STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2012-04

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

IN THE MATTER OF:	:	
	:	**Sales/Use Tax**
	:	**Case No.: 10-T-0023**
Taxpayer.	:	

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 October 1, 2010 and issued to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to a request for hearing. A hearing was held on September 21, 2011. At hearing, the parties were represented by counsel and briefs were timely filed by November 25, 2011.

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.*, the *Division of Taxation Administrative Hearing Procedures*, *Regulation AHP 97-01*, and the Department of Administration's *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings*.

III. ISSUE

Whether the Taxpayer owes the Division's assessment in light of R.I. Gen. Laws § 44-18-30(7) and (22).

IV. MATERIAL FACTS AND TESTIMONY

Revenue Agent II, testified on behalf of the Division. He testified that he performed a field audit of the Taxpayer for the period February 1, 2006 to January 31, 2009. He testified that the Taxpayer is incorporated in and has its principal place of business in Rhode Island and holds a permit to make sales at retail. See Division's Exhibits One (1) and Two (2). He testified that the Taxpayer produces asphalt for retail and contract work and regularly files tax. See Division's Exhibit Three (3) (sale tax filing history). He testified that he reviewed the Taxpayer's tax returns, corporate returns, assets, invoices, payroll, etc. and the Taxpayer's records were complete. He testified that the Taxpayer signed a statute of limitation's waiver. See Division's Exhibit Six (6).

testified that there were two (2) areas of tax liability in the Division's revised deficiency notice to the Taxpayer: extax purchases from Rhode Island vendors (Schedule 2B) and extax purchases from out-of-state vendors for supply and expenses (Schedule 3B).[1] See Division's Exhibit Eight (8) (audit workpapers). He testified that the Taxpayer paid sales tax on some items but not on the assessed items. He testified that he used a test period for 2008 which he applied to the total sales. He testified that under R.I. Gen. Laws § 44-18-30, the Taxpayer owed tax on non-exempt items.

On cross-examination, testified that he is aware of the prior audits but did not participate in them. He testified that he agreed with the Taxpayer's controller and counsel that based on the asphalt tonnage, 42.3% is exempt because it resold by the Taxpayer. He testified that the Taxpayer acts a contractor for the balance of jobs for

[1] testified that a third liability (Schedule 3A) was included in the first deficiency notice (See Division's Exhibit Ten (10)) issued to the Taxpayer but it was deleted from the revised deficiency issued to the Taxpayer. See Division's Exhibit 12.

which the Taxpayer charges sales tax. He testified that the Division assessed the Taxpayer's replacement equipment on a *pro rata* basis based on the non-exempt manufacturing. On re-direct examination, testified asphalt is used in the Taxpayer's jobs and the Taxpayer calculated its cost based on per ton including depreciation but did not include replacement parts.

the Taxpayer's controller, testified on behalf of the Taxpayer. He testified that he interacted with on the audit and that explained the charges. He testified that he understood why the Division determined the 42.3% was sold at retail but he did not agree with the end conclusion of the tax liability. He testified that the Taxpayer does not manufacture the asphalt for specific jobs but rather asphalt is manufactured and the Taxpayer draws from the same asphalt pile as the retail customer though there is some asphalt that is made to specification for towns. On cross-examination, testified that the Taxpayer is a manufacturer and charges sales tax on asphalt sold at retail and when it performs its own jobs, it charges sales tax so it is being charged tax again since it already calculated the cost for the selling price of asphalt.

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 and Regulations

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. Pursuant to R.I. Gen. Laws § 44-18-20, a use tax is imposed on the storage, use or consumption of tangible personal property. "The use tax . . . is a complement to Rhode Island's sales tax . . . The sales tax applies to 'sales at retail in this state.' (citation omitted). The use tax, in contradistinction, is imposed on 'the storage, use, or other consumption in this state of tangible personal property.'" *Dart Industries, Inc. v. Clark*, 696 A.2d 306, 309 (R.I.1997). R.I. Gen. Laws § 44-18-10 defines "use" as "the exercise of any right or power of tangible personal property incident to the ownership of that property." In this matter, the Division is assessing use tax on the Taxpayer's replacement equipment. See Division's Exhibit Eight (8) (schedule 2B-extax purchases from RI vendors for equipment; schedule 3A-extax purchases from out-of-state vendors for equipment).

R.I. Gen. Laws § 44-18-25[2] presumes that all gross receipts are subject to sales tax and all use of tangible personal property is subject to use tax and that the burden of proving otherwise falls on the taxpayer. The Taxpayer has claimed an exemption pursuant to R.I. Gen. Laws § 44-18-30 but the Division argued that pursuant to R.I. Gen. Laws § 44-18-30(7) and (22),[3] the Taxpayer is liable for the deficiency. The Division

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[2] R.I. Gen. Laws § 44-18-25 states 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.

[3] R.I. Gen. Laws § 44-18-30 states in part 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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> (7) *Purchase for manufacturing purposes*
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> (i) From the sale and from the storage, use, or other consumption in this state of computer software, tangible personal property, electricity, natural gas, artificial gas, steam, refrigeration, and water, when the property or service is purchased for the purpose of being manufactured into a finished product for resale, and becomes an ingredient, component, or integral part of the manufactured, compounded, processed, assembled, or prepared product, or if the property or service is consumed in the process of manufacturing for resale computer software, tangible personal property, electricity, natural gas, artificial gas, steam, refrigeration, or water.
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> (iv) "Manufacturing" means and includes manufacturing, compounding, processing, assembling, preparing, or producing.
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> (v) "Process of manufacturing" means and includes all production operations performed in the producing or processing room, shop, or plant, insofar as the operations are a part of and connected with the manufacturing for resale of tangible personal property, electricity, natural gas, artificial gas, steam, refrigeration, or water and all production operations performed insofar as the operations are a part of and connected with the manufacturing for resale of computer software.
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> (vi) "Process of manufacturing" does not mean or include administration operations such as general office operations, accounting, collection, sales promotion, nor does it mean or include distribution operations which occur subsequent to production operations, such as handling, storing, selling, and transporting the manufactured products, even though the administration and distribution operations are performed by or in connection with a manufacturing business.
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> (22)(i) From the sale and from the storage, use, or other consumption in this state of tools, dies, and molds, and machinery and equipment (including replacement parts), and related items to the extent used in an industrial plant in connection with the actual

also relied on *Sales and Use Tax Regulation* 91-27 *Contractors and Subcontractors - "Regulation C"* (91-27")[4] and *Sales and Use Tax Regulation SU 07-58 Manufacturing, Property and Public Utilities Service Used In* ("07-58").[5] Additionally, pursuant to R.I.

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manufacture, conversion, or processing of tangible personal property, or to the extent used in connection with the actual manufacture, conversion or processing of computer software as that term is utilized in industry numbers 7371, 7372, and 7373 in the standard industrial classification manual prepared by the technical committee on industrial classification, office of statistical standards, executive office of the president, United States bureau of the budget, as revised from time to time, to be sold, or that machinery and equipment used in the furnishing of power to an industrial manufacturing plant. For the purposes of this subdivision, "industrial plant" means a factory at a fixed location primarily engaged in the manufacture, conversion, or processing of tangible personal property to be sold in the regular course of business;

(ii) Machinery and equipment and related items are not deemed to be used in connection with the actual manufacture, conversion, or processing of tangible personal property, or in connection with the actual manufacture, conversion or processing of computer software as that term is utilized in industry numbers 7371, 7372, and 7373 in the standard industrial classification manual prepared by the technical committee on industrial classification, office of statistical standards, executive office of the president, United States bureau of the budget, as revised from time to time, to be sold to the extent the property is used in administration or distribution operations;

(iii) Machinery and equipment and related items used in connection with the actual manufacture, conversion, or processing of any computer software or any tangible personal property which is not to be sold and which would be exempt under subdivision (7) or this subdivision if purchased from a vendor or machinery and equipment and related items used during any manufacturing, converting or processing function is exempt under this subdivision even if that operation, function, or purpose is not an integral or essential part of a continuous production flow or manufacturing process;

(iv) Where a portion of a group of portable or mobile machinery is used in connection with the actual manufacture, conversion, or processing of computer software or tangible personal property to be sold, as previously defined, that portion, if otherwise qualifying, is exempt under this subdivision even though the machinery in that group is used interchangeably and not otherwise identifiable as to use.

[4] *Sales and Use Tax Regulation* SU 91-27 *Contractors and Subcontractors – Regulation C*

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(2) Tangible Personal Property Fabricated by Contractors

A contractor may in certain instances fabricate part or all of the articles which he/she uses in construction work. For example, a sheet metal contractor may partly or wholly manufacture roofing, cornices, gutter pipe, furnace pipe, furnaces, ventilation or air conditioning ducts or other items from sheet metal which he or she purchases, and use these articles, pursuant to a contract for the construction or improvement of real property. In such a contract the partly or wholly manufactured articles are not made for resale as tangible personal property but for incorporation into the work to be performed. In this instance the sale of sheet metal to such contractor constitutes a sale at retail by the contractor's supplier within the meaning of the law and the contractor pays the tax as a consumer when he/she buys the same. This is so whether the articles so fabricated are used in the alteration, repair or reconstruction of an old building, or are used in new construction work.

[5] *Sales and Use Tax Regulation* SU 07-58 *Manufacturing, Property and Public Utilities Service Used In*

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II. Property used in production

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III. Section 44-18-30(22) provides a further exemption from the sale (including lease or rental) and from the storage, use, or other consumption in this state of tools, dies and molds, and machinery and equipment (including replacement parts thereof) to the extent used in an industrial plant in the actual manufacture, conversion or processing of tangible personal property including computer software as that term is utilized in SIC numbers 7371, 7372 and 7373, or in the corresponding industry sectors of the North American Industry Classification System (NAICS Code), to be sold or such machinery and equipment used in the furnishing of power to an industrial manufacturing plant.

Under section 44-18-30(22) the sales or use tax applies to the sale, (including lease or rental), storage, use, or other consumption in this state of tools, dies and molds, and machinery and equipment (including replacement parts thereof) to the extent used in administration and distribution operations.

The exemption provided in section 44-18-30(22) applies to the sale (including lease or rental) and to the storage, use or other consumption in this state of tools, dies and molds, and machinery and equipment (including replacement parts thereof) to the extent used in the production of tangible personal property including computer software to be sold.

In the event that a manufacturer purchases equipment that does not qualify for exemption, it shall pay the tax due at time of purchase. Provided, however;

(a) If the equipment purchased partially qualifies for exemption and the manufacturer knows the extent of the partial exemption, the manufacturer shall give the vendor a Manufacturer's Exemption Certificate and file a use tax return with the Division of Taxation and pay a use tax based on the percentage of the nonexempt use of the equipment, or

(b) If the equipment purchased partially qualifies for exemption and the manufacturer does not know the extent of the partial exemption, it shall give the vendor a Manufacturer's Exemption Certificate and file a use tax return with the Division of Taxation and pay use tax on the entire cost of the equipment.

If a manufacturer files a use tax return under the provisions of (a) or (b) above, it shall, twenty-four months thereafter, analyze the machinery usage to determine the actual exempt usage for that machinery. This shall be compared to the original estimate made and any balance due or credit due the manufacturer must be reported on the next month's use tax return. Any balance due or credit due shall bear interest from time of original purchase.

The word machinery includes tools, dies and molds, and machinery and equipment (including replacement parts thereof).

Machinery used in the actual manufacture, conversion, or processing of any computer software or tangible personal property which is not to be sold and which would be exempt under this section or section 44-18-30(22) if purchased from a vendor shall be exempt under this paragraph even if such operation, function or purpose is not an integral or essential part of a continuous production flow or manufacturing process. This is so even though the tangible personal property being produced by such machinery would in itself be exempt under 44-18-30(7) or under 44-18-30(22) if purchased from a vendor thereof.

Where a portion of a group of portable or mobile machinery is used in the actual manufacture, conversion or processing of tangible personal property or computer software to be sold, as heretofore defined, such portion, if otherwise qualifying, shall be exempt under this paragraph even though the machinery in said group is used interchangeably and not otherwise identifiable as to use.

The term "industrial plant" means a factory at a fixed location primarily engaged in the manufacture, conversion or processing of tangible personal property to be sold in the regular course of business.

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Gen. Laws § 44-19-33, regulations promulgated by the Tax Administrator regarding R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-19-1 *et seq.* are "are prima facie evidence of their [the statutes] proper interpretation."

C. Arguments

i. The Division

The Division argued that the Taxpayer manufactures asphalt and that pursuant to R.I. Gen. Laws § 44-18-30(7) in order for it to fall under the manufacturing exemption, the product must be manufactured for resale. The Division argued that it determined that the Taxpayer sells 42.3% of its product at retail but the remaining 57.7% is manufactured

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V. The following guidelines may be used to determine if the exemption applies.

1. Machinery must be used by a manufacturer in manufacturing tangible personal property to be sold to be exempt. This excludes from the exemption all machinery used in the furnishing of services. For example, the machinery of a laundry or dry cleaner, since it does not manufacture tangible personal property, but rather provides a service, cannot be within the exemption.

2. Machinery used by a manufacturer before the manufacturing process has begun or after it has been completed is taxable. For example, machinery used for delivery to or from a plant, repair or maintenance of facilities, and crating or packaging for shipment are not within the exemption, except as provided in paragraph 4 below.

3. Machinery used by a manufacturer to produce component parts which are to become an integral part of the finished product to be sold would be exempt. For example, a milling machine used to make parts which are to become a component of the finished product to be sold would be exempt.

4. Packaging machinery when used to place the property to be sold in the primary container, package or wrapping in which such property is normally sold to the ultimate consumer is exempt. For example, a primary package or container includes the bottle or cap used for a carbonated beverage, the aerosol can, the wrapper for a candy bar or the tray for frozen convenience foods. Machinery used in packaging for the purposes of transporting, displaying or merchandising the product, where such packaging is normally discarded by the wholesaler, retailer, or ultimate consumer prior to the use or consumption of the product is taxable. Such packaging includes shipping cartons, cases in which goods are placed for case lot sales, wooden cases, or six-pack containers for carbonated or alcoholic beverages.

5. Materials used in constructing a foundation to hold production machinery would be subject to the tax in that such a foundation is part of a building or structure and does not qualify for the production exemption.

6. The parts and repair service for exempt machinery also are exempt. Examples of such items would be conveyor belts, grinding wheels, grinding balls, machine drills, auger bits, milling cutters, emery wheels, jigs, saw blades, machine tool holders, reamers, dies and molds.

SU 07-58 superseded SU 00-58 effective January 3, 2007 which is toward the beginning of the audit period. There were no relevant substantive changes.

for the Taxpayer's own use so the latter percentage is the taxable amount of the Taxpayer's manufacturer's equipment pursuant to R.I. Gen. Laws § 44-18-30(22). The Division argued that the Taxpayer's cost per ton formula included costs for gravel, stone, labor, and depreciation but did not include equipment and replacement parts which are not exempt under the manufacturer's exemption. The Division also argued that it was irrelevant that the Taxpayer charged sales tax on the sale of asphalt used in its non-exempt sales as all business are required to collect sales tax on non-exempt sales items and use tax is a business' legal obligation and sales tax is a customer's legal obligation.

ii. The Taxpayer

The Taxpayer argued that it is 100% a manufacturer and has always been found to be a manufacturer in previous Division audits. It argued that it collects sales tax on asphalt that it sells to other contractors and on what installs itself so it charges sales tax on all jobs except exempt jobs. The Taxpayer argues that 91-27 does not apply to it since it is not a contractor but rather a manufacturer since it does not buy and install asphalt but rather makes asphalt from raw materials so falls under R.I. Gen. Laws § 44-18-30(22)(i).

D. Whether the Taxpayer Owes the Assessed Tax

A tax exemption statute is construed against a taxpayer and a taxpayer has the burden of proof to establish that it is entitled to an exemption. *Dart Industries, supra.* A review of the statute at issue indicates that the exemption is two-fold. The exemption for "purchase for manufacturing purposes" exempts from the storage or use when the property is purchased for "the purpose of being manufactured into a finished product for resale" and is part of the manufactured product. R.I. Gen. Laws § 44-18-30(7). Therefore, products purchased must be used for manufacturing and manufactured into a

product for resale. The same exemption also applies to equipment used for the actual manufacture of products for sale. R.I. Gen. Laws § 44-18-30(22). Thus, the machinery and equipment used in the manufacturing of products to be sold are exempt.

Pursuant to R.I. Gen. Laws § 44-19-33, Division regulations are *prima facie* evidence of a statute's proper interpretation. 07-58 provides for the tax exemption as delineated by statute for equipment including replacement equipment when used in the production of tangible personal property to be sold. But the exemption does not apply to equipment including replacement parts to the extent used in administration and distribution operations (as provided in the statute). The regulation gives examples of what would fall under the manufacturing exemption and what would not. It also further discusses how a "portion" of machinery can be exempt with the taxpayer only paying use tax on the percentage of the non-exempt use of the manufacturing equipment.

In construing this statute, *Rhode Island Lithograph Corp. v. Clark*, 519 A.2d 589 (R.I. 1987) found that the clear and unambiguous language of the statute establishes that machinery is not exempt when it is part of the process to create items but the items are not sold. Since that case, the statute at issue has been amended to change some of the statutory language referenced in the case so that the statute no longer states the equipment must be "used directly and exclusively in an industrial plant" but rather the statute provides for the exemption to the "extent used" in manufacturing.[6] (See footnote three (3) for current text of statute). The statutory amendments did not change the requirements that the product manufactured must be sold. The legislative explanation

[6] P.L. 1996 ch. 253 §§ 1, 2 deleted "directly and exclusively" effective July 1, 1997. Also deleted at the same time was the definition of manufacturing that needed to be met in order to fall under the exemption. *Id.* P.L. 1998 ch. 407 § 1 effective July 21, 1998 but retroactive to July 1, 1997 added the term "to the extent used" in R.I. Gen. Laws § 44-30-30(22)(i).

for these amendments to the definition of manufacturing contained in R.I. Gen. Laws § 44-18-30(7) and (22) were that the amendments relaxed the definition of the items used in manufacturing that would qualify for the sales and use tax exemption. See P.L. 1996 ch. 253 §§ 1, 2.

In this matter, there is no dispute that the Taxpayer is manufacturing products. What is disputed is whether the products are being sold. The Taxpayer objects to being labeled a contractor when it manufactures its own asphalt. The Division points to 91-27 regarding contractors and which provides that partly or wholly fabricated items that are then incorporated into the work being performed are not exempt from tax as the items are not made for resale but for incorporation into the final product. The Division argues that by analogy, the Taxpayer's asphalt that is not sold at retail and is incorporated into a final product is not being sold at retail so is not exempt.

The Taxpayer argues that it has always been a manufacturer and has always been exempt. However, the tax exemption requires a taxpayer to be a manufacturer of items for sale. Manufacturing by itself is not enough for the tax exemption. The Taxpayer does not need to be labeled a contractor for it to be found that part of its asphalt is not sold for retail but is manufactured for its own use and thus not exempt. The Division apportioned the asphalt being manufactured between the asphalt sold at retail and the asphalt being used by the Taxpayer for its own use. The Taxpayer agreed to the apportionment of the asphalt but not to the Division's conclusion as to the taxability. However, as discussed above, the Taxpayer's usage of the asphalt is not exempt. Thus, while the Taxpayer has paid tax on its supplies and products, it has not paid tax on its

equipment and pursuant to R.I. Gen. Laws 44-18-30(22) and 07-58, the Taxpayer is only partially exempt from paying use tax on its equipment.[7]

E. Interest and Penalties

The Division imposed interest on the assessment pursuant to R.I. Gen. Laws § 44-19-11.[8] However, the Division did not impose a 10% penalty on said deficiency. See Division's Exhibits Ten (10) (initial deficiency notice) and Exhibit 12 (revised deficiency notice from which this hearing arises). However, both R.I. Gen. Laws § 44-19-12 and R.I. Gen. Laws § 44-19-14 provide for the imposition of penalties.[9] R.I. Gen. Laws §

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[7] During the hearing, there was an implication by the Taxpayer that since the Taxpayer charges sales tax on its sales that this assessment would result in double taxation. But as pointed out by the Division in its brief, sales tax is paid by the customer on what is purchased and the use tax is a liability for a business which in this case the Taxpayer.

[8] R.I. Gen. Laws § 44-19-11 states 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.

[9] 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.

R.I. Gen. Laws § 44-19-14 states as follows:

> Determination without return – Interest and penalties. – If any person fails to make a return, the tax administrator shall make an estimate of the amount of the gross receipts of the person or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this state is subject to the use tax. The estimate shall be made for the month or months in respect to which the person failed to make a return and is based upon any information, which is in the tax administrator's possession or may come into his or her possession. Upon the basis of this estimate, the tax administrator computes and determines the amount required to be paid to the state, adding to the sum arrived at a penalty equal to ten percent (10%) of that amount.

44-19-12 clearly provides that if a taxpayer does not pay a tax because of negligence or does not pay, a 10% penalty is imposed. That penalty is not discretionary because the statute provides that the penalty "is" to be added rather than "may be added."

Brier Mfg. Co. v. Norberg, 377 A.2d 345 (R.I. 1977) found that R.I. Gen. Laws § 44-19-12 does not provide authority to waive a penalty even when the taxpayer has a good-faith, though erroneous, belief that certain property is not subject to tax when the disputed tax matter is in hearing. *Brier* held as follows:

> The statute identifies no exception to its provisions in circumstances where the taxpayer has a good-faith, albeit erroneous, belief that certain property is not subject to tax liability. The operative language of s (sic) 44-19-12 is clear and unambiguous and imposes a penalty upon an intentional but nonfraudulent avoidance of the tax. Western Elec. v. Weed, supra. [185 Colo. 340, 524 P.2d 1369 (1974)] The taxpayer's remedy in the event that he disputes a portion of his liability is to pay the tax and then seek a refund pursuant to the appropriate statute. *Id.*, at 350.

The 10% penalty is for intentional but non-fraudulent disregard of the law requiring the payment of a tax. This interpretation is consistent with R.I. Gen. Laws § 44-1-10[10] which grants the Tax Administrator the authority to settle and compromise tax, excise, fee, penalties, or interest. The penalty is to be assessed and is only waived as part of a compromise of settlement between a taxpayer and the Tax Administrator. Thus,

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> One or more determinations may be made 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 (15th) day after the close of the month for which the amount or any portion of the amount should have been paid until the date of payment. If the failure of any person to file a return is due to fraud or an intent to evade the provisions of this chapter and chapter 18 of this title, a penalty of fifty percent (50%) of the amount required to be paid by the person, exclusive of penalties, is added to the amount in addition to the ten percent (10%) penalty provided in this section. After making his or her determination, the tax administrator shall mail a written notice of the estimate, determination, and penalty.

[10] R.I. Gen. Laws § 44-1-10 states as follows:

> Compromise or abatement of uncollectible or excessive taxes. – Whenever the tax administrator determines that any tax, excise, fee, penalty, interest, or other charge payable to the tax administrator is un-collectible, illegal, or excessive, in whole or in part, the tax administrator may, with the approval of the director of administration, compromise, abate, or cancel the charge, as the circumstances may warrant.

based on R.I. Gen. Laws § 44-19-12 and *Brier*, the undersigned does not have the authority to waive a penalty.[11]

There is no evidence that the Taxpayer and the Division have entered into a settlement pursuant to R.I. Gen. Laws § 44-1-10. Thus, pursuant to R.I. Gen. R.I. Gen. Laws § 44-19-12 and R.I. Gen. Laws § 44-19-14, a 10% penalty is imposed on the revised deficiency as set forth in Division's Exhibit 12. See *Administrative Decision* 2008-10 (8/16/08).

VI. FINDINGS OF FACT

1. On or about October 1, 2010, the Division issued a Notice of Hearing and Appointment of Hearing Officer.

2. A hearing in this matter was held on September 21, 2011 and all briefs were timely filed by November 25, 2011.

3. The Taxpayer's replacement equipment is subject to use tax unless exempt.

4. 57.7% of the asphalt is manufactured for the Taxpayer's own use so is not exempt and that percentage is to be applied to the equipment.

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[11] In this matter, the Division issued the Notice of Deficiency to the Taxpayer without any assessed penalty. R.I. Gen. Laws § 44-19-17 states as follows:

> Hearing by administrator on application. – Any person aggrieved by any assessment, deficiency, or otherwise, shall notify the tax administrator, in writing, within thirty (30) days from the date of mailing by the tax administrator of the notice of the assessment and request a hearing relative to the assessment; and the tax administrator shall, as soon as practicable, fix a time and place for a hearing and shall, after the hearing, determine the correct amount of the tax, interest, and penalties. When a jeopardy assessment or determination is made, the hearing is not had unless the jeopardy assessment with penalties and interest has been paid.

Therefore, the undersigned has the authority to determine the correct amount of tax, interest, and penalties in the course of an administrative hearing on the appeal of a tax assessment. Thus, the undersigned has the authority to increase or decrease an assessment, if appropriate. See *Sportfisherman Charter, Inc. v. Norberg*, 340 A.2d 143 (R.I. 1975). This statutory provision does not allow the undersigned to waive the penalty but it does allow the amount of a tax assessment to be adjusted which would result in adjusting the interest and penalty.

5. 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 § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-1-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 44-18-30 and R.I. Gen. Laws § 44-19-11, the Taxpayer owes use tax on its non-exempt replacement equipment and interest assessed by the Division and set forth in the Division's Exhibit Twelve (12) (revised Notice of Deficiency). Pursuant to R.I. Gen. Laws § 44-19-12 and R.I. Gen. Laws § 44-19-14, the Taxpayer owes a 10% penalty.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-18-30, the Taxpayer's claimed exemption is not applicable and the Taxpayer's owes the tax assessed and pursuant to R.I. Gen. Laws § 44-19-11, the Taxpayer owes the interest assessed by the Division. See Division's Exhibit Twelve (12). Pursuant to R.I. Gen. Laws § 44-19-12 and R.I. Gen. Laws § 44-19-14, the Taxpayer owes a 10% penalty.

Date: January 17, 2012

Catherine R. Warren, Esquire
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: January 26, 2012

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 26th day of January, 2012 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to the Taxpayer's attorney's address on file with the Division of Taxation and by hand-delivery to Linda Riordan, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.