

**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 Additional Sales )  
Tax for the period December 1, 2004 through )  
January 31, 2005 and May 1, 2005 through )  
June 30, 2005 by the Secretary of Revenue )  
of North Carolina )

**FINAL DECISION**  
Docket No. 2007-42

vs. )

[Taxpayer], President )

This matter was heard before the Assistant Secretary of Revenue for Administrative Tax Hearings, Eugene J. Cella, in the City of Raleigh on October 17, 2007, upon an application for hearing by the Taxpayer, wherein he protested the proposed assessments of tax, penalty and interest for the period December 1, 2004 through January 31, 2005 and May 1, 2005 through June 30, 2005. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1. As stated by Mr. Cella at the end of the hearing, the hearing record remained open until October 24, 2007. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Ginny C. Upchurch, Administration Officer. [Certified Public Accountant] and [Attorney], represented the Taxpayer.

Pursuant to G.S. 105-241.1, the Department mailed Notices of Sales and Use Tax Assessment to the Taxpayer on December 13, 2005. On December 20, 2005, the Taxpayer's CPA protested the assessments and timely requested a hearing before the Secretary of Revenue.

**ISSUES**

The issues to be decided in this matter are as follows:

1. Is the Taxpayer president of the [Taxpayer's Corporation] (hereinafter referred to as "Corporation")?
2. As president of the Corporation, is the Taxpayer a responsible officer and, therefore, liable for the unpaid sales taxes of the Corporation?

## **EVIDENCE**

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

1. Copy of a Memorandum dated September 26, 2007, from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings (Assistant Secretary of Revenue), designated as Exhibit E-1.
2. Copy of the Corporation's Final Notice Sales & Use dated August 9, 2005 for the period December 1, 2004 through December 31, 2004, designated as Exhibit E-2.
3. Copy of the Corporation's Final Notice Sales & Use dated July 12, 2005 for the period January 1, 2005 through January 31, 2005, designated as Exhibit E-3.
4. Copy of the Corporation's Final Notice Sales & Use dated October 25, 2005 for the period May 1, 2005 through May 31, 2005, designated as Exhibit E-4.
5. Copy of the Corporation's Final Notice Sales & Use dated October 25, 2005 for the period June 1, 2005 through June 30, 2005, designated as Exhibit E-5.
6. Copy of Notice of Sales & Use Tax Assessment dated December 13, 2005 for the period December 1, 2004 through December 31, 2004, designated as Exhibit E-6.
7. Copy of Notice of Sales & Use Tax Assessment dated December 13, 2005 for the period January 1, 2005 through January 31, 2005, designated as Exhibit E-7.
8. Copy of Notice of Sales & Use Tax Assessment dated December 13, 2005 for the period May 1, 2005 through May 31, 2005, designated as Exhibit E-8.
9. Copy of Notice of Sales & Use Tax Assessment dated December 13, 2005 for the period June 1, 2005 through June 30, 2005, designated as Exhibit E-9.
10. Copy of a letter dated December 20, 2005 from the Taxpayer's Certified Public Accountant (CPA) to the Sales and Use Tax Division (Division) along with a Power of Attorney and Declaration of Representative dated December 20, 2005, designated as Exhibit E-10.
11. Copy of a letter dated February 16, 2006 from the Division to the Taxpayer's CPA, designated as Exhibit E-11.
12. Copy of a letter dated March 4, 2006 from the Taxpayer's CPA to the Division, designated as Exhibit E-12.

13. Copy of a letter dated April 11, 2006 from the Division to the Taxpayer's CPA, designated as Exhibit E-13.
14. Copy of a letter dated April 24, 2006 from the Taxpayer's CPA to the Division, designated as Exhibit E-14.
15. Copy of a letter dated June 14, 2006 from the Division to the Taxpayer's CPA, designated as Exhibit E-15.
16. Copy of the Business Corporation North Carolina Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2002, dated September 15, 2003, designated as Exhibit E-16.
17. Copy of the Business Corporation North Carolina Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2003, dated September 15, 2004, designated as Exhibit E-17.
18. Copy of the Business Corporation North Carolina Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2004, dated September 15, 2005, designated as Exhibit E-18.
19. Copy of the amended Business Corporation Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2002, dated May 22, 2006, designated as Exhibit E-19.
20. Copy of the amended Business Corporation Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2003, dated May 22, 2006, designated as Exhibit E-20.
21. Copy of the amended Business Corporation Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2004, dated May 22, 2006, designated as Exhibit E-21.
22. Copy of the S Corporation Tax Return 2002, bearing the Taxpayer's name on September 15, 2003, designated as Exhibit E-22.
23. Copy of the S Corporation Tax Return 2003, bearing the Taxpayer's name on September 15, 2004, designated as Exhibit E-23.
24. Copy of the S Corporation Tax Return 2004, bearing the Taxpayer's name on September 15, 2005, designated as Exhibit E-24.
25. Copy of a Certificate of Assumed Name filed with the [North Carolina] County Register of Deeds, dated April 16, 2004, designated as Exhibit E-25.

26. Copy of a Durable Power of Attorney appointing [Corporation's former Secretary] the Taxpayer's attorney-in-fact dated October 19, 1994, designated as Exhibit E-26.
27. Copy of check No. 5504 written to the North Carolina Department of Revenue on the account of [Taxpayer or Wife], dated March 15, 2006, with the attached Application for Corporate Income Tax Extension for the period January 1, 2005 through December 31, 2005, designated as Exhibit E-27.
28. Copy of check No. 5462 written to the North Carolina Department of Revenue on the account of [Taxpayer or Wife] dated September 16, 2005, designated as Exhibit E-28.
29. Copy of a letter dated February 28, 2007 from the Assistant Secretary of Revenue to the Taxpayer's CPA, designated as Exhibit E-29.
30. Copy of a letter dated April 9, 2007 sent by facsimile on April 24, 2007, designated as Exhibit E-30, with the following attachments from the Taxpayer's CPA to the Division:
  - (a) Copy of an Affidavit from [Taxpayer] notarized on April 5, 2007, designated as Exhibit E-30(a).
  - (b) Copy of an Affidavit from [Corporation's former Secretary] notarized on April 5, 2007, designated as Exhibit E-30(b).
  - (c)(1) Copy of a North Carolina Annual Report for Business Corporations dated September 14, 1999, designated as Exhibit E-30(c)(1).
  - (c)(2) Copy of a North Carolina Annual Report for Business Corporations dated August 10, 2000, designated as Exhibit E-30(c)(2).
  - (c)(3) Copy of a Business Corporation North Carolina Annual Report dated September 17, 2001, designated as Exhibit E-30(c)(3).
  - (c)(4) Copy of a Business Corporation North Carolina Annual Report dated September 16, 2002, designated as Exhibit E-30(c)(4).
  - (c)(5) Copy of a Business Corporation North Carolina Annual Report dated September 15, 2003, designated as Exhibit E-30(c)(5).
  - (c)(6) Copy of a Business Corporation North Carolina Annual Report dated September 15, 2004, designated as Exhibit E-30(c)(6).
  - (c)(7) Copy of a Business Corporation North Carolina Annual Report dated September 15, 2005, designated as Exhibit E-30(c)(7).
  - (d) Copies of [Taxpayer's] signature, designated as Exhibit E-30(d).
  - (e) Copy of the Schedule K-1 2004 Shareholder's Share of Income, Deductions, Credits, etc., designated as Exhibit E30(e).
  - (f)(1) Copy of a [Bank] Deposit Account Application signed by [Corporation's employee], on June 9, 2005, designated as Exhibit E-30(f)(1).

- (f)(2) Copy of a [Bank] Directors' Resolution Authorizing Corporate Depository and Other Cash Management Transactions, designated as Exhibit E-30(f)(2).
  - (g) Copy of an Affidavit from [Corporation's CPA] notarized on March 23, 2007, designated as Exhibit E-30(g).
31. Copy of a facsimile dated April 24, 2007 from the Division to the Taxpayer's CPA, designated as Exhibit E-31.
32. Copy of a facsimile dated April 25, 2007 from the Division to the Taxpayer's CPA with the attached Durable Power of Attorney dated October 19, 1994, designated as Exhibit E-32.
33. Copy of a letter dated April 25, 2007 from the Taxpayer's CPA to the Assistant Secretary of Revenue, sent by facsimile to the Division, designated as Exhibit E-33.
34. Copy of a letter dated April 25, 2007 from the Assistant Secretary of Revenue sent by facsimile to the Taxpayer's CPA, designated as Exhibit E-34.
35. Copy of a letter dated April 28, 2007 from the Taxpayer's Confidential Expert to the Taxpayer's CPA sent by facsimile from the Taxpayer's CPA to the Division on May 1, 2007, designated as Exhibit E-35, and the following attachments:
- (a) Copy of a Business Corporation North Carolina Annual Report dated September 16, 2002, designated as Exhibit E-35(a).
  - (b) Copy of a Business Corporation North Carolina Annual Report dated September 15, 2003, designated as Exhibit E-35(b).
  - (c) Copy of a Business Corporation North Carolina Annual Report dated September 15, 2004, designated as Exhibit E-35(c).
  - (d) Copy of a Business Corporation North Carolina Annual Report dated September 15, 2005, designated as Exhibit E-35(d).
  - (e) Copy of a Certificate of Assumed Name recorded at the Register of Deeds Office in [North Carolina] County on April 22, 2004, designated as Exhibit E-35(e).
  - (f) Copies of known signatures of [Taxpayer], designated as Exhibit E-35(f).
  - (g) Copies of questioned signatures of [Taxpayer], designated as Exhibit E-35(g).
  - (h) Copy of a facsimile dated May 1, 2007 from the Taxpayer's CPA to the Division, designated as Exhibit E-35(h).
36. Copy of a letter dated May 15, 2007 from the Division to the Taxpayer's CPA, designated as Exhibit E-36.

37. Copy of a letter dated May 15, 2007 from the Division to the Corporation's CPA, designated as Exhibit E-37.
38. Copy of a letter dated May 15, 2007 from the Division to another officer of the Corporation, designated as Exhibit E-38.
39. Copy of a letter dated May 15, 2007 from the Division to the Corporation's CPA returned to the Division with the Corporation's CPA's handwritten responses written thereon, designated as Exhibit E-39.
40. Copy of a letter dated May 16, 2007 from the Taxpayer's CPA to the Assistant Secretary of Revenue, designated as Exhibit E-40.
41. Copy of a letter dated May 23, 2007 from the Assistant Secretary of Revenue to the Taxpayer's CPA, designated as Exhibit E-41.
42. Copy of a letter dated May 29, 2007 from the Taxpayer's CPA to the Division, designated as Exhibit E-42.
43. Copy of a letter dated July 23, 2007 from the Division to the restaurant's Office Manager/Secretary, designated as Exhibit E-43.
44. Copy of a letter dated July 23, 2007 from the Division to the Corporation's former Secretary/Treasurer, designated as Exhibit E-44.
45. Copy of a letter dated July 23, 2007 from the Division to another officer of the Corporation, designated as Exhibit E-45.
46. Copy of a letter dated September 4, 2007 from the Secretary of Revenue to the Taxpayer, designated as Exhibit E-46.
47. Copy of a letter dated September 11, 2007 from the Division to the Taxpayer's CPA, designated as Exhibit E-47.
48. Copy of a letter dated September 12, 2007 and attachment from the Taxpayer's CPA to the Division, designated as Exhibit E-48.
49. Copy of a letter dated September 17, 2007 from the Assistant Secretary of Revenue to the Taxpayer's CPA, designated as Exhibit E-49.
50. Copy of a letter dated September 6, 2007 from the Corporation's former Secretary to the Division, designated as Exhibit E-50, and the following attachments:

- (a) Copy of page 2 of a letter dated July 23, 2007 to [Corporation's former Secretary] from the Department with her handwritten notes thereon, designated as Exhibit E-50(a).
  - (b) Copy of a Business Corporation North Carolina Annual Report dated September 16, 2002, designated as Exhibit E-50(b).
  - (c) Copy of a Consent to Action of Shareholders and Directors of [Corporation] with an effective date of April 1, 2001, designated as Exhibit E-50(c).
  - (d) Copy of a Release and Indemnity Agreement made and delivered as of April 1, 2001 and notarized on July 23, 2001, designated as Exhibit E-50(d).
  - (e) Copy of a Consent to Action of Shareholders and Directors of [Corporation] with an effective date of October 1, 2001, designated as Exhibit E-50(e).
  - (f) Copy of a Release and Indemnity Agreement made and delivered as of April 1, [2]001, the effective date of which is October 1, 2001, designated as Exhibit E-50(f).
  - (g) Copy of the [Corporation] Officers, designated as Exhibit E-50(g).
51. Copy of a screen from the North Carolina Secretary of State's website printed on October 9, 2007 regarding the Corporation, designated as Exhibit E-51.
  52. Copy of a letter dated October 30, 2006 from the State of North Carolina Department of the Secretary of State to the Corporation, designated as Exhibit E-52.
  53. Copy of the Business Corporation North Carolina Annual Report filed with the North Carolina Secretary of State's Office for the Fiscal Year Ending December 31, 2005, dated October 15, 2006, designated as Exhibit E-53.
  54. Copy of the S Corporation Tax Return 2005, signed by the Office Manager/Secretary/Bookkeeper on October 15, 2006, designated as Exhibit E-54.
  55. Copy of a Business Corporation North Carolina Annual Report for [another Corporation] dated September 15, 2006, designated as Exhibit E-55.

The following items were introduced into evidence by the parties at the hearing:

56. Copy of a letter dated July 7, 2007 from the CPA's employee to a Revenue Officer in [North Carolina City], designated as Exhibit E-56.
57. Copy of handwritten notes written by the Administration Officer after a telephone conversation with [Corporation's employee], restaurant Secretary/Office Manager, on August 10, 2007, designated as Exhibit E-57.

58. Copy of an Affidavit from the Taxpayer notarized on October 16, 2007, designated as Exhibit T/P-1.

The following items were introduced into evidence by the parties after the hearing:

59. Copy of a letter dated October 18, 2007 from the Taxpayer's CPA to the Assistant Secretary of Administrative Tax Hearings, designated as Exhibit T/P-2.
60. Copy of a Power of Attorney dated October 17, 2007 sent to the Department by facsimile on October 19, 2007 from the Taxpayer's CPA, designated as Exhibit T/P-3.
61. Copy of a memorandum dated October 24, 2007 from the Division to the Assistant Secretary of Revenue, designated as Exhibit S-1.

The following item was submitted after the hearing record closed on October 24, 2007 and, therefore, was not considered:

62. Copy of a letter dated October 26, 2007 from the Taxpayer's CPA to the Assistant Secretary of Administrative Tax Hearings, designated Exhibit T/P-4.

### **FINDINGS OF FACT**

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

1. [Corporation] ("Corporation") was engaged in business as a restaurant.
2. Corporation is incorporated under North Carolina law.
3. The Corporation collected the sales tax on sales of food but failed to remit the sales tax to the Department for the periods December 1, 2004 through January 31, 2005 and May 1, 2005 through June 30, 2005.
4. The Corporation closed its business in June 2005.
5. Because the Corporation failed to pay the taxes due, the assessments were billed final.
6. The Taxpayer was assessed the sales tax as President after the Corporation failed to pay the Department the sales taxes it had collected.
7. The Taxpayer has 50% ownership of the stock in the Corporation.



8. On October 19, 1994, the Taxpayer appointed [Corporation's former Secretary] his attorney-in-fact giving her full power of substitution and revocation. The Power of Attorney allowed [Corporation's former Secretary] to perform anything the Taxpayer might do or perform if he were present and acting.
9. The Power of Attorney naming [Corporation's former Secretary] was recorded at the Register of Deeds Office in [North Carolina] County on February 13, 1996.
10. The Business Corporation North Carolina Annual Reports and the S Corporation Tax Returns were prepared by the [Corporation's CPA].
11. The Taxpayer's name was signed by [Corporation's former Secretary], listing his title as President, on the Business Corporation North Carolina Annual Report for the fiscal year ending December 31, 2002 filed on September 15, 2003.
12. The Taxpayer's name was signed by [Corporation's former Secretary], listing his title as President, on the Business Corporation North Carolina Annual Report for the fiscal year ending December 31, 2003 filed on September 15, 2004.
13. The Taxpayer's name was signed by [Corporation's former Secretary], listing his title as President, on the Business Corporation North Carolina Annual Report for the fiscal year ending December 31, 2004 filed on September 15, 2005.
14. The Taxpayer's name was signed by [Corporation's former Secretary], listing his title as President, on the S Corporate Tax Return 2002 on September 15, 2003.
15. The Taxpayer's name was signed by [Corporation's former Secretary], listing his title as President, on the S Corporate Tax Return 2003 on September 15, 2004.
16. The Taxpayer's name was signed by [Corporation's former Secretary], listing his title as President, on the S Corporate Tax Return 2004 on September 15, 2005.
17. [Corporation's former Secretary] signed the Business Corporation North Carolina Annual Reports and the S Corporate Tax Returns at the offices of [Name], a corporation whose corporate officers included the Taxpayer and [Corporation's former Secretary].
18. The Taxpayer's name was signed on a Certificate of Assumed Name for the Corporation, listing his title as President, on April 16, 2004.
19. The Certificate of Assumed Name was notarized and contained the following statement: ". . . [Taxpayer] personally appeared before me this day and acknowledged that he is \_\_\_\_\_ President of **[CORPORATION]**, a North Carolina corporation, and that he, as \_\_\_\_\_ President, being authorized to do so, executed the foregoing on behalf of the corporation . . . ."

20. The Certificate of Assumed Name was recorded at the Register of Deeds Office in [North Carolina] County on April 22, 2004.
21. An employee of the Taxpayer's CPA referred to the Taxpayer as President of the Corporation in a letter dated July 7, 2005 to one of the Department's Revenue Officers in [North Carolina City].
22. The Taxpayer paid the Franchise Tax due by the Corporation for the calendar year ending December 31, 2004 with personal check number 5462 dated September 16, 2005, signed by [Corporation's former Secretary].
23. The Taxpayer paid the taxes due with the Corporate Income Tax Extension and the Franchise Tax Extension for 2005 with personal check number 5504 dated March 15, 2006, signed by [Corporation's former Secretary].
24. The Department provided the Taxpayer's CPA with a written statement on February 16, 2006 indicating the assessments against the Taxpayer, as President, were based on the Taxpayer signing the Corporate Income Tax Returns for 2002, 2003 and 2004 and the Annual Reports for the years ending December 31, 2002, December 31, 2003 and December 31, 2004 as President.
25. In a letter dated March 4, 2006, the Taxpayer's CPA stated the Taxpayer "held the title of President as a figurehead, only."
26. The Taxpayer's CPA made these representations to the Department under a Power of Attorney signed by the Taxpayer.
27. The Taxpayer filed or caused to be filed amended Business Corporation North Carolina Annual Reports for the fiscal years ending December 31, 2002, December 31, 2003 and December 31, 2004 changing his title from President to Vice President on May 22, 2006.
28. On April 24, 2007, an Administration Officer in the Sales and Use Tax Division faxed a copy of the Certificate of Assumed Name to the Taxpayer's CPA in [North Carolina City].
29. On April 25, 2007, an Administration Officer in the Sales and Use Tax Division faxed a copy of the Power of Attorney granting [Corporation's former Secretary] the authority to act on behalf of the Taxpayer to the Taxpayer's CPA.
30. On May 1, 2007, the Taxpayer's CPA faxed a copy of a Confidential Expert Witness Work Product prepared by [Taxpayer's witness], Director of a [forensic science company], to the Administration Officer.
31. [Taxpayer's witness] stated in the Confidential Expert Witness Work Product that he had compared the signatures on the Business Corporation North Carolina

Annual Reports dated September 16, 2002, September 15, 2003, September 15, 2004 and September 15, 2005 as well as the signature on the Certificate of Assumed Name with known signatures of the Taxpayer and it was [Taxpayer's witness] opinion that the Taxpayer was not the author of the signatures on the documents.

32. [Corporation's former Secretary's husband] and [Corporation's former Secretary] resigned as President and Secretary of the Corporation, respectively, effective September 30, 2001.
33. New corporate officers were elected effective October 1, 2001. The new corporate officers were [Name] – President, [Taxpayer] – Vice President and [a shareholder] Secretary/Treasurer.
34. [Name] resigned as President of the Corporation in December 2002.
35. The Taxpayer and [Two individuals] were the only shareholders listed on the S Corporation Tax Returns for the calendar years 2003, 2004 and 2005.
36. The Taxpayer received the benefit of 50% of the Corporation's losses on his personal tax returns for the calendar years 2003, 2004 and 2005.
37. The S Corporation Tax Return 2005 was filed on October 15, 2006.
38. [Corporation's employee], Office Manager/Secretary/Bookkeeper, at the restaurant, signed the S Corporation Tax Return 2005.
39. The Corporation's Business Corporation North Carolina Annual Report for the fiscal year ending December 31, 2005 was filed with the North Carolina Secretary of State's Office and signed by [Corporation's employee], Office Manager/Secretary/Bookkeeper, on October 15, 2006.
40. The Business Corporation North Carolina Annual Report for the fiscal year ending December 31, 2005 was rejected by the North Carolina Secretary of State's Office in a letter dated October 30, 2006. The letter stated that an officer of the Corporation must sign the Annual Report and the titles of the principal officers must be listed.
41. The Taxpayer did not deny being President of the Corporation in the Affidavit notarized on October 16, 2007 and presented at the hearing by the Taxpayer's CPA.
42. The Taxpayer was President of the Corporation.
43. The Notices of Proposed Sales Tax Assessment against the Taxpayer, as President, were mailed to the Taxpayer on December 13, 2005.

44. The Taxpayer, through his CPA, objected to the assessments 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. G.S. 105-253(b) provides that each responsible officer of a corporation is personally and individually liable for all sales taxes collected by the corporation.
2. The term "responsible officer" is defined to include the president of a corporation.
3. The Taxpayer is a responsible officer and, as such, is liable for the State and applicable county sales taxes collected by the Corporation but never remitted to the Department.
4. The Notices of Proposed Assessment for the period December 1, 2004 through January 31, 2005 and May 1, 2005 through June 30, 2005 were properly issued pursuant to G.S. 105-241.1.

### **DECISION**

It is the decision of the Assistant Secretary of Revenue that the proposed assessment of additional sales tax plus accrued interest is deemed to be correct under the facts and is hereby sustained. I find reasonable cause to waive the penalties. The proposed assessment is hereby declared to be finally determined and immediately due and collectible with interest thereon as permitted by law.

Made and entered this 18<sup>th</sup> day of December, 2007.

---

Eugene J. Cella  
Assistant Secretary of Administrative Hearings