

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2014-04

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

IN THE MATTER OF:

Taxpayer.

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**SC 13-135, SC 13-136
13-T-0150, 13-T-0151
cigarette and sales tax**

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to two (2) separate Orders to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer (“Notice”) issued on July 17, 2013 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”) in response to the Taxpayer’s requests for hearing. Prior to hearings on either matter, the parties consolidated both matters and settled them by stipulation (“Stipulation”) dated October 10, 2013. The Division alleged that the Respondent violated said Stipulation and a hearing was held on December 12, 2013. The parties were represented by counsel and the parties rested 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 § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-20-1 *et seq.*, *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 Taxpayer violated said Stipulation entered into on October 10, 2013 and if so, what should be the sanction.

IV. MATERIAL FACTS AND TESTIMONY

The Taxpayer stipulated that it had previously violated R.I. Gen. Laws § 44-20-1 *et seq.* and R.I. Gen. Laws § 44-20.2-1 *et seq.* as set forth in said Stipulation.¹ The parties stipulated that pursuant to the Stipulation, the Taxpayer's Cigarette dealer's license ("License") was suspended for 14 days from October 14, 2013 through October 26, 2013.

Tax Investigator, testified on behalf of the Division. He testified that he conducted follow-up inspections of the Taxpayer's premises during the suspension and the Taxpayer was open for business selling coffee in the morning. He testified that during an inspection on October 25, 2013, he found 24 cigarette packs of cigarettes inside a paper towel box which was inside a date box. He testified there were 23 New Hampshire stamped packs and one (1) Rhode Island stamped pack. See Division's Exhibit M (photographs of cigarettes found box).

On cross-examination, testified that three (3) inspections of the Taxpayer's premises were conducted between October 22 and October 25, 2013 and no violations were found by those inspectors. He testified that the Taxpayer's shop was open. He testified that the cigarettes were found in a box that was at the bottom of three (3) stacked boxes at the back of the store. He testified that the two (2) top boxes in the stack were

¹ See Division's Exhibits D and E, seizure reports from the two (2) violations covered in said Stipulation. See Division's Exhibits F and H, computation of tax and civil penalties for the two (2) violations covered in said Stipulation. See Division's Exhibits G, I, J, K, the two (2) notices of deficiencies and two (2) notices of cigarette tax dealer's license suspension issued to the Taxpayer for two (2) violations covered in said Stipulation.

taped closed but the bottom box was not. He testified that the bottom box in the stack contained the cigarettes in the smaller boxes. He testified that the three (3) boxes were about two (2) feet by three (3) feet.

The Taxpayer (owner of the Taxpayer which is a d/b/a) testified on its behalf. He testified that during the first week of the suspension, there were no inspections because the shop was mostly shut. He testified that on October 23, 2013, the inspectors came for a half-hour and found nothing. He testified that on October 25, 2013, the inspector found the cigarettes in the box. He testified that he had those boxes since January, 2013 and probably had not looked in them since April, 2013. He testified that he had bought a lot of bathroom tissue² because of a sale. He testified that he did not know about the cigarettes being inside the boxes. He testified that he previously had someone run the store and he believes that employee must have put those cigarettes there and he had discharged said employee in July, 2013 because of the prior violations that were subject of the Stipulation. On cross-examination, the Taxpayer testified that under the Stipulation, he was responsible for any agents within his shop and that all tobacco was supposed to have been removed from the store.

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

² The stacked boxes were bathroom tissue boxes. See Division’s Exhibit M.

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 Stipulation Provisions

In terms of the original violations in the Stipulation, they relate to the sale of unstamped Rhode Island tobacco products. R.I. Gen. Laws § 44-20-12 imposes a tax on cigarettes sold. It states as follows:

Tax imposed on cigarettes sold. – A tax is imposed on all cigarettes sold or held for sale in the state. The payment of the tax to be evidenced by stamps, which may be affixed only by licensed distributors to the packages containing such cigarettes. Any cigarettes on which the proper amount of tax provided for in this chapter has been paid, payment being evidenced by the stamp, is not subject to a further tax under this chapter. The tax is at the rate of one hundred seventy-five (175) mills for each cigarette.

In addition, R.I. Gen. Laws § 44-20.2-2, imposes a tax on little cigars sold pursuant to the provisions of R.I. Gen. Laws § 44-20-2 through R.I. Gen. Laws § 44-20-55. Due to the statutory violations of having untaxed tobacco products, the Taxpayer entered into the Stipulation with the Division that is dated October 10, 2103.

Numbered Paragraph One (1) of the Stipulation provides that the Taxpayer cannot sell or offer to sell and tobacco products during its License suspension. Numbered

Paragraph Two (2) of the Stipulation provides that during the License suspension the Taxpayer shall do as follows:

[Taxpayer] shall remove all cigarettes, cigarettes tubes, rolling papers, and any tobacco products from the premises at [Taxpayer's address] and these items shall be **stored off-site** during the period of suspension. (bold and underline in original).

Paragraph Four (4) of the Stipulation provides as follows:

[Taxpayer] expressly acknowledges the following conditions.

That the Licensee may be subject to inspection and investigation by the agents of the Tax Division, local police or state police during the period of suspension to insure compliance with the terms of this Stipulation.

That the Licensee is responsible for instructing and overseeing its employees, servants or agents as to fulfilling the terms of this Stipulation and will be deemed liable for any breach of the Stipulation.

Paragraph Eight (8) of the Stipulation provides as follows:

The parties mutually agree and understand that the Stipulation constitutes the entire and final agreement of the parties that incorporates and includes all prior agreements, representations or understandings, oral or otherwise, regarding the contested license suspension proceeding, and the Deficiency Determination. The terms of this Stipulation shall not be altered, revised or amended except by a subsequent written document mutually agreed to and signed by legal counsel of both parties.

C. Arguments

In closing, the Division argued that under the Stipulation the Taxpayer was responsible for the employees and needed to remove any tobacco in the store and during the suspension period, agents found tobacco in the store. The Division argued that the Taxpayer had agreed to the inspections during the License suspension. The Division argued that the violation of the Stipulation is the Taxpayer's third violation so the Division requested that the initial full sanction of a License suspension of ninety (90)

days and the full administrative penalty³ be imposed. The Division argued that the Taxpayer violated Paragraph Two (2) of the Stipulation which requires removal of all tobacco products from the premises.

In closing, the Taxpayer argued that the Stipulation is binding and there is no evidence that the Taxpayer offered to sell, sold, or displayed any cigarettes. The Taxpayer argued that in terms of the cigarettes in the boxes, there needs to be a *scienter*⁴ of knowledge by the Taxpayer and the Taxpayer did not have any knowledge that those cigarettes were in the boxes.

D. Whether the Taxpayer Violated the Stipulation

The Taxpayer argued that the Taxpayer needs to have some knowledge of the cigarettes being stored on the premises in order to be found to have violated the Stipulation. There is no provision in the Stipulation that the Taxpayer must know about tobacco or have the intent to violate the Stipulation by having tobacco on the premises. The Stipulation provides for the removal of all tobacco products.

In fact, the Stipulation specifically provides that the Taxpayer is responsible for any acts of agents or employees and would be liable for their breaches (if any). The Stipulation does not provide that the Taxpayer would only be liable for an employee's actions regarding the Stipulation if the Taxpayer knew about the employee's actions. Rather the Stipulation provides that the Taxpayer must instruct all agents and employees about the Stipulation and will be deemed liable for any breach of the Stipulation.

³ The Division is seeking the full administrative penalty initially sought for the two (2) violations settled by the Stipulation. Thus, the Division seeks an administrative penalty of (minus ; credit for money already paid to the Division) and a 90 day License suspension. The administrative penalty represents the amount of tax owed for the seized cigarettes in the first two (2) violations and the penalties imposed pursuant to R.I. Gen. Laws § 44-20-51.1.

⁴ *Black's Law Dictionary* (9th ed. 2009) defines *scienter* as a "degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission"

In this matter, the Taxpayer has blamed an employee that he testified was let go in July, 2013 prior to the Stipulation. It would not make sense to make a Taxpayer liable for current employees and agents but not prior agents or employees. Indeed, the Taxpayer was responsible for the removal of all tobacco products (paragraph two (2)). The failure by the Taxpayer to inspect the Taxpayer's premises and stock for tobacco prior to the suspension starting and pursuant to the requirements of the Stipulation cannot be excused on the grounds that the Taxpayer did not know about the cigarette packs. That would allow any taxpayer to claim ignorance of his or her inventory and avoid responsibility for statutory violations. And specifically in this matter, it would allow the Taxpayer to avoid the explicit requirements of the Stipulation (remove all tobacco products from the premises) by failing to ensure compliance with the Stipulation when he is responsible for his own acts and his employees and agents' acts. The Taxpayer has tried to read a requirement of *scienter* in the Stipulation where none exists.

There is no dispute that the Taxpayer had tobacco in the store during its License suspension in violation of the Stipulation. The Taxpayer had settled two (2) other unstamped cigarette violations when it entered into the Stipulation. Its violation of the Stipulation amounts to its third violation of the cigarette tax statute. Since the Taxpayer violated the Stipulation which resolved the two (2) previous matters, there is no reason not to impose the sanctions that the Division sought to impose prior to the settlement.

VI. FINDINGS OF FACT

1. The Stipulation was entered into on October 13, 2013. The Division alleged the Taxpayer violated said Stipulation. A hearing was held on December 12, 2013. The parties rested on the record.

2. On October 25, 2013, during the Taxpayer's License suspension pursuant to said Stipulation, 24 packs of cigarettes were found on the Taxpayer's premises in a cardboard box. Of these 24 packs, 23 were New Hampshire packs and one (1) was a Rhode Island pack.

3. The Taxpayer possessed/stored said cigarettes in the store.

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 § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-20-1 *et seq.*

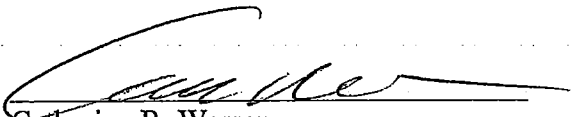
2. The Taxpayer violated the Stipulation by having tobacco in the store during the License suspension.

VIII. RECOMMENDATION

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

The Taxpayer violated the Stipulation and pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-20-1 *et seq.*, the Respondent's License shall be suspended 90 days effective 30 days from the signing of this Decision by the Tax Administrator and an administrative penalty of (minus credit) shall be paid and is due 30 days from the signing of this Decision.

Date: December 26, 2013


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 23, 2014

David Sullivan
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.

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 23rd day January, 2014 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 hand delivery to Meaghan Kelly, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill Providence, RI 02908.

Paul Belasco