

STATE OF NORTH CAROLINA

**BEFORE THE ASSISTANT SECRETARY
OF REVENUE FOR ADMINISTRATIVE
TAX HEARINGS**

COUNTY OF WAKE

IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
 Tax for the period April 1, 2002 through)
 February 28, 2005, by the Secretary of)
 Revenue of North Carolina)
)
 vs.)
)
 Taxpayer)

FINAL DECISION
 Docket No. 2007-108

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on July 17, 2007, upon application for hearing by the Taxpayer wherein it protested the assessment of tax, penalty and interest for the period April 1, 2002 through February 28, 2005. The hearing was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. [Taxpayer], owner, represented the business. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Dan R. Fulcher, Administration Officer.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales & Use Tax Assessment to the Taxpayer on June 21, 2005. The Taxpayer objected to the assessment in a letter dated July 20, 2005, and timely requested a hearing.

ISSUES

The issues to be decided are as follows:

- (1) Are sales of used articles taken in trade by the Taxpayer subject to North Carolina sales tax?
- (2) Did the Taxpayer keep acceptable shipping documentation to support exempt retail sales of boats and accessories made and delivered to customers out-of-state?

EVIDENCE

The Sales and Use Tax Division introduced the following items into evidence at the hearing:

1. Copy of Memorandum dated July 2, 2007, from the Acting Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-1.
2. Copy of the auditor's report sales and use tax dated June 10, 2005 covering the period April 1, 2002 through February 28, 2005, designated Exhibit E-2.
3. Copy of form letters from the Revenue Field Auditor to the Taxpayer's customers with the following responses:
 - (a) Purchases from the Taxpayer were picked up at the Taxpayer's North Carolina location.
 - (b) Purchases from the Taxpayer were delivered outside the state or the letters were not returned by the customers, designated Exhibit E-3.
4. Copy of Department Notice of Sales and Use Tax Assessment to Taxpayer dated June 21, 2005, designated as Exhibit E-4.
5. Copy of letter dated July 20, 2005, from the Taxpayer to the Department and a copy of Department Notice of Sales and Use Tax Assessment to Taxpayer dated June 21, 2005, designated Exhibit E-5.
6. Copy of Department Notice of Sales and Use Tax Penalty Assessment to Taxpayer dated August 9, 2005, designated Exhibit E-6.
7. Copy of letter from the Sales and Use Tax Division (Division) to the Taxpayer dated August 22, 2005, designated Exhibit E-7.
8. Copy of Department Notice of Amended Sales and Use Tax Assessment to the Taxpayer dated August 25, 2005, designated Exhibit E-8.
9. Copy of letter from the Division to the Taxpayer dated October 14, 2005, designated Exhibit E-9.
10. Copy of letter from Division to the Taxpayer dated December 2, 2005, designated Exhibit E-10.
11. Copy of undated letter the Taxpayer to the Division with the following attachments:

- a. Copy of Schedule E-2 of the auditor's report sales and use tax dated June 10, 2005, covering the period April 1, 2002, through February 28, 2005.
 - b. Blank copy of [Taxpayer] sales invoice.
 - c. Undated, unsigned copy of Form E-590, Certificate of Resale to [Taxpayer] from [Taxpayer's Customer] owner.
 - (d) through (h) Copies of invoices of various dates from [non-retailer individuals selling to other non-retailer individuals].
 - (i) Copy of invoice to [Taxpayer's Customer] dated November 29, 2002.
 - (j) Copy of invoice to [Taxpayer's Customer] dated February 15, 2002.
 - (k) Copy of Out of State Delivery Affidavit from [Taxpayer's Customer] dated March 8, 2003 and a copy of invoice dated March 8, 2003, from [a non-retailer individual selling to another non-retailer individual].
 - (l) through (o) Copies of invoices of various dates from [non-retailer individuals selling to other non-retailer individuals].
 - (p) Undated memo from [Taxpayer] concerning purchase of boat and accessories by [Taxpayer's Customer].
 - (1) Invoice from [Taxpayer] to [Taxpayer's Customer] dated May 28, 2004.
 - (2) Invoice from [Taxpayer] to [Taxpayer's Customer] dated May 31, 2004.
 - (p) Copy of product registration print out from website dated December 8, 2005, for [Taxpayer's Customer].
 - (1) Copy of bill of sale from [a non-retailer individual selling to another non-retailer individual] dated November 14, 2005.
 - (2) Copy of invoice from [a non-retailer individual selling to another non-retailer individual] dated September 14, 2004.
 - (q) Copy of bill of sale from [a non-retailer individual selling to another non-retailer individual] dated January 19, 2005.
 - (1) Undated copy of invoice from [a non-retailer individual selling to another non-retailer individual], designated Exhibit E-11.
12. Copy of letter from the Division to the Taxpayer dated January 30, 2006, designated Exhibit E-12.
13. Copy of Department Notice of Amended Sales and Use Tax Assessment to Taxpayer dated February 3, 2006, designated Exhibit E-13.
14. Copy of facsimile from the Taxpayer to the Division dated February 28, 2006, and Form E-595E, Streamlined Sales Tax Agreement Certificate of Exemption from [a non-retailer individual another retailer], designated Exhibit E-14.

15. Copy of letter from the Division to the Taxpayer dated February 28, 2006, designated Exhibit E-15.
16. Copy of Department Notice of Amended Sales and Use Tax Assessment to Taxpayer dated March 3, 2006, designated Exhibit E-16.
17. Copy of Form E-505 (Rev. 9/99) To Registered Taxpayers, designated Exhibit E-17.
18. Copy of Sales and Use Tax Technical Bulletin 34-6 CONSIGNMENT SALES, designated Exhibit E-18.
19. Copy of Sales and Use Tax Technical Bulletin 35-8 BOATS, BOAT TRAILERS, PARTS AND ACCESSORIES, revised effective February 1, 2004, designated Exhibit E-19.
20. Copy of Sales and Use Tax Technical Bulletin 40-1 TRADE-INS, revised effective February 1, 2004, designated Exhibit E-20.
21. Copy of letter dated May 24, 2007 from the Assistant Secretary of Administrative Hearings to the Taxpayer's CPA, designated Exhibit E-21.

FINDINGS OF FACT

Based on the foregoing evidence of record, the Assistant Secretary makes the following findings of fact:

- (1) Throughout the assessment period, the Taxpayer operated a boat dealership.
- (2) The Taxpayer made retail sales of boats, motors and other items to North Carolina customers.
- (3) The Taxpayer made retail sales of boats, motors and other items to out-of-state customers which were picked up at the Taxpayer's North Carolina business location.
- (4) The auditors assessed tax on the sales of boats, motors and other items to North Carolina customers on which the Taxpayer had failed to collect and remit the sales tax due.
- (5) The auditors assessed tax on the Taxpayer's retail sale to out-of-state customers who picked up the items purchased at the Taxpayer's North Carolina business location on which the Taxpayer had failed to collect and remit the sales tax due.

- (6) The auditors mailed letters to the Taxpayer's out-of-state customers to determine where their purchases from the Taxpayer were delivered. The letter gave the following four choices for the customer to check:
 - a. I picked up the item(s) at the place of business of [Taxpayer] in, North Carolina.
 - b. An employee or representative of [Taxpayer] delivered the item(s) to me in the state of _____.
 - c. A common carrier of U.S. Postal Service delivered the item(s) to me in the state of _____.
 - d. None of the above. Please Explain. _____.
- (7) The auditors assessed sales tax on invoices for customers that indicated they had picked up their merchandise at the Taxpayer's North Carolina business location.
- (8) If the customers' letters indicated that the Taxpayer delivered the merchandise to them outside of North Carolina or the Department did not receive a response from a customer, the auditors did not assess tax on those transactions.
- (9) The assessment against the Taxpayer covers the period from April 1, 2002 through February 28, 2005.
- (10) The Taxpayer's method of recording sales made it difficult to determine whether particular sales during the assessment period were consignment sales.
- (11) After the audit was concluded, the Taxpayer furnished additional documentation to show that some sales included in the audit report as consignment sales which were actually sales between two individuals. These sales were removed from the assessment.
- (12) Form E-505 (Rev. 9/99) was mailed to registered taxpayers to advise of law changes including the fact that the sale of a used article taken in trade as a credit on the sale of a new article would no longer be exempt from tax.
- (13) A notice of proposed sales and use tax assessment was mailed to the Taxpayer on June 21, 2005.
- (14) The Taxpayer notified the Department that it objected to the assessment and timely requested a hearing.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

- (1) The Taxpayer operated as a retailer during the audit period as defined in G.S. 105-164.3(35).
- (2) As a retailer engaged in the business of making retail sales of tangible personal property, the Taxpayer was liable for collecting the applicable State and local sales tax on its retail sales pursuant to G.S. 105-164.4, G.S. 105-467, G.S. 105-483, and G.S. 105-498.
- (3) Notice of proposed sales and use tax assessment for the audit period was issued pursuant to G.S. 105-241.1.
- (4) Until October 1, 1999, the sale of a used article taken in trade as a credit on the sale of a new article was exempt from sales tax.
- (5) From October 1, 1999 on, State law subjects to sales tax the sale of a used article taken in trade as a credit on the sale of a new article.
- (6) Throughout the assessment period, State law required that State and local sales taxes be collected and remitted by retailers selling boats, motors and other items to North Carolina customers.

DECISION

Therefore, the assessment of tax and interest is deemed correct under the law and the facts and is hereby declared to be finally determined and immediately due and payable as allowed by law. Because the failure to pay the tax was not the result of an intentional act by the Taxpayer, I find reasonable cause to waive the penalties. The proposed assessment of tax and accrued interest is hereby declared to be finally determined and immediately due and collectible with interest as allowed by law.

This _____ day of _____ 2007.

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings