

STATE OF RHODE ISLAND

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2023-10

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

IN THE MATTER OF:

Taxpayer.

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**Case No.: 23-T-057
Historic Preservation Tax Credit**

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Pre-Hearing and Appointment of Hearing Officer (“Notice”) issued on June 22, 2023 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”) in response to the Taxpayer’s request for hearing. A hearing was held on November 30, 2023. The parties were 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 § 44-33.6-1 *et seq.*, and 280-RICR-20-00-2 *Administrative Hearing Procedures*.

III. ISSUE

The parties agreed that the issue is whether the Taxpayer filed a Part 1 and a Part 2 application for certification with the Rhode Island Historical Preservation & Heritage Commission within 90 days of the date of notification by the Division that tax credits were available for the project pursuant to R.I. Gen. Laws § 44-33.6-1 *et seq.* and 280-RICR-20-20-6, [and if not] thereby resulting in the Taxpayer’s forfeiture of all rights, claims, and entitlements to the tax credits

initially available to the Taxpayer's project under the Historic Preservation Tax Credits 2013 program.

IV. MATERIAL FACTS AND TESTIMONY

The parties filed an agreed statement of facts and exhibits which is summarized as follows:¹

1. The Taxpayer is a foreign limited partnership that was organized under the laws of Pennsylvania. The Taxpayer qualified to do business in Rhode Island as of April 16, 2019 and October 28, 2019. Exhibit One (1) (Secretary of State records).

2. The Historic Preservation Tax Credit program allows taxpayers to apply for tax credits for work they do to qualifying historic buildings in Rhode Island.

3. On or about June 24, 2021, the Taxpayer applied for tax credits using Rhode Island Form HTC-13 pursuant to the Rhode Island Historic Preservation Tax Credits 2013 ("Historic Tax Credits") program regarding a certain project ("Project"). On Form HTC-13, the applicant was named as two different entities. Exhibit Two (2) (Taxpayer's application on Form HTC-13, Application for Rhode Island Historic Preservation Tax Credits 2013). The Taxpayer was advised at the time the application was submitted that only one entity would be permitted to execute an Agreement for Historic Tax Credits with the Division.

4. On or about July 8, 2021, the Division notified the Taxpayer that no Historic Tax Credits were immediately available for the Project, and the Taxpayer was assigned a number in the Historic Tax Credits queue. Exhibit Three (3).

5. By correspondence dated July 29, 2022, the Division notified the Taxpayer that credit in the amount of _____ became available for the Project. In this correspondence, the Division advised the Taxpayer that applications for Part 1 Certification (Request for Historical Certification) and Part 2 Certification (Request for Certification of Proposed Rehabilitation) were required to be filed with the Rhode Island Historical Preservation & Heritage Commission ("Commission") within 90 days of the July 29, 2022 notification date. Exhibit Four (4).

6. Ninety days of the July 29, 2022 notification date was October 27, 2022. Therefore, the Taxpayer was required to file the Part 1 and Part 2 applications for the Project with the Commission by October 27, 2022.

7. On November 3 and 4, 2022, the Division obtained information from the Commission that the Part 1 and Part 2 applications for the Project had not been received by the Commission within the required 90 day timeframe. Exhibit Five (5) (November 3 and 4, 2022 E-mails).

¹ See partial stipulation of facts and exhibits filed on November 3, 2023.

8. In future correspondence, the Commission stated that it had no records indicating that it received the Taxpayer's Part 1 and Part 2 applications for the Project. Exhibit Six (6) (September 8, 2023 E-mails).

9. On November 7, 2022, the Division notified the Taxpayer that it had forfeited all rights, claims, and entitlements to any Historic Tax Credits for its Project due to its failure to submit the Part 1 and Part 2 applications to the Commission within the requisite 90 day timeframe. Exhibit Seven (7).

10. On November 22, 2022, the Taxpayer, through its representative, sent a written request for an administrative hearing. Exhibit Eight (8).

11. On November 23, 2022, the Division again confirmed that the Commission had not received the Taxpayer's Part 1 and Part 2 applications for the Project. Exhibit Nine (9) (November 23, 2022 E-mails).

12. On December 1, 2022, the Division sent correspondence to the Taxpayer, through its representative, to schedule a preliminary review for December 15, 2022. Exhibit Ten (10).

13. By correspondence dated January 31, 2023, the Taxpayer, through its representative, submitted signed copies of the Part 1 and Part 2 applications to the Division dated August 26, 2022. Exhibit 11 (January 31, 2023 correspondence).

14. In the correspondence from its attorney, the Taxpayer's attorney claimed that the Part 1 and Part 2 applications were executed on August 26, 2022, and that the Taxpayer was unaware that they had not been received until receipt of the revocation notice. *Id.*

15. The Taxpayer submitted documentation that the Part 1 and Part 2 applications were executed within the required 90 day timeframe and claims that they were mailed to the Commission within that timeframe, but has not submitted proof that the applications were received by the Commission within the required 90 day timeframe. *Id.*

Chief Revenue Agent, Form, Credit, and Incentive Section, testified on behalf of the Division. She testified that the Taxpayer applied for historic preservation tax credits on June 24, 2021. Exhibit Two (2). She testified that at the time the Taxpayer was notified that no tax credits were available. Exhibit Three (3). She testified that the Taxpayer was later notified in 2022 that in credits were available, and that the Taxpayer had 90 days from the date of the notice to file the Part 1 and Part 2 applications for said credits. She testified the 90 day period ended on October 27, 2022 so that the applications were due by that date. Exhibit

Four (4). She testified the Commission did not receive the Taxpayer's applications by October 27, 2022. Exhibits Five (5) and Nine (9). She testified that since Part 1 and Part 2 were not timely filed as required by the relevant regulation, the Taxpayer was not entitled to the tax credits.

On cross-examination, the Auditor testified that the relevant regulation does not say how the applications to the Commission should be submitted. She testified that it does not say whether it should be in person or by certified mail. She testified that the regulation does not mention the application being received by the Commission. She testified that the Part 1 and Part 2 applications in Exhibit 11 do not indicate the manner in which to file them, and she was not aware if there are any separate instructions. She testified that the initial application for the credits sent by an applicant to the Division states on the application to mail it to [redacted] attention. Exhibit Two (2). She testified that her contact at the Commission mentioned in an email looking everywhere for the Taxpayer's application including in an electronic file. Exhibit Six (6)

["Manager"]) testified remotely on behalf of the Taxpayer. He testified he is the managing member of both entities which are single purpose entities to redevelop historic property and develop multifamily residences. He testified that when they were told the tax credits were available, [redacted] ("Director"), prepared the Part 1 and Part 2 applications, and he, the Manager, signed and returned them on August 26, 2022 to the Director who mailed them. He testified they only became aware the Commission did not receive the applications in time after the deadline. He testified the project is not viable without the tax credits. On cross-examination, he testified that he has no documentation showing when the applications were mailed. He testified that he only has copies of the signed Part 1 and Part 2 applications dated August 26, 2022.

The Director testified on behalf of the Taxpayer. He testified that he is the director of development, and the construction budget is based on receiving a certain amount of tax credits and

without them, the project is not viable. He testified that when he became aware of the available in tax credits, he prepared the Part 1 and Part 2 applications. He testified that he believed he got the application forms from their consultant. He testified that he gave the Part 1 and Part 2 applications to the Manager to sign and after the Manager signed them, he put them in an envelope and mailed them. He testified that by the time they realized that the Commission did not receive the applications, the deadline had passed. On cross-examination, he testified that he has no documentation showing when the applications were mailed. He testified that to the best of his recollection, he mailed the applications on August 26, 2022.

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). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, “the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Relevant Statutes and Regulation

R.I. Gen. Laws § 44-33.6-1 *et seq.* is the Historic Preservation Tax Credits 2013 act. R.I.

Gen. Laws § 44-33.6-1 provides as follows:

Declaration of purpose. The general assembly finds and declares that Rhode Island's historic structures continue to experience high vacancy rates and physical deterioration, particularly in Rhode Island's central business districts. Without adding economic incentive, these structures are not viable for the redevelopment and reuse by modern commercial, residential or manufacturing enterprises and will continue their physical deterioration. The redevelopment and reuse of these historic structures are of critical importance to the economic measures and will assist in stimulating the reuse and redevelopment of historic structures and will improve property values, foster civic beauty, create employment opportunities, enhance commerce, and promote public education, pleasure, and welfare. Furthermore, during this unprecedented economic climate, many in the building and construction trades, and related service industries, have been severely impacted. The redevelopment and reuse of these historic structures will serve as a vital catalyst in the recovery of these trades and services, in addition to stimulating various other related economic benefits and business activities. The purpose of this chapter is to create economic incentives for the purpose of stimulating the redevelopment and reuse of Rhode Island's historic structures, as well as to generate the positive economic and employment activities that will result from such redevelopment and reuse.

R.I. Gen. Laws § 44-33.6-7 provides in part as follows:

Timing and reapplication. (a) Taxpayers shall have twelve (12) months from the approval of Part 2 application to commence substantial construction activities related to the subject substantial rehabilitation. *** Furthermore, after commencement of substantial construction activities, no project shall remain idle prior to completion for a period of time exceeding six (6) months. In the event that a taxpayer does not commence substantial construction activities within twelve (12) months from the approval of Part 2 application, or in the event that a project remains idle prior to completion for a period of time exceeding six (6) months, the subject taxpayer shall forfeit all fees paid prior to such date and its then-current contract for tax credits shall be deemed null and void, and shall terminate without need for further action or documentation. ***

Tax benefits such as exemptions or credits do not arise by implication but must be established by express statutory provisions. *R.I. Recreational Bldg. Authority v. East Greenwich*, 505 A.d 1139 (R.I. 1986). The Division promulgated *Historic Preservation Tax Credits 2013*

Regulation, 280-RICR-20-20-6 (“Regulation”) to implement the 2013 statutory tax credits. The Regulation provides in part as follows:

6.1 Purpose

The purpose of this rule making is to implement R.I. Gen. Laws Chapter 44-33.6 “Historic Preservation Tax Credits 2013.” *** This regulation requires the filing of an application form, payment of a non-refundable three percent (3%) Processing Fee and entering into a Contract with the Rhode Island Division of Taxation. Applicants are also required to file a Part 1 and a Part 2 Application for certification with the Rhode Island Historical Preservation & Heritage Commission.

6.8 Queuing Process

A. In order to comply with the requirements of § 6.7(D) of this Part, the Division of Taxation has developed a “queuing” process, which is an equitable process that will provide Applicants some degree of certainty as to what credit amounts may be available to them at the conclusion of a project. This queuing process shall consist of the following:

1. On or after August 1, 2013, any Person intending to participate in the historic preservation tax credit 2013 program must first apply to the Division of Taxation using basis as Form HTC-13. These projects will be placed in sequence on a “first come, first served” further described in § 6.8(A)(7) of this Part below. Any application received before August 1, 2013 will be deemed received on August 1, 2013. This sequence is also referred to within as the “queue.”

2. To remain eligible for the tax credits, Applicants have ninety (90) days from the of date the Division of Taxation’s notice that credits are available for their project to apply for Part 1 and Part 2 certification from the Commission. Failure to do so will result in the loss of place in the queue and forfeiture of all rights, claims and entitlements to the credits initially available to the project. The project may reapply in accordance § 6.8(A)(1) of this Part. At the time of reapplication the project will be placed at the end of the queue. Any Part 1 or Part 2 certification received prior to August 1, 2013 must be re-certified by the Commission.

3. Within thirty (30) days after the date of Part 2 certification, the Applicant shall pay to the Division of Taxation a non-refundable Processing Fee equal to three percent (3%) of the estimated QREs and shall execute the Contract with the Division of Taxation.

7. If all available tax credits have been allocated, a project applying for tax credits shall be put at the end of the queue in the order of the date the application was received by the Division of Taxation.

B. In the event funds become available, the Division of Taxation may notify a project in the queue credits are available to them, provided the project has not been Placed-in-Service. ***

6.17 Application Guidelines

A. Certifications of Significance and Rehabilitation – General.

1. Application. Request for designation of a building as a Certified Historic Structure and of a proposed Rehabilitation shall be made on the Historic Preservation Certification Application forms.

a. Part 1 of the application is used to request certification of historic significance and is filed with the Commission and shall contain such information as is required in § 6.17(B)(2) of this Part;

b. Part 2 of the application is used to request certification of a proposed Rehabilitation plan as meeting the Standards for Rehabilitation. Part 2 of the application must be filed with and approved by the Commission prior to entering into a Contract with the Division of Taxation and shall contain such information as is required in § 6.17(D)(1) of this Part;

c. Part 3 of the application is used to request certification of a completed Rehabilitation project by the Commission;

d. The Part 1, Part 2 and Part 3 applications are submitted to and reviewed by the Commission[.]

6.12 Timing and Reapplication

A. Taxpayers shall have twelve (12) months from the certification date of Part 2 Application to commence Substantial Construction activities.

1. For this purpose, Substantial Construction activities shall be deemed to have commenced upon receipt by the Division of Taxation of all of the following:

C. Pursuant to R.I. Gen. Laws § 44-33.6-7, no project shall Remain Idle prior to completion for a period of time exceeding six (6) months. In the event that an Applicant does not commence Substantial Construction activities within twelve (12) months from the date of Part 2 Certification, or in the event that a project Remains Idle prior to completion for a period of time exceeding six (6) months, the subject Applicant shall forfeit all fees paid prior to such date, and all rights and entitlements to the tax credits, and its then-current Contract for tax credits shall be deemed null and void, and shall terminate without need for further action or documentation.

C. Arguments

The Division argued that the Regulation provides a 90 day deadline to submit the Part 1 and Part 2 applications and failure to comply with the deadline means an applicant is not eligible for the tax credits. The Division argued that as the Taxpayer failed to timely file said applications, it is not eligible for the tax credits.

The Taxpayer argued that two (2) people testified as to the mailing of the applications, and the relevant statute should be liberally construed to allow for the credits. It argued there will be a loss of economic benefit by denying the application. It argued that the Regulation does not specify how the applications are to be submitted, and it is not the Taxpayer's fault that the Commission did not receive the applications. It argued that if one believes the testimony, then the applications were submitted, and there could have been a mistake by the Post Office or Commission.

D. Whether the Taxpayer Can Receive the Tax Credits

Section 6.8 of the Regulation established the queueing process and provided the required deadlines to apply when in the queue. The queueing process is necessary as there are more applicants for tax credits than there are tax credits available. In response to the Taxpayer's initial application, the Taxpayer was notified by letter dated July 8, 2021 that there were no credits available and that the Taxpayer had been placed in the queue. Over a year later, by letter dated July 29, 2022, the Taxpayer was notified that there were now credits available. Section 6.8(A)(2) of the Regulation provides that an applicant has 90 days from the date an applicant is notified of available credits to file the Part 1 and Part 2 applications. The parties agreed that said applications were due by October 27, 2022.

A review of the statute and regulation shows that there are a variety of deadlines to ensure that the proposed projects are started and completed promptly and without a long delay. Projects must be started within one (1) year of Part 2 approval and if an approved project remains idle for over six (6) months, the taxpayer's contract for tax credits are deemed null and void. R.I. Gen. Laws § 44-33.6-7. These provisions are consistent with the purpose of the statute to rehabilitate and reuse historic structures that will improve property values, foster civic beauty, create employment opportunities, and enhance commerce. The statute and regulation do not want credits

to be approved for a project that is then not started or never completed. Such an approval and delay would tie up the available tax credit funds in a discontinued or nonviable project so that funds would not be available for operable projects.

The Taxpayer had 90 days from the notice from the Division of available tax credits “to apply for Part 1 and Part 2 certification.” *Supra*. The Taxpayer apparently chose to send their applications by first class mail. The Taxpayer raised the issue that neither the Regulation nor the application form state how the applications must be filed. There is no requirement for the applications to be sent by certified mail or in person delivery. However, that is not relevant to this matter. The issue in the matter is whether the Taxpayer applied in the 90 days. In other words, did the Taxpayer submit an application to the Commission within the 90 days. To submit an application means that the Commission received the application; otherwise, there is no record of an application and no knowledge that a taxpayer was seeking credits.

Assuming the Taxpayer mailed the applications on August 26, 2022, the Commission did not receive them. The Taxpayer did not have any documentary proof that the applications had been mailed to or received by the Commission. Without documentary proof the Commission received the application or at the very least that the applications were mailed, the Taxpayer cannot show it applied within the required 90 days. The Taxpayer speculated about whether the Commission could have misfiled or lost the applications based on an email from the Commission to the Auditor. In this email, the Commission’s contact person for the Division stated that the Taxpayer’s consultant told her that the Taxpayer had _____ in credit, and she looked everywhere but could not find any evidence that the Commission received the application. Exhibit Six (6). This email only showed the Commission made a thorough check of its files to ensure that it had not received the applications.

The Taxpayer argued that its oral testimony about the mailing of the applications must be accepted as definitive on the issue of meeting the 90 day deadline. However, the acceptance of such representations is not feasible in that this is a question of deadlines being met and that cannot rely on after the fact oral testimony. It would upset the certainty required in complying with deadlines if a year after a deadline closed, an applicant could testify to mailing something that was never received and thereby, change the outcome of missing deadlines. There must be at least some kind of documentary evidence showing timely receipt of the application or at the very least the timely mailing of an application. Otherwise, the applicable deadlines would be rendered meaningless, and that would undermine the certainty in the issuance of the tax credits.

The Taxpayer argued that it was unfair for it to bear the consequences of a mistake by the post office or Commission. A counter argument could be made that the Taxpayer is bearing the consequence of its choice either not to mail the application by certified mail or not to check with the Commission before the due date that the applications had been received. However, equitable principles are not applicable to administrative proceedings. See *Nickerson v. Reitsma*, 853 A.2d 1202 (R.I. 2004) (Supreme Court vacated a Superior Court order that vacated an agency sanction on equitable grounds). The issue here is limited to the Taxpayer's compliance with the deadline.

The Taxpayer argued the State was losing out on the economic benefit from its project so that its application should be accepted. However, presumably after the Taxpayer missed the deadline, the Division notified the next applicant in the queue (etc.) so the State received economic benefits of a rehabilitation project, just not the Taxpayer's project. Again, equitable principles are not applicable to administrative proceedings. *Id.* The issue is not about the substance or desirability of the Taxpayer's project but is limited to the Taxpayer's compliance with the deadline.

The Taxpayer was required to apply to the Commission within 90 days of the notice of available tax credits. No application was received by the Commission within the 90 day period. Thus, the Taxpayer failed to apply within the required 90 day deadline.

VI. FINDINGS OF FACT

1. A Notice was issued on June 22, 2023 by the Division to the Taxpayer in response to its request for a hearing.
2. A hearing was held on November 30, 2023. The parties were represented by counsel and rested on the record.
3. The facts contained in Sections 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 § 44-33.6-1 *et seq.*
2. Pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-33.6-1 *et seq.*, R.I. Gen. Laws § 44-33.6-7, and § 6.8 of the Regulation, the Taxpayer failed to apply for Part 1 and Part 2 certification within the 90 day deadline.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-33.6-1 *et seq.*, R.I. Gen. Laws § 44-33.6-7, and § 6.8 of the Regulation, the Taxpayer did not apply for Part 1 and Part 2 certification within 90 days of the date of notification of the availability of tax credits, so it lost its place in the queue and forfeited all rights, claims and entitlements to the credits initially available to the project. Thus, the Division properly denied the Taxpayer's application for tax credits.

Date: December 14, 2023


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: 12/19/2023


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 § 8-8-25 Time for commencement of proceeding against the division of taxation. – (a) Any taxpayer aggrieved by a final decision of the tax administrator concerning an assessment, deficiency, or otherwise may file a complaint for redetermination of the assessment, deficiency, or otherwise in the court as provided by statute under title 44.

(b) The complaint shall be filed within thirty (30) days after the mailing of notice of the final decision and shall set forth the reasons why the final decision is alleged to be erroneous and praying relief therefrom. The clerk of the court shall thereupon summon the division of taxation to answer the complaint.

CERTIFICATION

I hereby certify that on the 19th day of December, 2023 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid to the Taxpayer's attorney's address on file with the Division of Taxation and by electronic delivery to Matthew Cate, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.


April Belasco