

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2013-02

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

IN THE MATTER OF:

Taxpayer.

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Case No.: 12-T-0021
cigarette and sales tax

DECISION

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Hearing and Appointment of Hearing Officer ("Notice") issued on August 22, 2012 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing. A hearing was held on January 15, 2013. The parties were represented by counsel. A briefing schedule was set with briefs being timely filed by March 8, 2013.

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.*, R.I. Gen. Laws § 44-20-1 *et seq.*, *Division of Taxation Administrative Hearing Procedures, Regulation AHP 97-01*, and the *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings*.

III. ISSUE

Whether the Taxpayer owes the sales and cigarette taxes and interest assessed by the Division.

IV. MATERIAL FACTS AND TESTIMONY

Special Investigation Unit Supervisor, testified on the Division's behalf. He testified that the Division received information from the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") about a company named [redacted] that did business as [redacted] and was a licensed cigarette distributor in Kentucky but was shipping cigarettes throughout the country via internet or telephone orders. See Division's Exhibit A (ATF letters to Division). He testified that [redacted] is not licensed as a dealer or distributor in Rhode Island and does not have Rhode Island sales permit. He testified that the Division was informed by the ATF that Rhode Island residents had ordered cigarettes from [redacted] between 2003 and 2009. He testified that by State law, if someone buys cigarettes on-line, within 24 hours of purchase, he or she needs to file a tax form with the Division for payment of taxes. See Division's Exhibit L (form T-205C). He testified that the Division sent out tax assessments based on the ATF information and if a consumer disputed the bill then the Division contacted ATF and obtained the specific purchase invoices for that consumer from [redacted] records and verified residency using State, local, and police records.

[redacted] testified that a deficiency notice for purchases made online by the Taxpayer of cigarettes between 2007 and 2009 was issued to the Taxpayer on May 20, 2012 and the Taxpayer timely requested a hearing. See Division's Exhibits B (cigarette tax deficiency notice) and C (sales tax deficiency notice). He testified that the deliveries were made to [redacted] Rhode Island. See Division's Exhibits H ([redacted] invoices between 2007 to 2009 seized by ATF) and I (payment screens for [redacted] account number [redacted] obtained by ATF). He testified that he checked the Taxpayer's DMV and Division's records and found her at the

address for 2007 to 2009. He testified that using the Taxpayer's social security number, he verified via LexisNexis records that she lived at that same address for those years. See Division's Exhibit M, N, and O (LexisNexis printout, Division, and DMV records). He testified that the Division never received a form T-205C from the Taxpayer for cigarette purchases.

On cross-examination, [redacted] testified that he did not seize any cigarettes from the Taxpayer and did not find any untaxed cigarettes at the Taxpayer's house. He testified that he never saw the Taxpayer use these cigarettes. He testified that there were two (2) other individuals also located at the [redacted] address. On redirect, [redacted] testified that the other two names listed at the [redacted] address were never identified by the ATF as purchasers from [redacted].

[redacted] Senior Revenue Agent, testified on behalf of the Division. He testified he served a subpoena on the Keeper of the Records for the Taxpayer's bank records and received said records. See Division's Exhibits J (subpoena) and K (bank records).

The Division called the Taxpayer as a witness but her attorney represented that she refused to answer on the basis of her fifth amendment right against self-incrimination contained in the United States Constitution.

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

R.I. Gen. Laws § 44-18-18 imposes a 7% sales tax upon sales at retail. Sales price is defined by R.I. Gen. Laws § 44-18-12. 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. Pursuant to R.I. Gen. Laws § 44-20-1 *et seq.*, cigarettes sold at retail shall be sold with a tax stamp which evidences the payment of tax. R.I. Gen. Laws § 44-20-12 imposes a tax on cigarettes sold. It states as follows:

Tax imposed on cigarettes sold. – A tax is imposed on all cigarettes sold or held for sale in the state. The payment of the tax to be evidenced by stamps, which may be affixed only by licensed distributors to the packages containing such cigarettes. Any cigarettes on which the proper amount of tax provided for in this chapter has been paid, payment being evidenced by the stamp, is not subject to a further tax under this chapter. The tax is at the rate of one hundred seventy-five (175) mills for each cigarette.

R.I. Gen. Laws § 44-20-13 authorizes the imposition of tax on unstamped cigarettes. It states as follows:

Tax imposed on unstamped cigarettes. – A tax is imposed at the rate of one hundred seventy-five (175) mills for each cigarette upon the storage or use within this state of any cigarettes not stamped in accordance with the provisions of this chapter in the possession of any consumer within this state.

R.I. Gen. Laws § 44-20-14 provides that consumers owe tax on unstamped cigarettes. It provides as follows:

Return and payment of use tax. – Any consumer having in his or her possession any cigarettes with respect to the storage or use of which a tax is imposed in § 44-20-13 shall, within twenty-four (24) hours after coming into possession of the cigarettes in this state, file a return with the tax administrator in a form prescribed by the tax administrator. The return shall be accompanied by a payment of the amount of the tax shown on the form to be due.

R.I. Gen. Laws § 44-18-25 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. Said statute¹ is as follows:

Presumption that sale is for storage, use, or consumption – Resale certificate. [Effective until October 1, 2012.]. – It is presumed that all gross receipts are subject to the sales tax, and that the use of all tangible personal property, or prewritten computer software delivered electronically or by load and leave, are subject to the use tax, and that all tangible personal property, or prewritten computer software delivered electronically or by load and leave, 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.

C. Arguments

The Division argued that the Taxpayer ordered cigarettes online to be delivered to her home address and paid by credit card or from her checking account. The Division argued that the Taxpayer has not demonstrated that she does not owe the tax and was in

¹ This is the version that was in effect during the audit period. It was amended effective January 1, 2007 and has been amended subsequently. See PL 2006, ch. 246, Art. 30 § 9.

constructive possession of the cigarettes. The Division also argued that the Taxpayer's fifth amendment right do not prevent a finding that she possessed the cigarettes.

The Taxpayer argued that that she did not possess the cigarettes as set forth in the statute so is not liable for any taxes. The Taxpayer argued that asserting her fifth amendment right was justified as the statute contains criminal sanctions and she was never offered immunity.

D. Whether the Taxpayer Owe Sales and Cigarette Taxes

Pursuant to R.I. Gen. Laws § 44-18-25, the burden of proof is on the Taxpayer rather than the Division since the statute provides for a statutory presumption that all items purchased or sold are subject to tax unless the "contrary" is established by a taxpayer to the satisfaction of the Tax Administrator. The purpose of this hearing was to provide the Taxpayer with an opportunity to rebut the presumption of taxability. The burden of proof for the Taxpayer is the preponderance of the evidence.²

When cigarettes are sold in Rhode Island by a retail establishment (a dealer) with licenses to sell at retail and to sell cigarettes, sales tax and cigarette tax have been pre-paid pursuant to R.I. Gen. Laws § 44-19-10.1 and R.I. Gen. Laws § 44-20-12 (and each cigarette box has a tax stamp).³ Cigarette purchases made over the internet and mailed to Rhode Island residents are still subject to the same Rhode Island cigarette and sales taxes which are then owed by the purchaser of the cigarettes.⁴

R.I. Gen. Laws § 44-20-13 and R.I. Gen. Laws § 44-20-14 require that consumers that are in possession of unstamped cigarettes owe tax. The Taxpayer argues that that

² See R.I. Gen. Laws § 8-8-28 and *DeBlois v. Clark*, 764 A.2d 727 (R.I. 2003).

³ Pursuant to R.I. Gen. Laws § 44-19-10.1(d), the taxes paid are "conclusively presumed to be a direct tax on the retail consumer, precollected for the purpose of convenience and facility only."

⁴ See Division's Exhibit L which is the form to be used by purchasers of cigarettes when they owe sales and cigarette taxes and have to submit payment to the Division.

the clear and unambiguous meaning of possession is actual physical possession or control of the cigarettes and the Division did not establish any physical control of the cigarettes by the Taxpayer.

Black's Law Dictionary's (ninth edition)⁵ entry on possession discusses how possession is distinct from ownership and there are many types of "possession." *Black's* defines possession as "the fact of having or holding property in one's power; the exercise of dominion over property" and "the right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object." *Black's* also defines different types of possession such as "actual possession" which is the "[p]hysical occupancy or control over property" as opposed to "constructive possession" which is "[c]ontrol or dominion over a property without actual possession or custody of it."

The Taxpayer's brief argued that *Black's* defined possession as "direct physical control over a thing at a given time" and "a thing in the immediate occupancy and control of a party." However, the undersigned did not find those definitions in *Black's* (ninth edition). However, the definition regarding "direct physical control over a thing at a given time" is included 25 Am. Jur.2d Drugs and Controlled Substances § 156.⁶

The Taxpayer argued that she needed to be found with actual cigarettes in her physical possession or control in order for the statute to attach to her. This is contrary to

⁵ 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.

⁶ Said entry states as follows:

Possession of contraband may be joint or exclusive, and actual or constructive; a person who knowingly has direct physical control over a thing at a given time is in actual possession of it, and a person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it. In re D.H., 285 Ga. 51, 673 S.E.2d 191 (2009).

the clear and unambiguous language of the statute which merely speaks of possession of cigarettes by any consumer. The statute does not require physical possession or even ownership but rather merely requires possession. It is clear and unambiguous that possession is not solely limited to being found in the actual physical possession of cigarettes but encompasses the holding of property in one's power, dominion over property, control over property, and control over property without physical possession. Thus, possession includes the ordering and shipping of goods to one's home address as well as payment for goods.

The evidence is that the cigarettes were ordered to be shipped to Taxpayer's name and address. See Division's Exhibits H and I. The evidence is that the Taxpayer lived at the address to which the cigarettes were shipped. See Division's Exhibits M, N, and O. The evidence is that the Taxpayer paid for the ordered cigarettes. See Division's Exhibits H, I, and K.

The Taxpayer declined to testify and invoked the right against self-incrimination under the United States Constitution. The Taxpayer argues that she has a right against self-incrimination that may be claimed at any time. She has the right to invoke the right against self-incrimination; however, a negative inference may be drawn against a party who refuses to testify. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Furthermore, "an inference may be drawn against a party in a civil case who declines to answer questions or to testify in a civil case." *Pulawski v. Pulawski*, 463 A.2d 151, 156 (R.I. 1983).

This was an administrative proceeding against the Taxpayer for taxes owed. While the statute might include criminal sanctions for the non-payment of taxes, the proceeding was administrative and not criminal. Thus, a negative inference may be drawn from the Taxpayer's refusal to testify.

The Taxpayer has the burden to overcome the presumption of taxability. There was evidence that two (2) other names were associated with the address to which the cigarettes were shipped. There was no evidence that either of those individuals bought the cigarettes. The cigarettes were paid for by the Taxpayer and shipped to the Taxpayer's name and address. Even without drawing a negative inference from the Taxpayer's failure to testify, the Taxpayer provided no evidence that she did not possess the cigarettes.

Based on the forgoing, the Division properly assessed the Taxpayer the sales tax she owed. See Division's Exhibit C (sales tax Notice of Deficiency). The Division imposed interest on the assessment pursuant to R.I. Gen. Laws § 44-19-14⁷ which provides for interest and penalties for deficiencies when no returns were filed. See Division's Exhibit D (workpapers). The Division did not impose the statutorily required 10% negligence penalty on said deficiency pursuant to R.I. Gen. Laws § 44-19-14. The statute clearly provides that if a taxpayer does not pay the sales or use tax because of

⁷ 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.

negligence or does not pay, a 10% penalty is imposed. See *Brier Mfg. Co. v. Norberg*, 377 A.2d 345 (R.I. 1977).

The Division properly assessed the Taxpayer the cigarette tax she owed. See Division's Exhibit B (cigarette tax Notice of Deficiency). The Division imposed interest on the assessment pursuant to R.I. Gen. Laws § 44-19-11.

Since no return was filed by the Taxpayer, pursuant to R.I. Gen. Laws § 44-19-13,⁸ the three (3) year statute of limitations does not apply. See *Couture v. Norberg*, 338 A.2d 538 (R.I. 1975) and Regulation SU 87-115 *Use Tax Statute of Limitation*.

VI. FINDINGS OF FACT

1. The Notice was issued on August 22, 2012 to the Taxpayer in response to the Taxpayer's request for hearing.
2. The hearing was held on January 15, 2013.
3. The parties filed timely briefs by March 8, 2013.
4. The Taxpayer purchased cigarettes online between 2007 and 2009 and did not pay the sales and cigarette tax owed on said purchases.
5. The Taxpayer possessed said cigarettes.
6. The facts contained in Section IV and V are reincorporated by reference herein.

⁸ R.I. Gen. Laws § 44-19-13 states as follows:

Notice of determination. – The tax administrator shall give to the retailer or to the person storing, using, or consuming the tangible personal property a written notice of his or her determination. Except in the case of fraud, intent to evade the provisions of this article, failure to make a return, or claim for additional amount pursuant to §§ 44-19-16 – 44-19-19, every notice of a deficiency determination shall be mailed within three (3) years after the fifteenth (15th) day of the calendar month following the month for which the amount is proposed to be determined or within three (3) years after the return is filed, whichever period expires later, unless a longer period is agreed upon by the tax administrator and the taxpayer.

7. The Taxpayer did not make a showing that she did not owe the sales and cigarette taxes assessed by the Division.

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.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-20-1 *et seq.*

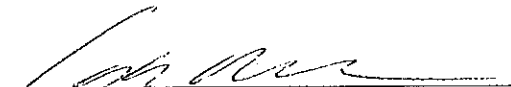
2. Pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-20-1 *et seq.*, the Division properly assessed the Taxpayer the sales tax and the cigarette tax set forth in the respective Notice of Deficiencies admitted as Division's Exhibit B and C. Pursuant to R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-14, the Taxpayer owes the interest assessed for both deficiencies. R.I. Gen. Laws § 44-19-14 requires that a 10% penalty be added to the sales tax deficiency.

VIII. RECOMMENDATION

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

Pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, and R.I. Gen. Laws § 44-20-1 *et seq.*, the Taxpayer owes the assessed sales and cigarette tax. Pursuant to R.I. Gen. Laws § 44-19-11 and R.I. Gen. Laws § 44-19-14, the Taxpayer owes the interest assessed on both deficiencies. R.I. Gen. Laws § 44-19-14 requires that a 10% penalty be assessed on the sales tax deficiency so that such penalty shall be included in the final assessment. See Division's Exhibits B and C.

Date: March 22, 2013



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: 4/22/13



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.

R.I. Gen. Laws § 44-20-48 Appeal to district court.

Any person aggrieved by any decision of the tax administrator under the provisions of this chapter may appeal the decision within thirty (30) days thereafter to the sixth (6th) division of the district court. The appellant shall at the time of taking an appeal file with the court a bond of recognizance to the state, with surety to prosecute the appeal to effect and to comply with the orders and decrees of the court in the premises. These appeals are preferred cases, to be heard, unless cause appears to the contrary, in priority to other cases. The court may grant relief as may be equitable. If the court determines that the appeal was taken without probable cause, the court may tax double or triple costs, as the case demands; and, upon all those appeals, which may be denied, costs may be taxed against the appellant at the discretion of the court. In no case shall costs be taxed against the state, its officers, or agents. A party aggrieved by a final order of the court may seek review of the order in the supreme court by writ of certiorari in accordance with the procedures contained in § 42-35-16.

CERTIFICATION

I hereby certify that on the 22nd day of April, 2013 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail to the Taxpayer's attorney's address on record with the Division and by hand delivery to Bernard Lemos, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Paul Belasio