STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2012-08

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.: 11-T-015**
	:	**sales and use tax**
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 August 3, 2011 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 December 21, 2011. The Division was represented by counsel and the Taxpayer was represented by a certified public accountant. A briefing schedule was set and the parties timely filed briefs by February 23, 2012.[1]

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

[1] The Taxpayer attached further exhibits to its brief to which the Division did not object. However, the record had already closed so the exhibits are not part of the record and were not considered by the undersigned.

III. ISSUE

The parties stipulated that for the hearing, it is assumed that the trucks/trailers at issue were engaged exclusively in inter-state commerce. Thus, the issue is whether the Taxpayer is a trucking company and thus, whether the Taxpayer owes the Division's assessment in light of R.I. Gen. Laws § 44-18-40.[2]

IV. MATERIAL FACTS AND TESTIMONY

Senior Revenue Agent, testified on behalf of the Division. He testified that he has been employed by the Division for 30 years with 28 years in Field Audit. He testified that he conducted a re-audit[3] of the Taxpayer during which he examined all taxes but primarily sales and use tax. He testified that the Taxpayer has a permit to make sales and each of its stores has a permit but they all file under the same permit number. He testified that the Taxpayer declared its business as a retail sale and files monthly returns. He testified that the Taxpayer signed a statute of limitations waiver. He testified that the trailers were purchased in Maine and the Taxpayer paid use tax on some trailers but not on the trailers that were assessed by the Division. See Division's Exhibit 13 (Notice of Deficiency).

On cross-examination, the Auditor testified that he did not review the different stores because the Taxpayer is not a trucker for hire and under the Federal registration, the Taxpayer is not for hire, trucks its own goods, and the employees are its own. He testified that the Taxpayer owns the trailers but he believes that they are a trucking division of the Taxpayer but the Taxpayer could set up a separate trucking entity. On re-direct examination, the Auditor testified that each store is charged a delivery fee. On re-

[2] The parties stipulated that the hearing only related to the Taxpayer's 53 foot trailers and that the notice of deficiency included another trailer but that the Taxpayer agreed to pay that assessment.
[3] The audit period was from May 1, 2006 through April 30, 2009. See Division's Exhibit 11.

cross examination, he testified that if the trucking company was a separate S corporation, it should be acceptable.[4]

testified on behalf of the Taxpayer. He testified he has been the Taxpayer's Chief Financial Officer for 24 years. He testified that each of the 16 entities except the one (1) owned by the Taxpayer has its own FEIN number. He testified that each entity has its own book of accounts, files its own tax returns, and has its own payroll allocated to it from a common paymaster. He testified that the truckers receive different wages and benefits from the Taxpayer's other employees in order to be competitive with other truckers such as being eligible for safe driving awards.

The CFO testified that the property title transfers from the Taxpayer's warehouse to the stores (entities) once the goods are loaded onto a truck. Thus, he testified when the goods are in transit, they are owned by the legal entities (stores) so they are someone else's goods and not the Taxpayer's. He testified that the stores are legally distinct entities that pay the Taxpayer to haul goods and the trucking component acts as its own division with its own books and records and its own employees and is licensed by the Federal government to haul goods as a compensated inter-corporate hauling company which is a group of affiliated companies where one company hauls goods for another.

The CFO testified that there are licensing agreements between the Taxpayer and entities (See Taxpayer's Exhibit One (1)) which provides that costs incurred by the Taxpayer including trucking will be reimbursed by the entities. He testified that payment is made through collection of the individual stores/entities' receipts and money is

[4] It was clarified at hearing that this was the Auditor's opinion and not necessarily the position of the Division as it would have to review all facts at issue. The Taxpayer argued that if it made the S corporation changes, its set-up would still be the same as it is currently structured. However, that is speculative regarding what would happen with a different corporate structure and the issue before the undersigned is whether the Taxpayer is a trucking company as currently structured.

transferred every day by those stores/entities to reimburse the Taxpayer for its expenses. He testified that the Taxpayer is an S corporation which is owned by two (2) individuals but is not a parent company of the stores/entities.

On cross-examination, the CFO testified that the Taxpayer only provides trucking for its retail stores and makes no effort to market itself to outsiders. He testified that the retail stores turn over their gross receipts to the Taxpayer's corporate account and the Taxpayer reimburses itself from said account. He testified that the Taxpayer has licensing agreements with each store and under each agreement, the Taxpayer develops employee policies for the stores, prepares the stores' tax returns, pays the stores' employees, tracks personnel records for the stores, is involved in employee discipline and termination for all stores, and if there is a product recall, a store has to contact the Taxpayer and receive permission from the Taxpayer to destroy the product. On being questioned how Taxpayer can retain control over the goods when title is transferred once the goods are loaded on the trucks, he testified that the licensing agreements gives the Taxpayer administrative oversight for each store. He testified that each store has its own inventory and accountability but the Taxpayer acquires all merchandise that the affiliated entities (stores) sell and makes recommendations to the stores what inventory to carry. He testified that there is common control of the Taxpayer and the retail stores in the same two (2) individuals and the two (2) individuals are 50%-50% co-owners of Taxpayer.

On re-direct examination, the CFO testified that if the Taxpayer had a separate S corporation for the trucking division, there would still be the same level of oversight and control as there is now.

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 Statute and Regulation

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). In this matter, the Division is assessing use tax on the Taxpayer.

Pursuant to R.I. Gen. Laws § 44-18-25, there is a presumption that the use of all tangible personal property is subject to the use tax. Said statute 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.

The Taxpayer argues that it is exempt from use tax on its trucks and trailers because of R.I. Gen. Laws § 44-18-40 which states as follows:

> Exemption for buses, trucks and trailers in interstate commerce. – Notwithstanding any provision of the general laws to the contrary, the purchase, rental or lease of a bus, truck, or trailer by a bus or trucking company is not subject to the provisions of the sales and use taxes imposed by this chapter on the condition that the bus, truck and/or trailer is utilized exclusively in interstate commerce.

The Division's Sales and Use Tax Regulation SU 99-111 ("SU 99-111") addresses the issue of the interstate commerce tax exemption. Said Regulation states in part as follows:

> The purchase or rental/lease of a truck, trailer or bus by a trucking or busing company that transports goods or passengers for hire is not subject to sales and use tax provided such vehicle is to be used "exclusively in interstate commerce."

> In order to qualify for the exemption, the purchaser is required to furnish a completed "Affidavit of Truck, Trailer or Bus to be Used Exclusively in Interstate Commerce" to the Registry of Motor Vehicles at the time of registration. In the case of a lease, the lessee must furnish the Affidavit form to the lessor at the time of signing the lease.[5]
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C. Arguments

In closing, the Division argued that the Taxpayer is a trucking company since it does not carry goods for hire for separate entities. The Division argued that while the stores might be separate legal entities, the stores are really shells in that they cannot make their own decisions and the Taxpayer has the authority, common ownership of the stores, and carries its own goods.

In closing, the Taxpayer argues that the Division does not understand the relationship between the Taxpayer and the stores since the Taxpayer does not own the stores but rather they are separate entities owned by separate individuals and the profit from the stores flows to the Taxpayer's shareholders and not the Taxpayer. The Taxpayer argued that the licensing agreements protect the brand name but the stores are independent with their own income tax, profit, and loss. The Taxpayer argued that Federal law allows compensated inter-corporate hauling so that the Taxpayer is considered a trucker for hire under Federal law.

D. Whether the Taxpayer Owes the Assessed Tax

East Greenwich Dairy Company v. Clark, A.A. No. 85-424 (R.I. District Court 5/20/88) reviewed Division regulations that were very similar to the current R.I. Gen. Laws § 44-18-40. That regulation stated that a "trucking company may register tax-free in this state trucks which it purchases from a Rhode Island dealer provided . . . that such

[5] No such affidavit was submitted by either party at hearing.

trucks . . . will be used exclusively in its interstate operations as a carrier." The Court found that under the regulation, the plaintiff in that case was not a trucking company because by definition a trucking company means "a company that carries goods of others for hire" and that taxpayer did not "carry goods of others."

In 1992, after *East Greenwich* was decided, R.I. Gen. Laws § 44-18-40 was enacted with a similar provision to that case's regulation. (see statute above). See P.L. 1992, ch. 133, art. 51, § 2. Regulation SU 99-11 (and its predecessor 92-111) was promulgated by the Division to assist in the promulgation of said statute. As set forth above, SU 99-111 clarifies that a trucking company "transports goods or passengers for hire;" thus, adopting a similar definition to the one in *East Greenwich.*

The resolution of this matter turns on whether the Taxpayer is transporting goods for hire. The Taxpayer relies on *American Trucking Company Association, Inc. v. ICC*, 672 F.2nd 850 (11th Cir. 1982) to argue that under Federal law, compensated inter-corporate haulers are considered trucking companies. That case found that subsidiary members of corporate families for parent corporations or other affiliates that were hauling goods for each other are exempt from ICC regulation but that non-incorporated entities would not be exempt from ICC. Thus, the Taxpayer argued that since it is an inter-corporate hauler, it is a trucking company under Federal law and therefore can receive the tax exemption at issue.

However, the issue is not whether the Taxpayer is considered to be an inter-corporate hauler under the ICC but whether the Taxpayer falls under the Rhode Island statute. An exemption from taxation is to be strictly construed. If no ambiguity in the statute is evident, the words in the statute must be applied literally. Any ambiguity in a

statute is resolved in favor of the Division. See *Roger Williams General Hospital v. Littler, et al.*, 566 A.2d 948, 950 (R.I. 1989). Furthermore, a "party claiming the tax exemption has the burden of showing the language of the statute demonstrates 'a clear legislative intent to grant such exemption'" See *Fleet Credit Corporation v. Frazier*, 726 A.2d 452, 454 (R.I. 1999) (internal citation omitted). See also *American Hoechst Corp. v. Norberg*, 462 A.2d 369 (R.I. 1983). In addition, pursuant to R.I. Gen. Laws § 44-19-33, the Division's regulations that are reasonably designed to carry out the intent and purpose of R.I. Gen. Laws § 44-18-1 *et seq.* and R.I. Gen. Laws § 44-19-1 *et seq.* are *prima facie* evidence of their proper interpretation.

For hire clearly means in return for payment.[6] *East Greenwich* found that its taxpayer transported its own goods so was not for hire. The Division has rejected other similar claims finding that "[t]he taxpayer is not hauling goods in arms-length third party transactions" and while "transporting water is what he [taxpayer] does, he does it not for parties as an independent trucker would, but he does it for his own benefit." *Administrative Decision*, 97-08 (1/21/97) 1997 WL 27084. See also *Administrative Decision*, 97-24 (6/5/97) WL 306318 (taxpayer transporting own goods so not exempt).

The Taxpayer argued that the stores are separate entities and it is transporting the goods of others by transporting goods to the stores. The stores reimburse the Taxpayer for its various costs including the cost of trucking. The bills of lading do not provide a price for goods or transport. See Division's Exhibit Ten (10). However, the Taxpayer

[6] 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, 674 (R.I. 1980), the Court relied on a dictionary definition in applying the "ordinary meaning" of "must." 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. While "for hire" is referenced in a regulation, the *Random House Dictionary Dictionary of English Language*, 2nd ed. unabridged (1987), defines "for hire" as "available for use or service in exchange for payment."

acquires all merchandise that is sold in its stores. The title of the goods passes from the Taxpayer to the stores when the goods are loaded on the trucks. Despite title passing at the time of loading the goods, the Taxpayer still has control of the goods under its licensing agreements with the stores. See Division's Exhibit Nine (9) (agreements between Taxpayer and stores). The Taxpayer does not market itself to outsiders. Thus, the Taxpayer purchases goods prior to transportation with the title passing at the time of loading when it transports the goods to its related entities (the stores) and those related entities pay for the goods and transport from their daily receipts.

The Taxpayer's arrangement with its related entities is very different from the trucking company in *Administrative Decision*, 2011-6 (4/19/11) 2011 WL 1525175. In that matter, there was no dispute that the taxpayer was a trucking company for hire but rather the dispute was whether the taxpayer's trucks were exclusively used in inter-state travel. The trucking company in that matter picked up goods from separate entities and delivered them to other separate entities that had purchased the goods from the first entities. The trucking company in the 4/19/11 *Administrative Decision* was involved in "arms-length transactions" as referred to in the 1/21/97 *Administrative Decision*.

As discussed above, the Taxpayer purchases the goods it delivers to the stores though title does pass to the stores during delivery. It delivers those goods for its own benefit and not for another's benefit because it delivers the goods it purchases and chooses to be sold by its related stores. While the Taxpayer is reimbursed for the costs of delivery, it is delivering goods it purchased to its related stores. It is not being "hired" to make deliveries of goods purchased by another entity.

Presumably the Taxpayer would argue that a requirement for an arms length transaction is being read into the statute and regulation. However, a tax exemption is strictly construed with the burden on a taxpayer to prove that it/she/he falls under the exemption. SU 99-111 kept in place the definition given by *East Greenwich* of "for hire." When similar trucking situations to *East Greenwich* were subsequently administratively decided by the Division, the Division – as expected – found a taxpayer cannot haul its own goods but must be for hire as an independent trucker or at arms length which is what is meant by being for hire.[7] There is nothing in the statute to support the taxpayer's argument otherwise. The Taxpayer may be reimbursed for the costs of shipping the goods that it purchased for its related stores and then sold to the stores but that scenario does not fall under a "trucking company" "for hire" as defined by statute and regulation and understood in *East Greenwich* and administrative decisions.

E. Interest and Penalties

The Division imposed interest on the assessment pursuant to R.I. Gen. Laws § 44-19-11.[8] In addition, the Division properly imposed a 10% penalty on said deficiencies

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[7] The statute is clear and unambiguous and the regulation implementing it is *prima facie* evidence of its proper intention. Nonetheless, it is a well-recognized principle that a longstanding, practical and plausible interpretation given a statute of doubtful meaning by those responsible for its implementation without any interference by the Legislature should be accepted as evidence that such a construction conforms to the legislative intent. Thus, if it was found that the statute was unclear, the Division's long standing interpretation is entitled to deference. *Trice v. City of Cranston*, 297 A.2d 649 (R.I. 1972).

[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.

pursuant to R.I. Gen. Laws § 44-19-12 and/or R.I. Gen. Laws § 44-19-14.[9] See Division's Exhibits 12 (interest calculation) and 13. Those statutes provide that if a taxpayer does not pay a tax because of negligence (e.g. poor records) 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. On or about August 3, 2011, the Division issued a Notice of Hearing and Appointment of Hearing Officer.

2. A hearing in this matter was held on December 21, 2011 and all briefs were timely filed by February 23, 2012.

3. The facts contained in Sections IV and V are reincorporated by reference herein.

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[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. 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.

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 § 44-18-40, the Taxpayer is not a trucking company so owes the assessed taxes, interest, and penalty. See Division's Exhibit 13.

VIII. RECOMMENDATION

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

As set forth above, the Taxpayer is not a trucking company so owes the assessed taxes and interest and penalties as properly assessed by the Division pursuant to R.I. Gen. Laws § 44-18-40, R.I. Gen. Laws § 44-19-11, R.I. Gen. Laws § 44-19-12 and/or R.I. Gen. Laws § 44-19-14. See Division's Exhibit 13 (Notice of Deficiency).

Date: April 9, 2012

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:

__X__ ADOPT
_____ REJECT
_____ MODIFY

Date: April 10, 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 11th day of April, 2012 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail to the Taxpayer's authorized representative's address on file with the Division and by hand delivery to Linda Riordan, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.

Gail Belasco