

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2011-09

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

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IN THE MATTER OF:

Taxpayer.  
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Case No.: 10-T-0024  
Litter Control Permit

**DECISION**

**I. INTRODUCTION**

The above-entitled matter came before the undersigned as the result of a Notice of Hearing and Appointment of Hearing Officer dated November 16, 2010 and issued to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing filed with the Division. The parties agreed to have a decision rendered on stipulated facts, exhibits, and briefs. Both parties were represented and timely filed briefs by March 8, 2010.

**II. JURISDICTION**

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

**III. ISSUE**

The parties agreed that the issue is whether the proceeds from the sale of gasoline should be included in determining a retailer's gross receipts for purposes of computing the annual Litter Participation Permit Fee.

#### IV. MATERIAL FACTS AND TESTIMONY

The parties submitted and agreed to the following stipulated facts:

1. The Taxpayer is a domestic for-profit corporation chartered in 1970 with its principal place of business located Providence, R.I. See Joint Exhibit One (1).

2. The Division is a state agency charged with the administration and enforcement of all state taxes including, *inter alia*, the Sales and Use Tax imposed under R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-18.1-1 *et seq.* including the Litter Control Participation Permit (a/k/a the Litter Permit Fee) imposed under R.I. Gen. Laws § 44-44-1 *et seq.*

3. The Taxpayer engages in the business of operating a gas station and a car wash. The Taxpayer also conducts a small retail operation where it sells soft drinks, snacks, cigarettes and auto related items. The Taxpayer has held a sales tax permit since 1970 and has a regular history of filing and remitting taxes thereunder. See Joint Exhibits Two (2) and Three (3).

4. For the years 2008 through 2010, the Taxpayer obtained an annual Litter Permit and paid the minimum fee of \$25.

5. During the course of a routine Sales and Use Tax field audit conducted by the Division, it was found that the Taxpayer had an annual average of \_\_\_\_\_ in gross receipts derived from the sale of tangible personal property during the years 2008 through 2010 inclusive. See Joint Exhibit Eight (8). Over 90% of these annual receipts were attributable to the sale of gasoline; which is statutorily exempt under the Sales and Use Tax.

6. As a result of this finding, it was determined that the Taxpayer should have paid the annual Litter Permit Fee between 2008 and 2010 at a higher capped rate. Accordingly, the Division re-computed the Taxpayer's Litter Permit Fee to be \_\_\_\_\_ per annum between 2008 and 2010. See Joint Exhibit Seven (7).

7. On July 12, 2010, the Division issued the Taxpayer a Notice of Deficiency Determination ("Deficiency Notice") for Litter Permit Fees. On July 12, 2010, the Taxpayer made a timely request for administrative review of the Deficiency Notice. See Joint Exhibits Five (5), Six (6), Nine (9), Ten (10), and Eleven (11).

#### 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 (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) (citing *Cocchini v. City of Providence*, 479 A.2d 108 (R.I. 1984)). In cases where a statute may contain ambiguous language, the Rhode Island 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**

Pursuant to R.I. Gen. Laws § 44-18-18, Rhode Island imposes a sales tax of 7% on gross receipts of a retailer. Pursuant to R.I. Gen. Laws § 44-18-19, the retailer is responsible for the collection of sales tax. The parties agree that the sale of gasoline is exempt from sales tax as set forth in R.I. Gen. Laws § 44-18-30(6) as follows:

Gross receipts exempt from sales and use taxes. – There are exempted from the taxes imposed by this chapter the following gross receipts:

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(6) *Gasoline*. From the sale and from the storage, use, or other consumption in this state of: (i) gasoline and other products taxed under chapter 36 of title 31, and (ii) fuels used for the propulsion of airplanes.

R.I. Gen. Laws § 44-44-3.1 sets forth the Litter Permit requirements as follows:

Permit required. - Commencing August 1, 1988, every person

engaging in, or desiring to engage in activities described in § 44-44-2(20), shall annually file an application with the tax administrator for a litter control participation permit, hereinafter called a "permit", (sic) for each place of business in Rhode Island. . . . At the time of making an application, the applicant shall pay the tax administrator a permit fee based as follows:

(1) For the applicant whose gross receipts for the prior calendar year measured less than fifty thousand dollars (\$50,000), a fee of twenty-five dollars (\$25.00);

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(5) For the applicant whose gross receipts for the prior calendar year measured one million dollars (\$1,000,000) or more, a fee of one hundred twenty-five dollars (\$125) for each one million dollars (\$1,000,000) or fraction of this amount. The fee in this subdivision shall not exceed the sum of one thousand dollars (\$1,000) for each permit at each place of business in Rhode Island when the "qualifying activities" referred to in this section and defined in § 44-44-2(20) and the sale of food products do not exceed ten percent (10%) of the gross receipts for each permit.

"Gross receipts" and "qualifying activities" are defined in R.I. Gen. Laws § 44-44-2(12) as follows:

(12) Gross Receipts. Those receipts reported for each location to the tax administrator included in the measure of tax imposed under chapter 18 of this title, as amended. For those persons having multiple locations' receipts reported to the tax administrator the "gross receipts" to be aggregated shall be determined by each individual sales tax permit number. The term gross receipts shall be computed without deduction for retail sales of items in activities other than those which this state is prohibited from taxing under the constitution of the United States.

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(20) "Qualifying activities" means selling or offering for retail sale food or beverages for immediate consumption and/or packaged for sale on a take out or to go basis regardless of whether or not the items are subsequently actually eaten on or off the vendor's premises.

The Sales and Use tax statute defines gross receipts in R.I. Gen. Laws § 44-18-13 as follows:

Gross receipts defined. – "Gross receipts" means the total amount of the sale price, as defined in § 44-18-12 or the measure subject to tax as defined in § 44-18-12.1, of the retail sales of retailers.<sup>1</sup>

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<sup>1</sup> R.I. Gen. Laws § 44-18-12 states in part as follows:

### C. Arguments

This matter turns on the statutory interpretation of R.I. Gen. Laws § 44-44-12(2). The Taxpayer argued the Litter Permit Fee is based only on its sales of gross receipts and that gross receipts do not include any items that are exempt from sales tax.<sup>2</sup> Therefore, the Taxpayer argued that its sales of gasoline cannot be included in the calculation of gross receipts for what is owed for the Litter Permit Fee. However, the Division argues that gross receipts as defined in R.I. Gen. Laws § 44-44-2(12) includes the sale of tax exempt items including gasoline.

The Division relies on the Litter Permit Fee's statute's definition of gross receipts that the only items "deducted" from the gross receipts for the purpose of calculating the Litter Permit Fee are those items that are prohibited from being taxed by the U.S. Constitution. In contrast, the Taxpayer argued that since gasoline is already exempt from sales tax and thus not included in gross receipts, no deduction for gasoline sales is required to be found in R.I. Gen. Laws § 44-44-2.

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"Sale price" defined. – (a) "Sales price" applies to the measure subject to sales tax and means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for the following: [omitted]

R.I. Gen. Laws § 44-18-12.1 states as follows:

"Additional measure subject to tax". – Also included in the measure subject to tax under this chapter is 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; provided, that the measure of tax in regard to telecommunications service is the total consideration received for the service as defined in § 44-18-7(9); provided, that in order to prevent multistate taxation of all telecommunications service, any taxpayer is allowed a credit or refund of sales tax upon presenting proof that a tax has been paid to another state to which the tax is properly due for the identical service taxed under this chapter. Furthermore, included in the measure of tax is the total amount charged for the rental of living quarters in any hotel, rooming house, or tourist camp.

<sup>2</sup> The Taxpayer indicated in its brief that based on its arguments, it underpaid the Litter Permit Fee and should have paid \_\_\_\_\_ in 2008, \_\_\_\_\_ in 2009, and \_\_\_\_\_ in 2010 based on its gross receipts without including tax exempt items instead of \_\_\_\_\_ each year. See its brief. See R.I. Gen. Laws § 44-44-3.1(3) and (4).

**D. Whether Tax Exempt Items are Included in the Definition of Gross Receipts Contained in R.I. Gen. Laws § 44-44-12(2)**

Gross receipts are defined in the Sales Tax statute and are defined differently in the Litter Permit Fee statute. There is no support for the proposition that the two (2) definitions or statutes should be read together. Indeed, if the General Assembly wanted the definition for gross receipts from the Sales Tax statute to be used in the Litter Permit Fee statute, it would not have bothered to define gross receipts differently. The Legislature is deemed to know its prior enactments when it enacts new laws. See *Rhode Island Depositors Economic Protection Corp. v. Coffey and Martinelli, Ltd.*, 821 A.2d 222 (R.I. 2003). The Litter Permit Fee statute was enacted after the sales tax statute and at that time, the General Assembly chose to define gross receipts differently.<sup>3</sup>

Turning to the R.I. Gen. Laws § 44-14-2(12) definition, a statute must be examined in its entirety and the words given their plain and ordinary meaning. The Litter Permit Fee gross receipts definition is clear and unambiguous. The definition includes those receipts reported from each location and included in the measure of tax. It is also to be computed “without deduction” for any items except “those which this state is prohibited from taxing under the constitution of the United States.” The U.S. Constitution does not prohibit the taxing of gasoline.<sup>4</sup> Rather the General Assembly has chosen to exempt gasoline from the sales tax. Thus, gross receipts do not include items which are barred by the U.S. Constitution from being taxed but include all other items

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<sup>3</sup> See also *Carcieri v. Salazar*, 129 S.Ct. 1058, 1065 (U.S. 2009) (“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks omitted)).

<sup>4</sup> For example, the U.S. Constitution prohibits the taxing of items passing through the State in the stream of interstate commerce. See *Randall v. Norberg*, 403 A.2d 240 (RI 1979).

even those exempted from the sales tax. To ignore the last sentence regarding the computation of gross receipts would render that sentence meaningless.

Furthermore, even if a statute does not define every term, that does not make that statute ambiguous. In *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the “ordinary meaning” of “must.” *Id.*, at 674. As the Court has found, “[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary.” *Defenders of Animals, Inc.*, at 543. *Black’s Law Dictionary* (9<sup>th</sup> Edition 2009) defines gross receipts in the context of tax as “[t]he total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a taxable year, before deductions.”

Similarly, the Litter Permit Fee definition of gross receipts only deducts those sales items barred from being taxed by the U.S. Constitution. The Taxpayer attempts to bootstrap a Sales Tax exemption into the definition of gross receipts contained in the Litter Permit Fee. There is no basis for that argument. The General Assembly chose to include in the Litter Permit Fee definition of gross receipts all retail sales except those that cannot be taxed under the U.S. Constitution. The General Assembly chose not to rely on the Sales and Use definition of gross receipts. The Division properly assessed the Taxpayer for underpaying its Litter Permit Fees from 2008 to 2010.

#### **E. Penalty and Interest**

Pursuant to R.I. Gen. Laws § 44-44-18.1,<sup>5</sup> the Division imposed a 10% penalty on the Taxpayer’s assessment. Pursuant to R.I. Gen. Laws § 44-44-18,<sup>6</sup> the Division

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<sup>5</sup> R.I. Gen. Laws § 44-44-18.1 states as follows:



imposed interest on the Taxpayer's assessment. See Joint Exhibits Nine (9) (interest calculation) and Ten (10) (Deficiency Notice).

## VI. FINDINGS OF FACT

1. On or about November 16, 2010, the Division issued a Notice of Hearing and Appointment of Hearing Officer.
2. The parties submitted an agreed statement of facts and exhibits and all briefs were timely filed by March 8, 2010.
3. The facts and exhibits have been agreed upon by both parties and are not disputed.

## 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 § 44-44-1 *et seq.*
2. Pursuant to R.I. Gen. Laws § 44-44-2(12) and R.I. Gen. Laws § 44-44-1 *et seq.*, the Taxpayer is not entitled to the claimed gross receipt gasoline exemption.

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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, a penalty of ten percent (10%) of the amount of the determination shall be added to this amount. 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, a penalty of fifty percent (50%) of the amount of the determination shall be added to this amount.

<sup>6</sup> R.I. Gen. Laws § 44-44-18 provides as follows:

Notice of determination. – The tax administrator shall give written notice of his or her determination to the beverage wholesaler or litter control participation permittee or hard-to-dispose material wholesaler or hard-to-dispose material retailer or person. Except in the case of fraud or failure to make a return, or noncompliance with § 44-44-8, every notice of determination shall be mailed within three (3) years of the date the taxes first became due. The amount of this determination shall bear interest at the rate prescribed in § 44-1-7 from the date when taxes should have been paid until the date of payment.

3. Pursuant to R.I. Gen. Laws § 44-44-1 *et seq.*, the Division properly calculated the Taxpayer's annual Litter Permit Fee between 2008 and 2010 to include the sale of gasoline as set forth in the Deficiency Notice.

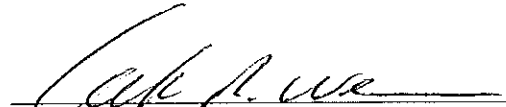
4. Pursuant to R.I. Gen. Laws § 44-44-18.1 and R.I. Gen. Laws § 44-44-18, the Division properly assessed the penalty and interest included in the Deficiency Notice.

**VIII. RECOMMENDATION**

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

Pursuant to R.I. Gen. Laws § 44-44-2(12), the sale of gasoline is included in gross receipts for the purpose of calculating the annual Litter Permit Fee. Pursuant to R.I. Gen. Laws § 44-44-1 *et seq.*, the Division properly assessed the Taxpayer's Litter Permit Fee, penalty, and interest for 2008 to 2010 as set forth in the Deficiency Notice.

Date: 5/25/11

  
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

Date: 5/31/11

  
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 R.I. Gen. Laws § 44-44-21 WHICH STATE AS FOLLOWS:**

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

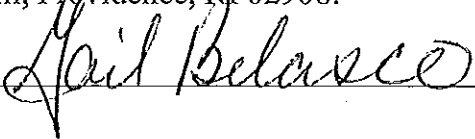
R.I. Gen. Laws § 8-8-25 states as follows:

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 31<sup>st</sup> 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 authorized representative's address on file with the Division of Taxation and by hand delivery to Bernard Lemos, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.

  
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