood.

D. The Taxpayer's Records

By letter dated January 21, 2014, the Division contacted the Taxpayer to inform the Taxpayer it had been selected for audit and requested various records for March 1, 2011 through January, 2014. The sales and use audit began in July, 2014. The Taxpayer signed a statute of limitations waiver on July 21, 2014. The field audit was conducted at the Taxpayer's CPA's office who filed a POA dated April 28, 2014. The Division reviewed the records on the basis of a test period so that the Division sought certain records for 2012. Exhibit Ten (10). The parties agreed that the Taxpayer produced its records slowly and piecemeal. The Taxpayer was missing invoices

that would have backed up its checks. Thus, while the Division was able to review amounts spent by the Taxpayer, it did not have documentary evidence of what the amounts were spent on.

The Owner testified that at the time that the audit began, he gave all of his records to his CPA for the audit. He testified whatever records he had at that time, he gave them to the CPA. The Auditor testified he did not get all of the records that he requested. He testified that he did not receive bank statements and some of the purchase invoices were missing. He testified that the records that he received were largely complete. He testified that he performed the audit at the CPA's office but took some records back to the Division. The Division requested purchase invoices as well as other records by letter dated January 21, 2014.

The Owner testified that he had records in his basement that were destroyed by a flood in March, 2015. The Taxpayer blamed that destruction of records for why the purchase invoices were not produced. In fact, the Taxpayer argued that it did not know of the missing critical

invoices until 2017 when the Owner returned to the country after requesting a hearing by letter November 8, 2016. Exhibit 30 (letter requesting hearing). The Taxpayer also asserted that the Division took possession of the records on November 24, 2015 so after the flood which could be why the records were missing. Exhibit 11. However, the Owner testified all records were given to the CPA from whom the Division took possession of the records.

The Taxpayer argued that when it learned of the missing records in 2017, it was beyond the three (3) year period required for the keeping of records, so it did not have any obligation to maintain the records. Further, the Taxpayer argued that by the time the Division took possession of the records in November, 2015, it was past the three (3) year period for the maintenance of the records for the first test period and that by the time the Division agreed to do another test period in 2018, it was long past the three (3) year period for maintaining records.

On July 21, 2014, the Taxpayer's CPA signed a waiver of the sales and use period of limitation for issuing a deficiency in R.I. Gen. Laws § 44-19-13. In 2014, the Taxpayer was still obligated by regulation to maintain all records from 2011 to 2014 including invoices. The Owner testified that he gave all the records to the CPA. The audit was performed at the CPA's office. If for some reason the Owner kept the invoices in his basement in 2015 which had been requested for the audit in 2014, those records got destroyed. The Taxpayer cannot claim that because he did not understand until 2017 why the invoices were needed that somehow that absolves the Taxpayer of its statutory and regulatory obligation to maintain the invoices in 2014 and produce them at the time of the audit.

E. 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. See R.I. Gen. Laws § 8-8-28 and *DeBlois v. Clark*, 764 A.2d 727 (R.I. 2003).

The Taxpayer challenged the Division's audit. The Taxpayer represented that the Division used an indirect audit method by reviewing the Taxpayer's purchases and applying a percentage of taxable purchases to the Taxpayer's sales. The Taxpayer argued that the Division included items in its review that should not be considered taxable. The Taxpayer argued that the Division included telephone cards from the dome book , as well as purchases from and that any reference to purchases from should be assumed to be from and not the associate, (different spelling). The Taxpayer argued that the Owner testified that the purchases from were not OTP but rather were

groceries or pipes so were a mix of taxable and non-taxable items. The Taxpayer argued that based on the telephone cards, from , and the purchases, the entire amount of the dome book should not have been included in the Division's calculations.

The majority of the checks had no notations on them for what the purchases purported to be. The Owner testified that they were for groceries or for various tobacco pipes. However, the Taxpayer was unable to produce invoices showing that the items purchased were not taxable. The Division did remove some of the checks from the OTP audit upon showing that they were to at Exhibits 47 and 48.[7] The Taxpayer argued that the Division should not have included telephone cards in its audits, but it produced no documentation to show what were telephone cards.

The Auditor testified as to how he calculated the sales tax owed by the Taxpayer based on the available records subject to the test period. The Division's methodology is based on the records that were available as to purchases and sales. On the basis of those records, the Division determined a ratio of taxable and non-taxable items.

As stated above, by statute, a taxpayer is liable for sales and by statute, a taxpayer must keep certain records. The Division has promulgated regulations[8] 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

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[7] In its reply brief, the Taxpayer argued that other checks should not have been included as OTP from as the checks were made to but noted as payable to in the dome book. The Division removed from OTP checks to that it identified as checks. Without supporting documentation (invoices), the Division used the information in its possession so that checks that appeared to go to were considered OTP.

[8] 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.

and R.I. Gen. Laws § 44-19-14.[9] Such audits where there were few or no records have been the subject of prior administrative decisions which have found that assessments are to be made on the available evidence.[10]

The Taxpayer questioned the Division's audit methodology of using a three (3) month "test" period arguing that the Division may only make an estimate where a taxpayer failed to file regular reports. While R.I. Gen. Laws § 44-19-14 authorizes estimates to be made when a taxpayer fails to file a return, R.I. Gen. Laws 44-19-11 authorizes that estimates can be made when the

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[9] 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.

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.

[10] In a 2003 Division administrative decision (2003 WL 23105231), an audit found *ex tax* purchases by a taxpayer of supplies and expenses. The auditor reviewed that taxpayer's depreciation schedules and purchase invoices. 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 that 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).

Division is not satisfied with a return or returns or amount paid and may compute the amount owed on the basis of a return, returns, or any information in the possession of the Division. The Taxpayer raised the issue of the use of a test period citing to a 1988 Division administrative decision, 1988 WL 220520, which referenced that signed test agreements are used when the records are available but too voluminous to review them all. Said decision also mentioned that the second use of a test period is when there are no records available to provide a fair analysis of a taxpayer's liability. From there, the Taxpayer argued that if any part of the liability is upheld, it should be limited to actual records reviewed. Here, the Division was not satisfied with the amount paid. Indeed, the Auditor testified that there was a discrepancy between the amount listed on the Taxpayer's monthly sales returns and prepaid cigarette tax which caused the original special audit. When the Division is not satisfied with the amount paid, the Division may make an estimate on any information in its possession. In this matter, the Division made an estimate on the basis of information in its possession. The Taxpayer requested an expansion of the test period. See agreed statement of facts. While there may not be a test period agreement signed by the parties, the test periods used by the Division are authorized by statute and were agreed to by the Taxpayer.

In this matter, the Taxpayer did not have the requisite records demonstrating what products had been purchased and sold or what sales tax had been collected and/or charged. A taxpayer must overcome the presumption of taxability to the satisfaction of the Tax Administrator. A presumption of taxability cannot be overcome by inference and testimony without some kind of back up documentary materials for each specific payment.[11] To find otherwise would render the recordkeeping statute and presumption of taxability statute as well as the regulations meaningless.

[11] A prior Division administrative decision has found that since the law is clear in requiring specific records to be kept, it cannot be the intent to require a hearing officer to accept just the bare testimony of a taxpayer's business dealings. See 1990 WL 204412.

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. There has been no showing by the Taxpayer that the Division's methodology was improper or incorrect. 2010 WL 3948095 (Division administrative decision). See also Division administrative decisions, 2017 WL 1946578 (audit based on available records); 2000 WL 567589 (strict record keeping requirements; cannot estimate); and 2000 WL 307472 (tax assessed on actual records; not oral testimony).

F. Interest and Penalty on the Sales Tax Assessment

The Division properly imposed interest on the additional 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 § 44-19-12[12] and R.I. Gen. Laws § 44-19-14.

R.I. Gen. 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. If a taxpayer purposely avoids paying a tax through fraud (e.g. false records) or has an actual intent to evade tax (e.g. knowing that a tax is owed and taking steps to avoid paying), then the penalty is 50%. In other words, if a taxpayer negligently (e.g. doesn't pay tax because records are poorly maintained) or just does not pays a tax, a 10% penalty is added. That penalty is not discretionary because the statute provides that the penalty "is" to be added rather than "may be added."

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[12] R.I. Gen. Laws § 44-19-12 provides 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.

This interpretation of the two (2) different standards for the imposition of a penalty for the non-payment of tax is consistent with the Rhode Island Supreme Court's ruling in *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977). *Brier* found that R.I. Gen. Laws § 44-19-12 does not provide any authority to waive a penalty even when the taxpayer has a good-faith, though erroneous, belief that certain property is not subject to tax. *Brier* held as follows:

> The statute identifies no exception to its provisions in circumstances where the taxpayer has a good-faith, albeit erroneous, belief that certain property is not subject to tax liability. The operative language of s (sic) 44-19-12 is clear and unambiguous and imposes a penalty upon an intentional but nonfraudulent avoidance of the tax. Western Elec. v. Weed, supra. [185 Colo. 340, 524 P.2d 1369 (1974)] The taxpayer's remedy in the event that he disputes a portion of his liability is to pay the tax and then seek a refund pursuant to the appropriate statute. *Id.* at 350.

The 10% penalty is for intentional but non-fraudulent disregard of the law requiring the payment of a tax.[13] This interpretation is consistent with R.I. Gen. Laws § 44-1-10[14] which grants the Tax Administrator the authority to settle and compromise tax, excise, fee, penalties, or interest. The penalty is to be assessed and is only waived as part of a compromise between a taxpayer and the Tax Administrator. Therefore, the statutory scheme is that a notice of deficiency is issued with interest calculated on the deficiency amount exclusive of penalties. See R.I. Gen. Laws § 44-19-11. A penalty is added to the deficiency based on whether the taxpayer has negligently or

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[13] Thus the 10% penalty is for the intent to do an act: the nonpayment of tax. There is no requirement that the taxpayer purposely avoided a tax that the taxpayer knew he/she/it owed. The distinction between the types of intent is analogous to the definition of "willfully" in the context of another Rhode Island licensing statute, the Rhode Island Securities Act, R.I. Gen. Laws § 7-11-101(25), which defines "willfully" as "intentionally committing the act which constitutes a violation: there being no requirement that the actor also be aware that he or she is violating any provision of this chapter or any rule or order under this chapter." Thus, the act just needs to be completed rather than the intent to violate the statute. Similarly, in this situation the intent to purposely avoid the tax and violate the law results in a 50% penalty. The intent to just not pay a tax – even based on good faith belief – results in a 10% penalty. See definition of "willful" in *Black's Law Dictionary* (9th Ed. 2009).

[14] R.I. Gen. Laws § 44-1-10 states as follows:

> Compromise or abatement of uncollectible or excessive taxes. –Whenever the tax administrator determines that any tax, excise, fee, penalty, interest, or other charge payable to the tax administrator is un-collectible, illegal, or excessive, in whole or in part, the tax administrator may, with the approval of the director of revenue, compromise, abate, or cancel the charge, as the circumstances may warrant.

intentionally not paid the tax *or* whether the taxpayer committed fraud or intentionally evaded the tax. A penalty "is" to be assessed on the basis of either scenario.

The records regulations at the time of the audit (*supra*) provided that the lack of records would be considered evidence of negligence. The Taxpayer argued that a negligence penalty should not be imposed as it was not negligent in relation to its records and its reliance on its CPA. The Taxpayer did not produce all of its records when requested in 2014. The Owner testified that he turned over all records to his CPA in 2014. The Taxpayer produced its record in piecemeal fashion. The Taxpayer blamed a 2015 flood on the fact that it could not produce invoices. However, the records requested should have been produced in 2014. Such evidence indicated poor record keeping and negligence. However, even if for some reason poor record keeping was not found, the penalty is still imposed by statute for failure to pay tax.

G. Whether the Taxpayer Owes the Assessed Other Tobacco Products Tax

The Taxpayer argued it did not owe any of the assessed OTP tax because of the Owner's testimony that all purchases from were either for groceries or non-taxable pipes. However, the Taxpayer did not produce any documentation to support this testimony. The Division argued that the Taxpayer failed to comply with 280-RICR-20-15-2, *Other Tobacco Products* regulation. The Taxpayer also cited to this regulation. However, that regulation was adopted and effective August 1, 2014.[15] Thus, it was not in effect at the time of the Audit Period. Effective July 1, 2012, R.I. Gen. Laws § 44-20-13.2(b) requires that records shall be preserved on the premises to allow for permanency and availability for inspection by the Division. The statute refers to records required under this section. Indeed, the District Court has found that R.I. Gen. Laws § 44-20-13.2(b) requires that any dealer having OTP in its possession shall preserve records

[15] https://rules.sos.ri.gov/regulations/part/280-20-15-2.

in a manner as to ensure permanency and accessibility for inspection. *Pasha Lounge, Inc. v. Department of Revenue, et al.*, A.A. No. 17-121 (District Crt. 6th Div. 12/9/19).

While the 2014 OTP regulation fleshed out the type of records to be kept for OTP, the fact is the statute requires records be kept for inspection so that the Taxpayer was already obligated to maintain OTP records. R.I. Gen. Laws § 44-19-27 requires every person storing or using tangible personal property to keep books, records, receipts, etc. *Supra.* SU 13-91 (and its predecessors) required all retailers to keep certain records such as invoices. *Supra.* The Taxpayer had no invoices to support its testimony that the purchases were not taxable OTP. In contrast, the Division had information that sold untaxed tobacco products to convenience stores, and the Taxpayer purchased items from to sell.

The Owner admitted that the invoices were OTP products that he purchased from convenience stores that were going out of business. He testified that he was able to buy OTP at a discount, and the seller (out of business retailer) would have already paid OTP tax. The Division argued that based on the discounted amount charged the Owner[16] compared to the amount of tax that should have been already paid by the seller on OTP (80% *supra*), it was unlikely that the out of business retailer had already paid OTP tax on those items sold to the Taxpayer. The Taxpayer asserted that it purchased the OTP at retail and had no obligation to maintain its records at the time of the OTP audit in 2018 as it was more than three (3) years from the date of purchase. The Owner's testimony showed that he purchased the OTP for the purposes of selling it in his store.[17]

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[16] The Owner testified that he would be given a 40% to 50% discount. June 8, 2021 transcript at 59.

[17] The seller of the OTP to the Taxpayer was not a licensed tobacco distributor. Even if that retail seller had paid tax on the OTP, the Taxpayer was still purchasing the OTP for sale so under the statute owes OTP.

Pursuant to R.I. Gen. Laws § 44-20-13.2, tax is to be paid on OTP. Pursuant to R.I. Gen. Laws § 44-20-13.2(a), the Taxpayer was holding OTP - and - for sale in the State of Rhode Island and therefore, tax was imposed. Pursuant to R.I. Gen. Laws § 44-20-13.2(b) (effective July 1, 2012), the Taxpayer was to file with the Division a tax return for OTP within five (5) days after coming into possession of the OTP. There was no evidence that the Taxpayer ever paid the OTP tax and/or filed a tax return for any of the OTP or OTP purchased at any time during the Audit Period.[18] Thus, the Taxpayer owes the OTP tax for the and OTP.[19]

H. Interest and Penalty

The Division imposed interest on the OTP deficiency. Exhibit 56. R.I Gen Laws § 44-1-7[20] provides that interest shall be imposed on any tax not paid when due and payable.

The Division's notice of deficiency for OTP did not include a penalty. However, this is erroneous as a penalty was required under the statute in effect at the time of the audit.

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[18] The parties agreed that the Taxpayer never filed Form OTP-4 (OTP tax) from March 31, 2011 to June 30, 2014.

[19] The Taxpayer argued that its prior administrative matter with the Division related to a seizure of products in November, 2012 so if it had been purchasing OTP in the Fall of 2012, the amount of tobacco products seized in November, 2012 would have been much more than actually was seized. The Taxpayer also argued that it makes no sense that it would be selling OTP for which it did not pay tax while it was in hearing with the Division. The undersigned will not speculate as to what OTP may or may not have been sold by the Taxpayer prior to the November, 2012 seizure nor will she engage in speculation of what products the Taxpayer may have decided to purchase while appealing its 2012 seizure. It is noted that the 2012 seizure did not relate to OTP but rather to cigarettes (rolling paper). Administrative Notice Item C (1/30/14 administrative decision).

[20] R.I. Gen. Laws § 44-1-7 provides in part as follows:

> Interest on delinquent payments. (a) Whenever the full amount of any state tax or any portion or deficiency, as finally determined by the tax administrator, has not been paid on the date when it is due and payable, whether the time has been extended or not, there shall be added as part of the tax or portion or deficiency interest at the rate as determined in accordance with subsection (b) of this section, notwithstanding any general or specific statute to the contrary.
>
> (b) Each January 1 the tax administrator shall compute the rate of interest to be in effect for that calendar year by adding two percent (2%) to the prime rate, which was in effect on October 1 of the preceding year. In no event shall the rate of interest exceed twenty-one percent (21%) per annum nor be less than eighteen percent (18%) per annum. ***

Prior to June 23, 2014, R.I. Gen. Laws § 44-20-51.1 provided as follows:

> Civil Penalties
>
> (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 to a penalty of one thousand dollars ($ 1,000), or five (5) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action.
>
> (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 to a penalty of five (5) times the tax due but unpaid.[21]

The statutory penalties prior to 2014 were mandatory.[22] In an OTP audit case that covered the years 2012 through 2016, the administrative decision imposed penalties on the OTP using the statute in effect for the period prior to June 23, 2014 and then used the new statute for the period afterwards. See administrative decision 2017 WL 4707711. That taxpayer appealed to District Court. The District Court found the old statute provided for mandatory penalties and should be applied to the relevant time period in the audit. The District Court found the new statute was prospective. *Pasha Lounge, Inc.*

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[21] After June 23, 2014, R.I. Gen. Laws § 44-20-51.1 provides as follows:

> Civil penalties. – (a) Whoever omits, neglects, or refuses to comply with any duty imposed upon him/her by this chapter, or does, 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 one thousand dollars ($1,000), or not more than five (5) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action;
>
> (2) For a second or subsequent offense in a twenty-four-month (24) period, a penalty of not more than five thousand dollars ($5,000), or not more than twenty-five (25) times the retail value of the cigarettes involved, whichever is greater, to be recovered, with costs of suit, in a civil action.
>
> (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 not more than five (5) times the tax due but unpaid.
>
> (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.
>
> See P.L. 2014, ch. 151, § 1; P.L. 2014, ch. 168, § 1.

[22] The amended R.I. Gen. Laws § 44-20-51.1 now provides for progressive discipline based on aggravating and mitigating factors.

While the Audit Period closed on June 30, 2014, and the new law took effect on June 23, 2014, none of the OTP that was assessed was purchased in the month of June, 2014. Exhibits 47 and 48.[23] Thus, in addition to the interest assessed, a penalty of five (5) times the amount of tax due but unpaid shall be assessed.[24]

VI. FINDINGS OF FACT

1. A Notice was issued on February 16, 2018 to the Taxpayer by the Division in response to a request for hearing.

2. On May 1, 2019, the Division issued a notice of deficiency to the Taxpayer in relation to other tobacco products tax.

3. The Taxpayer requested a hearing on the 2019 notice of deficiency and that matter was consolidated with the initial matter.

4. A hearing was held on May 19 and June 8, 2021. The parties were represented by counsel. The parties timely filed briefs by October 4, 2021.

5. Records including but not limited to bills, receipts, invoices, and cash register tapes were required to be kept by the Taxpayer during the Audit Period.

6. The Taxpayer was required to keep records for the purchase and sale of OTP during the Audit Period.

7. The Taxpayer did not provide all of its records to the Division for the Audit Period.

8. The Taxpayer was required to pay OTP tax during the Audit Period.

9. The Taxpayer did not pay any OTP tax during the Audit Period.

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[23] The only purchase in June, 2014 was to so was not included in the assessment. Exhibits 47 and 48.

[24] The OTP tax due is so that five (5) times that amount is R.I. Gen. Laws § 44-20-51.1(a) applies to cigarettes so it not relevant to OTP. R.I. Gen. Laws § 44-20-8 provides that a suspension of tobacco dealer's license could be imposed for failure to comply with the statutory provisions for the sale and purchase of OTP. In this matter, the Division did not seek a suspension of the Taxpayer's tobacco dealer's license.

10. The invoices represented the purchase of OTP that the Taxpayer was holding to sell.

11. Information received by the Division showed that was selling untaxed tobacco to convenience stores.

12. The checks and payments by the Taxpayer to were for OTP that the Taxpayer was holding to sell.

13. The Division based its audit on the information it had in its possession.

14. The Taxpayer did not provide any documentation of products it claimed were not OTP and/or were not subject to sales tax.

15. The facts contained in Section IV and V are incorporated 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 § 44-18-1 *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 assessed interest and penalty.

3. The Taxpayer owes the OTP assessment and the assessed interest as well as the statutory penalty under the "old" statute.

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 (Exhibit 45) and interest (Exhibit 46) and penalty.[25]

Pursuant to R.I. Gen. Laws § 44-20-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, and R.I. Gen. Laws § 44-20-51.1(b) (prior to June 23, 2014), the Taxpayer owes the assessed OTP tax (Exhibit 56), assessed interest (Exhibit 56), and a penalty of five (5) times the tax due. The Division shall calculate the penalty owed pursuant to R.I. Gen. Laws § 44-20-51.1(b) (prior to June 23, 2014).

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

Date: November 10, 2021

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: 11/17/2021

Neena S. Savage
Tax Administrator

[25] As the deficiency was recalculated during the hearing process, a notice of deficiency was not issued for the revised additional sales tax. The initial notice of deficiency (Exhibit 32) included the 10% percent penalty. The Division recalculated the sales tax owed and the interest owed so that the penalty is 10% of the revised tax owed.

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.

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 17th day November, 2021 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail to the Taxpayer's attorney'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.

Patricia J. Caligeto