

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2011-07

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

IN THE MATTER OF:	:	
	:	
	:	Case No.: 10-T-0006
	:	Sales and Use
Taxpayer.	:	
	:	

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to Notice of Hearing and Appointment of Hearing Officer (“Notice”) issued on February 1, 2011 to the above-captioned taxpayer (“Taxpayer”) by the Division of Taxation (“Division”) in response to the Taxpayer’s request for hearing. A hearing was scheduled for March 31, 2011 at which time the Taxpayer did not appear. The Division was represented by counsel. The Taxpayer had adequate notice of the hearing since the Notice was forwarded to counsel of record. See Division’s Exhibit 12. As the Taxpayer chose not to appear at hearing, the undersigned held the hearing.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, the *Division of Legal Services Regulation 1 – Rules of Procedure for Administrative Hearings*, and the *Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01*.

III. ISSUE

Whether the Taxpayer owes the sales tax, interest, and penalties assessed by the Division.

IV. MATERIAL FACTS AND TESTIMONY

Senior Revenue Agent, testified on behalf of the Division. He testified that this matter was a re-audit of the Taxpayer for period of January 1, 2000 through December 31, 2002. He testified that the Taxpayer is a software retailer and has been doing business in Rhode Island since 1995 but does not have a place of business in Rhode Island but held a permit to make sales at retail during the audit period. He testified that he reviewed the Taxpayer's general ledger, multi-sales tax, invoices, and sales journals. He testified that he used a statute of limitations waiver. See Division's Exhibit Five (5) (waiver). He testified that he divided the taxable items into five (5) categories: 1) training expenses in conjunction with leases of software; 2) items for which no tax exempt certificates were provided; 3) maintenance contracts for software leasing; 4) software licensing sales; and 5) consulting charges on the sales of software. See Division's Exhibit Seven (7) (Schedule 16A-E). He testified that he sent the Taxpayer's his final work papers on June 9, 2006 and a Notice of Deficiency with statutory interest was issued on July 26, 2006.

The Taxpayer did not appear at hearing but the Division represented that an audit of the same taxpayer for a different time period with the exact issue had just been the subject of a decision in District Court with the District Court upholding the Division's position that these types of items were all taxable as they were a mix of goods and services. See *Oracle Corporation v. Director, Department of Revenue*, District Court, 6th Div. A.A. No. 04-58 (September 15, 2010).

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. 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**

Sales price is defined by R.I. Gen. Laws § 44-18-12.¹ R.I. Gen. Laws § 44-18-18 imposes a 7% sales tax upon sales at retail. R.I. Gen. Laws § 44-18-19 requires that

¹ This statute was amended effective January 1, 2007. The statute in effect at the time of the audit states as follows:

"Sale price" defined. --(a) "Sale price" means the total amount for which tangible personal property is sold or leased or rented, and the total amount charged for the furnishing or distributing of electricity, natural gas, artificial gas, steam, refrigeration, water, telecommunications, telegraph, cable, and radio message service, community antenna television, subscription television and cable television service.

retailers collect sales tax. Pursuant to R.I. Gen. Laws § 44-19-10, taxes that are due and payable by taxpayers that hold permits to make sales at retail are to be paid every month.

C. Whether the Taxpayer Owe Sales Tax

The Division relies on said District Court decision which found that the Taxpayer's sales of software and related services could not be separated out but in fact the purchased services were a necessary element in order to use the purchased equipment and said services could not be separately purchased. Said decision relied on the leading Rhode Island cases regarding the taxability of mixed goods and services and found that as the services were incidental to the purchase of equipment, the services were taxable. See *New England Telephone Co. v. Clark*, 624 A.2d 298 (R.I. 1993); *Statewide Multiple Listing Service v. Norberg*, 392 A.2d 371 (R.I. 1978).

Pursuant to R.I. Gen. Laws § 44-18-25,² the Taxpayer had the burden to demonstrate that it did not owe the assessed tax. The evidence was that the Division assessed the services rendered as part of consulting, training, and maintenance of leases of software as well as for software licensing sales and those items with no tax exempt proof. Such items fall within mixed goods and services as found by the said District Court case, *New England Telephone*, and *Multiple Listing Service*.

Therefore, the Division properly assessed the Taxpayer the sales tax it owed. See Division's Exhibit Ten (10) (Notice of Deficiency). The Division imposed interest on the

² R.I. Gen. Laws § 44-18-25 provides as follows:

Presumption that sale is for storage, use, or consumption – Resale certificate. – It is presumed that all gross receipts are subject to the sales tax, and that the use of all tangible personal property is subject to the use tax, and that all tangible personal property sold or in processing or intended for delivery or delivered in this state is sold or delivered for storage, use, or other consumption in this state, until the contrary is established to the satisfaction of the tax administrator. The burden of proving the contrary is upon the person who makes the sale and the purchaser, unless the person who makes the sale takes from the purchaser a certificate to the effect that the purchase was for resale. The certificate shall contain any information and be in the form that the tax administrator may require.

assessment pursuant to R.I. Gen. Laws § 44-19-11.³ See Division's Exhibit Nine (9) (interest calculation). In addition, the Division properly imposed a 10% penalty on said deficiency pursuant to R.I. Gen. Laws § 44-19-12.⁴ The statute clearly provides that if a taxpayer does not pay a tax because of negligence or does not pay, a 10% penalty is imposed. See *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977).

VI. FINDINGS OF FACT

1. The Notice was issued on February 1, 2011 to the Taxpayer in response to the Taxpayer's request for hearing.
2. The hearing was held on March 31, 2011.
3. The Taxpayer was notified of the hearing date and did not appear.
4. A field audit was conducted by the Division for the period of January 1, 2000 through December 31, 2002.
5. The items at issue fell under mixed goods and services.
6. The Taxpayer did not make a showing that it did not owe sales tax and the Division properly assessed the Taxpayer the taxes and interest and penalties owed as set forth in the Notice of Deficiency admitted as Division's Exhibit Ten (10).

³ R.I. Gen. Laws § 44-19-11 states in part as follows:

Deficiency determinations – Interest. – If the tax administrator is not satisfied with the return or returns or the amount of tax paid to the tax administrator by any person, the administrator may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information in his or her possession or that may come into his or her possession. One or more deficiency determinations may be made of the amount due for one or for more than one month. The amount of the determination, exclusive of penalties, bears interest at the annual rate provided by § 44-1-7 from the fifteenth day (15th) after the close of the month for which the amount, or any portion of it, should have been paid until the date of payment.

⁴ R.I. Gen. Laws § 44-19-12 states as follows:

Pecuniary penalties for deficiencies. – If any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of the provisions of this chapter and chapter 18 of this title, a penalty of ten percent (10%) of the amount of the determination is added to it. If any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade the provisions of this chapter or chapter 18 of this title, a penalty of fifty percent (50%) of the amount of the determination is added to it.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-18-1 *et seq.*, and R.I. Gen. Laws § 44-19-1 *et seq.*

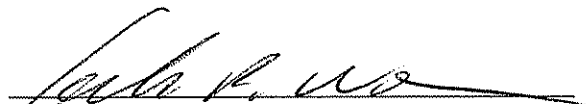
2. Pursuant to R.I. Gen. Laws § 44-18-18, the Taxpayer owes the assessed sales tax. Pursuant to R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-12, the Taxpayer owes the interest and penalties assessed on the deficiencies.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-18-18, the Taxpayer owes the assessed sales tax and pursuant to R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-12, the Taxpayer owes the interest and penalties assessed in the deficiency as set forth in the Notice of Deficiency. See Division's Exhibit Ten (10).

Date: May 19, 2011

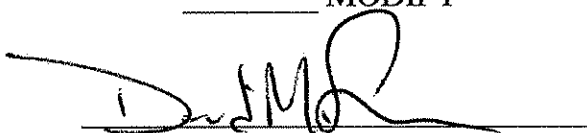

Catherine R. Warren
Hearing Officer

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: 5/27/11


David Sullivan
Tax Administrator

NOTICE OF APPELLATE RIGHTS

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

R.I. Gen. Laws § 44-19-18 Appeals

Appeals from administrative orders or decisions made pursuant to any provisions of this chapter are to the sixth (6th) division district court pursuant to chapter 8 of title 8. The taxpayer's right to appeal under this chapter is expressly made conditional upon prepayment of all taxes, interest, and penalties, unless the taxpayer moves for and is granted an exemption from the prepayment requirement pursuant to § 8-8-26.

CERTIFICATION

I hereby certify that on the 27th day of May, 2011 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid and return receipt requested to the Taxpayer's address and by hand delivery to Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Paul Belasco