STATE OF RHODE ISLAND

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2022-10

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

IN THE MATTER OF:	:	**SC 21-130; 21-T-210** **other tobacco products**
Taxpayer.	:	

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to an Order to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer ("Notice) issued on December 1, 2021 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). A hearing was scheduled for March 3, 2022 at which time the Taxpayer did not appear at the hearing. Since the Taxpayer was adequately noticed of hearing,[1] a hearing was held before the undersigned. Pursuant to Section 2.7(G)(3) of the 280-RICR-20-00-2 *Administrative Hearing Procedures* ("Hearing Regulation"), a default judgment may be entered against the party not appearing at hearing. The Department was represented by counsel who 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 § 44-20-1 *et seq.*, and the Hearing Regulation.

[1] A prehearing conference was held on January 27, 2022 at which time the Taxpayer did not appear. Division's Exhibit Ten (10) (Notice). A hearing was scheduled for March 3, 2022, and notice was sent by first class and certified mail to the Taxpayer's business address. Division's Exhibits Two (2) (business application and registration with business address); Nine (9) (request for hearing with business address); and 11 (notice of hearing dated January 31, 2022 with print out of United States Post Office tracking sheet showing delivery).

III. ISSUE

Whether the Taxpayer owes tax on other tobacco products, and if so, should any sanctions be imposed.

IV. MATERIAL FACTS

Tax Investigator, testified that he and his partner conducted an inspection of the Taxpayer for tobacco compliance on September 27, 2021. He testified that they identified themselves to the person operating the business who identified himself as the general manager. He testified that the manager produced some invoices that showed payment of taxes for certain other tobacco products, but the manager was unable to provide invoices for certain products. He testified that they seized those products and informed the manager that the Taxpayer had five (5) days to provide invoices for those products. He testified that the Taxpayer was able to provide invoices for some of the seized other tobacco products but not for all of them. Division's Exhibits Three (3) (Taxpayer's cigarette dealer's permit valid from July 1, 2021 to June 30, 2022); Four (4) (Taxpayer's sales permit valid from July 1, 2021 to June 30, 2022); Five (5) (seizure report dated September 27, 2021); Six (6) (audit report dated October 20, 2021); Seven (7) (notice of suspension dated November 1, 2021); Eight (8) (notice of assessment dated November 3, 2021); and Nine (9) (Taxpayer's request for hearing dated November 10, 2021).

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

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."[2] Inspections of cigarette dealers are allowed by R.I. Gen. Laws § 44-20-40.1. R.I. Gen. Laws § 44-20-51.1[3] provides for administrative penalties for the

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[2] R.I. Gen. Laws § 44-20-13.2 provides in part as follows:

(a) A tax is imposed on all other tobacco products, 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 revenue. The tax imposed by this section shall be as follows:

(1) At the rate of eighty percent (80%) of the wholesale cost of other tobacco products, cigars, pipe tobacco products, and smokeless tobacco other than snuff.

(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.

(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.

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[3] R.I. Gen. Laws § 44-20-51.1 provides as follows:

(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 as follows:

(1) For a first offense in a twenty-four-month (24) period, a penalty of not more than ten (10) times the retail value of the cigarettes and/or other tobacco products involved; and

(2) For a second or subsequent offense in a twenty-four-month (24) period, a penalty of not more than twenty-five (25) times the retail value of the cigarettes and/or other tobacco products involved.

(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 one thousand dollars ($1,000) or not more than five (5) times the tax due but unpaid, whichever is greater.

(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.

violation of the tax laws. In addition, R.I. Gen. Laws § 44-20-8[4] provides for the suspension or revocation of a cigarette dealer's license.

C. Whether Tax is Owed on the Other Tobacco Products

The Taxpayer did not appear at hearing. It is undisputed the Division seized other tobacco products from Taxpayer for which Rhode Island tax had not been paid. R.I. Gen. Laws § 44-20-13.2 provides that tax is imposed on other tobacco products so the Division properly assessed tax on the seized other tobacco products (hookah). Division's Exhibits Six (6) and Eight (8).

D. What Sanctions Should be Imposed

R.I. Gen. Laws § 44-20-51.1(a) provides that penalties are to be imposed at "not more than five (5) times" or not more than 25 times the retail value of cigarettes depending on the circumstances. R.I. Gen. Laws § 44-20-51.1(b) provides that a penalty of not more than five (5) times of the tax owed or $1,000 whichever is greater may be imposed. R.I. Gen. Laws § 44-20-51.1(c) provides that when determining the penalty to be imposed, mitigating and aggravating factors such as history, severity, and intent shall be considered. Thus, the statute envisions progressive discipline based on the history of offenses with the penalties becoming greater based on aggravating factors.

The Division requested that the requested monetary penalties be imposed. The Division argued that this was the Taxpayer's fourth offense since 2015 so that the 40 day suspension was warranted. Division's Exhibit Six (6) (audit report indicated first offense in 2015 where paid

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[4] R.I. Gen. Laws § 44-20-8 provides in part as follows:

> The tax administrator may suspend or revoke any license under this chapter for failure of the licensee to comply with any provision of this chapter or with any provision of any other law or ordinance relative to the sale or purchase of cigarettes or other tobacco products. The tax administrator may also suspend or revoke any license for failure of the licensee to comply with any provision of chapter 19 of title 44 and chapter 13 of title 6. *** Any person aggrieved by the suspension or revocation may apply to the administrator for a hearing as provided in § 44-20-47, and may further appeal to the district court as provided in § 44-20-48.

assessment in full; second offense in 2016 was settled with a payment and three (3) day suspension; and third offense in 2021 was settled).

The Division seeks monetary penalties for the unpaid other tobacco products tax pursuant to R.I. Gen. Laws § 44-20-51.1(a) and (b). The Division seeks a penalty of 12 times the retail value of the other tobacco products and a penalty of $1,000. See Division's Exhibits Eight (8) (notice of assessment) and Seven (7) (audit report indicating penalties imposed). R.I. Gen. Laws § 44-20-51.1(a)(2) provides that for a second offense in 24 months, a penalty of not more than 25 times the retail value or $5,000 whichever is greater can be imposed. The Taxpayer's first violation was in 2015, its second violation in 2016, and its third violation was in 2021. See Division's Exhibit Six (6). Those violations were settled by stipulation. The Taxpayer's 2022 violation was within 24 months of the Taxpayer's 2021 violation. Thus, the Division properly imposed greater penalties due to the Taxpayer's prior violations. The Taxpayer did not appear. No mitigating factors were shown in relation to the monetary penalties requested.

The Division sought a suspension of the Taxpayer's cigarette dealer's license for 40 days since this is the Taxpayer's fourth violation. Division's Exhibit Seven (7). At hearing, no reason was shown to vary the requested length of suspension.

VI. FINDINGS OF FACT

1. Other tobacco products for which no tax was paid were seized from the Taxpayer on September 27, 2021.

2. A notice of hearing was issued on December 1, 2021 and January 31, 2022. A hearing was held on March 3, 2022. The Taxpayer did not appear at the hearing. As the Taxpayer was adequately notified of hearing, a hearing was held. The Division was represented by counsel and rested on the record. The Taxpayer is in default for failing to appear at the hearing.

3. 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*. and R.I. Gen. Laws § 44-20-1 *et seq*.

2. The Taxpayer violated R.I. Gen. Laws § 44-20-13.2 on September 27, 2021.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-20-1 *et seq*., R.I. Gen. Laws § 44-20-51.1, and R.I. Gen. Laws § 44-20-13.2, the Taxpayer owes the tax and penalties assessed by the Division as set forth in Division's Exhibit Eight (8). Pursuant to R.I. Gen. Laws § 44-20-8, the Taxpayer's cigarette dealer's license shall be suspended for 40 days beginning on the 31st day after the execution of this decision.

Date: March 31, 2022

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

✓ ADOPT
_____ REJECT
_____ MODIFY

Dated: 4/11/22

Neena S. Savage
Tax Administrator

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:

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 11th day ~~March,~~ April 2022 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt requested to the Taxpayer's address on record with the Division and by electronic delivery to Michael Brady, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Neil Bilasco