

STATE OF RHODE ISLAND

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2025-09

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

IN THE MATTER OF

**SC 24-024; 24-T-050
other tobacco products**

Taxpayer.

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant an Order to Show Cause, Notice of Pre-Hearing Conference and Appointment of Hearing Officer (“Order to Show Cause”) issued on November 20, 2024 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”) in response to a request for hearing. A hearing was held on January 15 and February 6, 2025. The Taxpayer’s attorney appeared at the first day of hearing without his client. The Taxpayer’s attorney indicated that he had tried to contact the Taxpayer regarding the hearing but had been unable to contact his client. He moved for a continuance to which the Division objected. The undersigned denied the motion and proceeded to hearing. After the first day of hearing, the Taxpayer’s attorney contacted the undersigned that he had been in contact with his client and requested a second day of hearing. A second day of hearing was scheduled for February 6, 2025 at which time the Taxpayer’s attorney appeared but his client did not. Despite the attorney trying to contact his client that day, the Taxpayer did not appear at the second day of hearing. 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 § 44-20-1 *et seq.*, and 280-RICR-20-00-2 *Administrative Hearing Procedures*.

III. ISSUE

Whether the Taxpayer owes the other tobacco products (“OTP”) assessment, and if so, whether any further sanctions should be imposed.

IV. MATERIAL FACTS AND TESTIMONY

The parties stipulated the Division seized cigars (OTP) from the Taxpayer on January 18, 2024, and the seized cigars are listed in Division’s Exhibits Eight (8) (seizure report) and Nine (audit report).

(“Investigator”), Tax Investigator, testified on behalf of the Division. He testified the Taxpayer is a cigar bar and most cigar bars sell high end cigars so they will buy premium cigars from vendors like Ashton or My Father’s Cigar. He testified that cigar bars will then have to file an OTP-4 form for those purchases and pay the 50 cents excise tax per cigar. He testified the Taxpayer received its dealer’s license in 2021, and he reviewed its OTP-4 filings which had been made every month from 2021 to 2022. He testified in 2023, the Taxpayer only filed three (3) OTP-4 forms. Division’s Exhibits 15 (January 31, 2023 OTP-4 filing); 16 (March 31, 2023 OTP-4 filing); and 17 (May 5, 2023 OTP-4 filing). He testified the Taxpayer’s last filing had been in May, 2023 so there was a six (6) month period from the time of the most recent OTP-4 filing to the inspection. He testified that based on the Taxpayer’s OTP-4 filings, he ascertained the vendors from whom the Taxpayer bought cigars so he obtained from those vendors records of their sales to the Taxpayer after the Taxpayer’s May, 2023 OTP-4 filing. Division’s Exhibit Six (6) and Seven (7) (includes vendor invoices).

The Investigator testified that he and other Division inspectors conducted an inspection of the Taxpayer on January 18, 2024. He testified they arrived at approximately 10:00 a.m. which was soon after the Taxpayer opened according to its website, and the Taxpayer was open. He testified he prepared his compliance report based on the actions taken prior to and during inspection. Division's Exhibit Six (6) (compliance report). He testified that when they arrived, they asked for copies of the invoices and the person on duty was a new employee and did not know where the invoices were so called the manager. He testified the manager came and provided them with a binder of records, but it only had the last OTP-4 filing from May, 2023. He testified that based on the vendor invoices, many of products had been sold but there were many cigars still there, and they were able to identify the cigars (with the help of the manager) from the invoices for which no OTP had been filed. He testified the Division's Exhibit Eight (8) is the seizure report. He testified that after the inspection, the Taxpayer filed an OTP-4 form but that did not cover what had been seized. Division's Exhibit 18 (OTP-4 form dated January 19, 2024).

On cross-examination, the Investigator testified the owner also showed up during the inspection and provided the same binder with the 2023 OTP-4 forms.

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 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. *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989). 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 § 44-20-13.2¹ imposes tax on “other tobacco products.” Inspections of cigarette dealers are allowed by R.I. Gen. Laws § 44-20-40.1.² R.I. Gen. Laws § 44-20-51.1³

¹ R.I. Gen. Laws § 44-20-13.2 provides in part as follows:

Tax imposed on other tobacco products, smokeless tobacco, cigars, and pipe tobacco products.

(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.

(b) Any dealer having in his or her possession any other 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 other tobacco products in this state, file a return with the tax administrator in a form prescribed by the 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.

² R.I. Gen. Laws § 44-20-40.1 which provides as follows:

Inspections. (a) The administrator or his or her duly authorized agent shall have authority to enter and inspect, without a warrant during normal business hours, and with a warrant during nonbusiness hours, the facilities and records of any manufacturer, importer, distributor, or dealer.

(b) In any case where the administrator or his or her duly authorized agent, or any police officer of this state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes or other tobacco products in violation of this chapter, the administrator, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes or other tobacco products.

³ 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 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.

provides for administrative penalties for the violation of the tax laws. In addition, R.I. Gen. Laws § 44-20-8⁴ provides for the suspension or revocation of a cigarette dealer's license.

C. Motion to Suppress

At hearing, the Taxpayer objected to the seizure on fourth amendment grounds and moved to suppress the items seized by the Division inspectors. The Division objected. The undersigned denied the motion for the reasons below.

The fourth amendment of the United States Constitution⁵ protects against searches and seizures without a warrant. However, the United States Supreme Court has found there are exceptions to this requirement. The Court has held that any expectation of privacy in commercial premises is less than a similar expectation in an individual's home. *New York v. Burger*, 482 U.S. 691 (1987). Furthermore, certain "closely regulated" industries have such a history of government

(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.

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

Suspension or revocation of license. 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, and, for the purpose of determining whether the licensee is complying with any provision of chapter 13 of title 6, the tax administrator and his or her authorized agents are empowered, in addition to authority conferred by § 44-20-40, to examine the books, papers, and records of any licensee. *** 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.

⁵ The fourth amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section Six (6) of the Rhode Island Constitution provides as follows:

§ 6. Search and seizure. The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

oversight that no reasonable expectation of privacy could exist for a proprietor. Essentially, administrative inspections without court orders are often necessary to further an important state regulatory scheme. As the Court found, “[i]f an inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.” *Id.* at 710 (citation omitted). *Burger* established three (3) criteria needed for warrantless inspections of pervasively regulated businesses. Relying on *Burger*, the Rhode Island Supreme Court in *Keeney v. Vinagro*, 656 A.2d 973, 975 (R.I. 1995) found that a warrantless search of a pervasively regulated business is reasonable if the following three (3) criteria are met:

- 1) “a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made.”
- 2) “the warrantless inspections must be necessary to further the regulatory scheme.”
- 3) “the statute's inspection program, in terms of the certainty and regularity of its application,” must provide “a constitutionally adequate substitute for a warrant.” *Keeney*, at 975. See also *Burger*, 482 U.S. at 702-03.

Keeney relied on *Burger* in finding how and when administrative inspections may be made which were adopted by Rhode Island in *Keeney*.

All entities involved in the sale of tobacco products are required to be licensed by the Division. The Division has regulatory authority over the enforcement and administration of tobacco taxes. Records of tobacco sales and purchases must be kept and be available for inspection. Those records may be inspected by the Division and must be kept on premises for such inspection. Dealer licensees are required to keep records of the “sale, purchase, transfer, consignment, or receipt of cigarettes.” R.I. Gen. Laws § 44-20-40. The Division ensures compliance by licensees via inspections and noncompliant licensees are subject to administrative penalties and the suspension or revocation of dealer licenses. The tobacco taxing statute ensures that dealer licensees maintain records of the sale and purchase of cigarettes which ensures records

are kept about payment of statutorily required tax for tobacco products. R.I. Gen. Laws § 44-20-8, R.I. Gen. Laws § 40-20-13.2, R.I. Gen. Laws § 44-20-40, and R.I. Gen. Laws § 44-20-40.1 all authorize inspections of tobacco licensees. R.I. Gen. Laws § 44-20-12.2 and R.I. Gen. Laws § 44-20-15 authorize tax inspectors and law enforcement at the direction of the Division to seize contraband tobacco products without a warrant. R.I. Gen. Laws § 44-20-43 and R.I. Gen. Laws § 44-20-45 authorize criminal penalties for violations of the taxing statute.

1. **Applicability of *Burger and Keeney* - Closely Regulated Business**

Burger found that a warrantless inspection even in the context of a pervasively regulated business, will only be deemed reasonable if the three (3) criteria in that case are met. *Id.* at 701. Thus, the first question to be asked before applying the three (3) criteria is whether the sale of tobacco is a closely regulated industry. *Burger* found that automobile junkyards were a closely regulated industry because the regulatory scheme required junkyard owners to obtain licenses, keep books recording purchases and sales of automobiles and parts, make the books and automobiles available for inspection, and junkyard owners could be subject to criminal penalties, license revocation, and civil fines for failure to comply. *Burger* at 704-5. *Burger* also found other states impose such conditions on junkyard operators. Like junkyard operators, cigarette dealers must obtain licenses, keep records of sales and purchases, keep records on premises for inspection and are subject to license revocation, administrative penalties, and criminal penalties for violations.

The tobacco industry in other states with similar tobacco taxing statutes have been found to be closely regulated businesses subject to warrantless administrative inspections. *U.S. v. Mansour*, 252 F.Supp.3d 182 (Dt. Ct. W.D. N.Y. 2017) found that New York state cigarette retailers are pervasively regulated and upheld a warrantless inspection. That court found that all cigarette dealers must be licensed and risk suspension or revocation of license for possessing and

selling unstamped cigarettes. The court also noted that 47 states require tax stamps on cigarettes and New York pre-collects that tax (like Rhode Island) so inspections were a method to block the sale in New York of out of state cigarettes with lower excise taxes. *U.S. v. Hamad*, 6 F.Supp.3d 852 (Dt. Ct. N.D. IL, E.D. 2013) also found tobacco retailers to be closely regulated in Cook County, Illinois and upheld a warrantless inspection for the same kind of tax stamp regulatory scheme. *People v. Beydown*, 770 N.W.2d 54 (Mich.App. 2009) applied a *Burger* like test for a pervasively regulated industry finding that tobacco products were extensively regulated in Michigan. Like Rhode Island, Michigan had licensing, stamping, and record keeping requirements as well as a statutory provision allowing the seizure of tobacco as contraband during an inspection.

Anyone applying for dealer's license is aware that he or she is subject to "close government supervision." *Burger* 482 U.S. 700. An applicant for a dealer license would be aware of the licensing requirement as well as the conditions of the license to only buy from licensed distributors, to maintain and keep records, and be subject to inspections. Indeed, these statutory requirements demonstrate that the sale of tobacco is a closely regulated business or a pervasively regulated business. It is clear from a review of the tax statutes and *Burger* that the sale of tobacco is a closely regulated business in Rhode Island. Therefore, the three (3) criteria from *Keeney* apply.

a. "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made."

The original tobacco taxing statute was enacted in 1939. P.L. 1939, ch. 663, § 1 (etc.). As evidenced by the statutory licensing, records, and tax requirements and authority given to the Division in the cigarette and the OTP tax statute, R.I. Gen. Laws § 44-20-1 *et seq.*, and regulations promulgated pursuant to said statute, there is a strong public interest in the administration and enforcement and collection of the proper payment of tobacco taxes. Indeed, dealers are required to buy cigarettes from licensed distributors which ensures the cigarette tax is prepaid. R.I. Gen.

Laws § 44-20-12; R.I. Gen. Laws § 44-20-8.2. Thus, there is a strong government interest that informs the regulatory scheme pursuant to which inspections can be made.

b. “the warrantless inspections must be necessary to further the regulatory scheme.”

If a warrant was required for every inspection related to the tobacco industry, the regulatory scheme would be severely frustrated. If store owners had advance notice of inspections, they would be able to remove any untaxed tobacco products defeating the purpose of an inspection. The purpose of the inspection is to ensure the proper collection and payment of taxes. *Mansour*; and *Hamad*. It is for those reasons that *Keeney* adopted *Burger* regarding warrantless inspections for closely regulated businesses. *Burger* found that for regulatory inspections to be effective and serve as a deterrent, unannounced, even frequent, inspections are essential. That is the purpose of the statutory tax inspections.

c. “the statute's inspection program, in terms of the certainty and regularity of its application,” must provide “a constitutionally adequate substitute for a warrant.”

Under the third prong, the regulatory scheme must advise the tobacco licensee that an inspection is being made by law and has been properly defined in scope. Any licensed dealer is aware that under the statute they are subject to inspections without a warrant during business hours. The statutory scheme provides clear notice to tobacco licensees that “facilities and records” are subject to inspections during business hours and contraband goods may be seized.

2. Administrative Inspections

The statute authorizes the seizure of tobacco found in violation of this section. In other words, the Division is authorized to inspect licensees’ records for compliance. Indeed, those records are to be kept on premises for the ease of inspection. If during the inspection, the Division finds cigarettes or OTP not in compliance with the statute – e.g. no tax stamp, no records

supporting payment of taxes – they can be seized as part of the inspection. The inspector reviews the products and the records and then is authorized to seize products not in compliance as demonstrated by the record review.

In *Benson v. Department of Environmental Management*, 2022 RI Super LEXIS 38 (Superior Court), the Superior Court upheld the inspection, seizure, and disposal of a fisherman’s summer flounder catch as he did not hold the proper license for such fishing. In reviewing the administrative appeal, the Superior Court applied the *Burger* test adopted by *Keeney*. The Court found that commercial fishing was a closely regulated business as like the tobacco industry and the junkyard in *Burger*, it is subject to licensing requirements, inspections, and licensees face license suspension or revocation for violation of the regulatory scheme. The court found that the three (3) criteria applied and upheld the warrantless inspection and seizure of the catch.

Pursuant to R.I. Gen. Laws § 44-20-12.2⁶ and R.I. Gen. Laws § 44-20-15,⁷ the Division is authorized to seize contraband cigarettes and OTP if during an inspection of products and records,

⁶ R.I. Gen. Laws § 44-20-12.2 provides in part as follows:

Prohibited acts — Penalty. (a) No person or other legal entity shall sell or distribute in the state; acquire, hold, own, possess, or transport for sale or distribution in this state; or import, or cause to be imported, into the state for sale or distribution in this state; nor shall tax stamps be affixed to any cigarette package:

(d) Any cigarettes found in violation of this section shall be declared to be contraband goods and may be seized by the tax administrator, or his or her agents, or by any sheriff, or his or her deputy, or any police officer, without a warrant. The tax administrator may promulgate rules and regulations for the destruction of contraband goods pursuant to this section, including the administrator’s right to allow the true holder of the trademark rights in a cigarette brand to inspect contraband cigarettes prior to their destruction.

⁷ R.I. Gen. Laws § 44-20-15 provides in part as follows:

Confiscation of contraband cigarettes, other tobacco products, and other property. (a) All cigarettes and other tobacco products that are held for sale or distribution within the borders of this state in violation of the requirements of this chapter are declared to be contraband goods and may be seized by the tax administrator or his or her agents, or employees, or by any sheriff, or his or her deputy, or any police officer when directed by the tax administrator to do so, without a warrant. All contraband goods seized by the state under this chapter shall be destroyed.

(b) All fixtures, equipment, and all other materials and personal property on the premises of any distributor or dealer who, with the intent to defraud the state, fails to keep or make any record, return, report, or inventory; keeps or makes any false or fraudulent record, return, report, or inventory required

they are found to be noncompliant. See also 280-RICR-20-15-1 *Cigarette Tax* (“Cigarette Regulation”) and 280-RICR-20-15-2 *Other Tobacco Products* (“OTP Regulation”).⁸ As the

by this chapter; refuses to pay any tax imposed by this chapter; or attempts in any manner to evade or defeat the requirements of this chapter shall be forfeited to the state.

⁸ The Cigarette Regulation provides in part as follows:

1.19 Inspections

A. The Tax Administrator and his or her agents is authorized under R.I. Gen. Laws § 44-20-40.1 to conduct unannounced inspections to insure compliance with all provisions of R.I. Gen. Laws Chapter 44-20. Accordingly, the Tax Administrator and his or her agents shall be permitted to inspect the Place of Business of any person selling any and all tobacco products within the State. Inspections of Licensed Distributors or Dealers shall be conducted during normal business hours without a warrant and without prior notice.

B. The Tax Administrator and his or her duly authorized agents shall be permitted to inspect the books, papers, reports and records of any Manufacturer, Importer, Distributor, or Dealer in this state for the purpose of determining whether taxes imposed by R.I. Gen. Laws Chapter 44-20 have been fully paid, and may investigate the stock of cigarettes and other tobacco products in or upon the Place of Business for the purpose of determining whether the provisions of R.I. Gen. Laws Chapter 44-20 are being obeyed.

C. Failure to allow such inspection(s) of the Place of Business and/or records may result in civil penalties and/or suspension or revocation of a Cigarette Dealer’s or Distributor’s License.

1.20 Seizures

All cigarettes and/or other tobacco products which are possessed, stored, retained, or otherwise brought into the state in contradiction to R.I. Gen. Laws § 44-20-13.2 and these Regulations shall be considered untaxed contraband by the Tax Administrator and his or her agents. The cigarettes and/or other tobacco products may be seized by the Tax Administrator or his or her agents or employees or by any sheriff or his or her deputy or any police officer when directed by the Tax Administrator to do so, without a warrant.

1.21 Billings and Penalties

1.22 Seizure and Destruction of Unstamped Cigarettes

Any cigarettes found at any place in this state without stamps affixed as required R.I. Gen. Laws Chapter 44-20 are declared to be contraband goods and may be seized by the Tax Administrator, his or her agents, or employees, or by any deputy sheriff, or police officer when directed by the Tax Administrator to do so, without a warrant. Any cigarettes seized under the provisions of R.I. Gen. Laws Chapter 44-20 shall be destroyed. The seizure and/or destruction of any cigarettes under the provisions of this R.I. Gen. Laws § 44-20-37 does not relieve any person from a fine or other penalty for violation of R.I. Gen. Laws Chapter 44-20.

The OTP Regulation provides in part as follows:

2.9 Inspections

A. The Tax Administrator and his or her agents are authorized under R.I. Gen. Laws § 44-20-40.1 to conduct unannounced inspections to insure compliance with all provisions of R.I. Gen. Laws Chapter 44-20. Accordingly, the Tax Administrator and his or her agents shall be permitted to inspect the Place of Business of any Person selling any tobacco products within the State. Inspections of licensed Distributors or Dealers shall be conducted during normal business hours without a warrant and without prior notice.

B. The Tax Administrator and his or her duly authorize agents shall be permitted to inspect the books, papers, reports, and records of any Manufacturer, Importer, Distributor, or Dealer in this state for the purpose of determining whether taxes imposed by R.I. Gen. Laws Chapter 44-20 have been fully paid, and may investigate the stock of cigarettes and Other Tobacco Products in or upon the Place of Business for the purpose of determining whether the provisions of R.I. Gen. Laws Chapter 44-20 are being obeyed.

purpose of the statute is to ensure tax compliance, it would be inconsistent with the purpose of the statute to allow taxpayers to continue to sell products that are considered contraband. The statute authorizes the seizure and destruction of contraband goods. If cigarettes are seized without tax stamps, they can be destroyed. If a taxpayer is unable to provide proof either by invoice or at hearing that OTP tax was paid, the contraband is to be destroyed. Section 2.12 of OTP Regulation. The statute authorizes the seizure of contraband goods to ensure that tax is being properly paid. The fact that goods were seized during a statutory administrative inspection of the Taxpayer's commercial property does not turn the inspection into a criminal warrantless search.

As discussed in *Benson*, if a Department of Environmental Management ("DEM") administrative inspection of a fishing vessels finds fish caught without the proper permit, said fish are seized by the inspectors and sold. Thus, if the licensee contests the finding that it caught fish without a proper license and prevails at hearing, the licensee would conceivably be able to obtain

C. Failure to allow such inspection(s) of the Place of Business and/or records may result in civil penalties and/or suspension or revocation of a Cigarette Dealer's or Distributor's License.

2.10 Seizures

Other Tobacco Products which are possessed, stored, retained, or otherwise brought into the State in contradiction to R.I. Gen. Laws § 44-20-13.2 and this Regulation shall be considered untaxed contraband by the Tax Administrator and his or her agents. The Other Tobacco Products may be seized by the Tax Administrator or his or her agents or employees or by any sheriff or his or her deputy or any police officer when directed by the Tax Administrator to do so, without a warrant.

2.11 Billings and Penalties

A. In the event that contraband Other Tobacco Products are seized, the Tax Administrator shall issue a Notice of Deficiency Determination for the amount of tax due but unpaid on the seized items. The Tax Administrator may impose civil penalties for failure to pay tax on any Notice of Deficiency that results from a seizure of contraband Other Tobacco Products. The civil penalty shall be in the amount of five (5) times the tax due but unpaid, as calculated by the Tax Administrator and his or her agents.

B. In addition to the civil penalties listed above, the Tax Administrator, in his or her sole discretion, may suspend or revoke a cigarette Dealer's or Distributor's license for any violation of these Regulations.

2.12 Destruction of Other Tobacco Products

In the event that the taxpayer is unable or unwilling to provide valid records/invoices to evidence tax paid on the seized contraband, the contraband shall be destroyed in any manner deemed appropriate by the Tax Administrator pursuant to R.I. Gen. Laws § 44-20-15(b). If a Dealer contests a Notice of Deficiency Determination within thirty (30) days, no seized Other Tobacco Products will be destroyed while the matter is pending hearing. All seized contraband may be stored at any facility or location the Tax Administrator deems appropriate.

the return of the price for which the fish was sold. However, it would defeat the purpose of the DEM inspection to allow an inspected fishing vessel to keep and sell fish that had been caught in contravention of the fishing regulations.

The same is true here. Tobacco is a closely regulated business and under the statute administrative inspections are authorized. Indeed, the statute details the type of records to be kept. Failure to keep proper records can lead to a finding that the appropriate taxes were not paid. Rather than allow a business to continue with what has been found to be the nonpayment of taxes, the Division is authorized to seize those goods. If the business can demonstrate after the seizure by invoice or at hearing, that such goods were not contraband and the proper taxes were paid, the goods can be returned. If not, they are destroyed.

The tax statute provides that inspections are to be made during business hours. The Taxpayer agreed the inspection was made during business hours.

In this matter, the Taxpayer was engaged in an activity – sale of tobacco and other tobacco products - for which there is a substantial governmental interest (*supra*) and for which it needed permission to operate from the Division and for which warrantless and regulatory inspections as a closely regulated business are provided for by applicable statutes. The Division did not need a warrant to conduct inspections of a licensed dealer in its premises during business hours.

There was no showing by the Taxpayer that the Division inspectors did anything during the inspection but review records, products, and seize products deemed to be noncompliant with tax statutes. Therefore, the Division conducted an inspection as authorized by statute and seized tobacco products as authorized by law.

E. Whether the Taxpayer Owes the Tax Assessment on the Seized Cigars

The Taxpayer did not dispute the calculation of the taxes owed on the cigars. While the testimony at hearing was the Taxpayer's January 19, 2024 OTP-4 filing did not cover the seized products, no testimony was given as to why. The explanation is found in the audit report in which it states that the January 19, 2024 OTP-4 form that was filed included 100 cigars purchased but the submission was well after the five (5) days required. The audit report also indicated on February 21, 2024, another OTP-4 form was filed but invoices were not viewable (this form was not part of the exhibits). The audit report also stated that based on the Ashton cigars seized and the Ashton invoices, OTP-4 forms were either not filed for them or filed too late on the January 19, 2024 form. It is not clear if those Ashton cigars were part of the 100 cigars for which it was indicated the filing was too late. Altogether, the Division seized 947 cigars. Division's Exhibit Nine (9).

The Taxpayer's January 22, 2024 letter to the Division indicated the Taxpayer had failed to pay its November and December taxes which it did on January 19, 2024. Taxpayer's Exhibit One (1). The Taxpayer's OTP-4 filing on January 19, 2024 included invoices for purchases of cigars from October, November, and December, 2023. The form itself says that it is for the month ending "1/15/24." The Taxpayer submitted payment with its January 19, 2024 OTP-4 filing. Division's Exhibit 18. Presumably, any payment made then toward the tax owed on the seized cigars will be credited by the Division. The issue really becomes should those seized cigars (if any) for which an OTP-4 filing was made after they were statutorily due be included in the penalty calculation. That issue is discussed below. Thus, the Taxpayer owes the applicable tobacco taxes for the seized tobacco products with credit for any payments already made.

F. What Sanctions Should be Imposed for the Various Seizures

1. Penalties (a) and (b)

R.I. Gen. Laws § 44-20-51.1(a) provides that for a first offense in a 24 month period, a penalty of not more than ten (10) times the retail value of the cigarettes and/or other tobacco products involved “shall” be imposed. The statute further provides that for a second or subsequent offense in a 24 month period, a penalty of not more than 25 times the retail value of the cigarettes and/or other tobacco products involved “shall” be imposed. R.I. Gen. Laws § 44-20-51.1(b) provides that a penalty of not more than five (5) times the tax due or \$1,000 whichever is greater shall be imposed. Penalty (b) does not reset the clock for violations within a 24 month period as does penalty (a). 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 when imposing penalties (a) and (b). The Division seeks monetary penalties for the seized OTP and cigarettes pursuant to R.I. Gen. Laws § 44-20-51.1(a) and (b).

According to the audit report, penalty (a) was imposed as a factor of seven (7) consisting of a factor of five (5) for the first offense and two (2) aggravating factors of no invoices and no OTP-4 filings. Penalty (b) was assessed as one (1) time the tax due as the greater amount per the statute and as the first offense. Division’s Exhibit Nine (9) (audit report). The penalties imposed are in line with the statutory penalties for a first offense for penalty (a) in the last 24 months and for penalty (b). The Taxpayer did not make a showing that such penalties should not be imposed. As a consequence, the Taxpayer’s violations justified the penalties imposed in the Division’s notice of assessment for the seized OTP.

However, the penalties are based on the retail value and tax owed on the seized OTP. Thus, the calculation of the penalties could change dependent on any credit given for payment of the late OTP-4 filings and invoices received by the Division.⁹

2. Whether Dealer's License Should be Suspended

Along with the monetary penalties that "shall" be imposed under the statute, R.I. Gen. Laws § 44-20-8 provides the suspension or revocation of a cigarette dealer's license "may" be imposed. R.I. Gen. Laws § 44-20-51.1(c) provides that when determining the administrative penalty to be imposed, mitigating and aggravating factors including severity, history, and intent shall be considered. The suspension and revocation statute does not contain the same kind of mitigating and aggravating factors as those found in the administrative penalty statute. *Supra*. It also does not provide a look back of two (2) years when determining first or subsequent offences. Instead, it provides a license may be suspended or revoked for failure to comply with that chapter or any other law or ordinance relative to the sale or purchase of cigarettes or other tobacco products and for failure to comply with R.I. Gen. Laws § 44-19-1 *et seq.* or R.I. Gen. Laws § 6-13-1 *et seq.* Nonetheless, in considering whether a licensee's violations merit either a suspension or a revocation in addition to the mandatory monetary penalties, an agency does not have unbridled discretion but rather must determine the appropriate penalty in light of the relevant facts. Not all violations merit a revocation and not all violations merit a suspension of the same amount of time.

In *Chernov Enterprises, Inc. v. Sarkas*, 284 A.2d 61 (R.I. 1971), the Supreme Court construed a license renewal statute that did not provide specific statutory violations as grounds for denial but rather provided the license renewal could be denied for "cause." In that situation, the

⁹ It is noted that while it appears the Taxpayer filed some of the relevant OTP-4 forms late and may have paid some of the taxes owed late and that merits a recalculation of tax and penalties and interest owed, the penalties imposed do take into the consideration the lack of invoices and timely OTP-4 forms filings at the time of the inspection.

Court found that in “establishing cause as the controlling standard, the Legislature obviously did not intend to confer upon the licensing authority a limitless control or to permit the exercise of an unbridled discretion.” *Chernov* at 287. The Court found that such administrative action needed to be based on legally competent evidence, and a review of such an action would only be “to ascertain whether the action being reviewed was so arbitrary or capricious as to constitute an abuse of discretion, whether there was any legal evidence to support it, and whether the licensing proceeding was otherwise affected by an error of law.” *Id.* at 288. In other words, the Court would decide whether there was legally competent evidence to support the denial of a renewal application or whether the action was so arbitrary or capricious that it would be an abuse of discretion. The Superior Court has discussed the same kind of considerations for determining whether a suspension or revocation of a license is an appropriate sanction for a licensee’s violations.

Under *Rocha vs. Public Utilities Commission*, 694 A.2d 722 (R.I. 1997), a court cannot substitute its judgment for what should be an appropriate sanction but instead the Court will determine if there was legally competent evidence to support an agency’s decision. Thus, in *Rocha*, the Court upheld the revocation of license as there was legally competent evidence to support the finding of the violation that was a basis for revocation under the statute.

A Superior Court decision, *Jake and Ella’s Inc. v. Department of Business Regulation*, 2002 WL977812 (R.I. Super.), discussed *Rocha*’s holding that as long as there is an evidentiary basis for an agency’s finding, a court cannot overturn a sanction because it disagrees with the sanction. However, the Court discussed how in general hearing officers must apply concepts of proportionality to sanctions. The Court found that “[t]here are times when the sanction imposed by an agency, while permitted by law, is so arbitrary and extreme that it constitutes a clear abuse of discretion” so that under the arbitrary and capricious standard contained in R.I. Gen. Laws § 42-

35-15 of the Administrative Procedures Act (“APA”), the Court can reverse the lower court’s decision. *Jake* at 5. The Court found there are two (2) components to administrative decision: 1) a determination of the merits of the case; and 2) determination of the sanction and while the former is mainly factual, the latter not only involves ascertainment of factual circumstances but the application of administrative judgment and discretion. The Court indicated that factors to be considered in weighing the severity of a violation should include the number and frequency of the violations, the real and/or potential danger to the public posed by the violation(s), history of any prior violations and sanctions, and other relevant facts to determining an appropriate sanction.

In 2014, the Superior Court in reviewing a Department of Health’s licensee’s sanction on appeal cited to the factors considered in *Jake* for sanctions and discussed whether it had been properly applied by an agency director. *Blais v. Department of Health*, 2014 WL 7368789 (R.I.Super.). A more recent Superior Court case, *John Hope Settlement House, Inc. v. DCYF et al.*, 2017 WL 2021402 (R.I.Super.), also discussed *Rocha* and the applicability of *Jake* when determining administrative penalties for a licensee and what should be considered. In that case, the Superior Court discussed what would be the appropriate sanction by the Department of Children, Youth, and Families on a day care licensee for three (3) violations. The Court found there was not enough information in the record to make a determination about sanctions as the Court could not tell if the violations were intermittent technical violations or a “pattern of inability to comply with substantive Department policies.” *John Hope* at 6. The Court remanded the matter so the record could be supplemented so the Court could make a determination on sanctions.¹⁰

¹⁰ *John Hope* at 6 found as follows:

Finally, the Center contends that despite the three violations found, the Hearing Officer erred by affirming DCYF’s penalty—the revocation of its day care license. Specifically, John Hope argues that these three violations do not merit the “death sentence” that revocation would bring. . . . To that end, the Center points to *Jake & Ella’s* In *Jake & Ella’s*, the Superior Court vacated the revocation of a liquor license because “the sanction imposed [was] excessive and disproportionate as a matter of law.” *Id.* at *5. There, the Court held that “implementation of that sanction [revocation] under the facts of this

For an administrative appeal, the Division is not subject to the APA. When its decisions are appealed, its appeals are *de novo* to District Court. See R.I. Gen. Laws § 44-20-48. Thus, on appeal, the court would not be deciding whether a sanction was arbitrary and capricious, but rather the court, if it found violations after a *de novo* hearing, would determine the appropriate sanction. The suspension and revocation statute provides the statutory grounds for such an action but not every violation will merit a suspension of the same length of time or a revocation. There are several factors to be considered - even if they are not specifically delineated in the suspension and revocation statute - to assure that the sanction imposed is not disproportionate. The imposition of a suspension or revocation is not subject to unbridled discretion. Such a determination includes consideration of relevant facts to the licensee and its violations. Therefore, in determining the appropriate sanction for the Taxpayer's violations, it is relevant to consider the Taxpayer's disciplinary history, the seriousness of violations, the type of violations, and the effect on the public among the relevant factors to be considered.

case was clearly an abuse of discretion, ignoring concepts of proportionality that hearing officers should be expected to apply." *Id.* at *6.

On the other hand, the Court is mindful of *Rocha v. State Pub. Utils. Comm'n*, 694 A.2d 722 (R.I. 1997), heavily cited to in *Jake & Ella's*, which stated that "[t]he Superior Court is limited in its review of an agency decision to examining the record to determine whether it contains some or any legal evidence therein to support the finding made by the division." *Rocha*, 694 A.2d at 727. This Court cannot "merely disagree[] with the sanction decided upon by the division and reverse[] the division's decision." *Id.* at 726 (internal citations omitted).

Nevertheless, based solely on the three violations before the Court, the Court could find the revocation to be "so arbitrary and extreme that it constitutes a clear abuse of discretion" in the vein of *Jake & Ella's*, 2002 WL 977812 at *5. This Court lacks a sufficiently-developed record to make such a conclusion. Of the three violations, two were technical and only one potentially could have threatened the safety and welfare of the children in John Hope's care. ***

If the Department's revocation was based on the cumulative effect of the violations which led to the several probationary periods, the nature of John Hope's previous violations is unclear from the record. While the record hints at technical violations, see R. Ex. 9, there may be more substantive violations that were not mentioned. Whether the decision of the Department to revoke the license was arbitrary, capricious, or an abuse of discretion depends on whether John Hope has committed intermittent technical violations of DCYF regulations or has shown a pattern of inability to comply with substantive Department policies. The record here lacks the information needed for the Court to make such a determination.

It was undisputed this was the Taxpayer's first offense. The Division sought a five (5) day suspension of the Taxpayer's cigarette dealer's license. Division Exhibit Four (4) (notice of license suspension). While this is the Taxpayer's first offense, the Taxpayer had not filed OTP-4 forms for seven (7) months and failed to pay tax owed during that period. This is a serious violation as that is a basic condition of licensing.

Based on the foregoing, a five (5) day suspension is imposed on the Respondent's cigarette dealer's license.

3. Interest

Interest after the nonpayment of an assessment by its due date is authorized by R.I. Gen. Laws § 44-1-7.¹¹

VI. FINDINGS OF FACT

1. OTP for which no tax was paid was seized from the Taxpayer on January 18, 2024.
2. A hearing was held on January 15 and February 6, 2025 with the record closing and the parties resting on the record.
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.*, R.I. Gen. Laws § 44-20-1 *et seq.*, and 280-RICR-20-00-2 *Administrative Hearing Procedures*.

¹¹ 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.

2. The Taxpayer owes the assessed other tobacco products tax and penalties and any accrued interest; however, the tax and penalties and any interest assessed are subject to recalculation based on the applicability of any payments already made on the tax owed as discussed above.

3. The Taxpayer's cigarette dealer's license shall be suspended for five (5) days.

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 § 44-20-13.2, and R.I. Gen. Laws § 44-20-51.1, tax and penalties were properly assessed on the Taxpayer's OTP as set forth above but are subject to recalculation based on the applicability of any payments already made on the tax owed as discussed above. Pursuant to R.I. Gen. Laws § 44-1-7, the Taxpayer owes any accrued interest on said assessment.

Pursuant to R.I. Gen. Laws § 44-20-8, the Taxpayer's cigarette dealer's license shall be suspended for five (5) days effective on the 31st day after the execution of this decision.

The taxes and penalties and any interest owed by the Taxpayer shall be due to the Division by the 31st day after the execution of this decision.

Date: February 19, 2025



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: 2/19/25

Neena S. Savage
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 20th day February, 2025 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid and by electronic delivery to the Taxpayer's attorney's address on record with the Division and by electronic delivery to John Beretta, Esquire, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco