

STATE OF NORTH CAROLINA

**BEFORE THE
SECRETARY OF REVENUE**

COUNTY OF WAKE

In the Matter of:

The Proposed Assessment of Additional Sales)
and Use Tax for the period January 1, 2003)
through June 30, 2004, by the Secretary of)
Revenue of North Carolina)
)
)
vs.)
)
[Taxpayer])

FINAL DECISION
Docket No. 2006-218

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh, on October 12, 2006, upon application for hearing by the Taxpayer wherein he protested the proposed assessment of tax, penalty, and interest for the period January 1, 2003 through June 30, 2004. The hearing was held by the Assistant Secretary of Revenue pursuant to G.S. 105-260.1 and was attended by W. Timothy Holmes, Assistant Director, and Danny R. Fulcher, Administration Officer of the Sales and Use Tax Division. [Vice President of LLC], and [Industry Representative], Dealership Accounting Representative, represented the Taxpayer.

Pursuant to G. S. 105-241.1, the Department mailed a Notice of Proposed Assessment to the Taxpayer on January 25, 2005 assessing additional tax, penalty, and interest of \$82,198.05. The Taxpayer filed a timely protest to the proposed assessment and requested a hearing before the Secretary of Revenue.

ISSUE

Whether the Department of Revenue properly assessed sales tax where the Taxpayer delivered goods to customers in the State or lacked documentation of delivery outside of the State.

EVIDENCE

The following items were introduced into evidence at the hearing:

1. Copy of Memorandum dated May 16, 2001, from the Secretary of Revenue to the Assistant Secretary of Tax Administration, designated Exhibit E-1.
2. Copy of auditor's report-sales and use tax dated January 4, 2005, covering the period January 1, 2003 through June 30, 2004, designated Exhibit E-2.
3. Copies of letters from the Department's examining auditors to the Taxpayer's customers, designated Exhibit E-3, with the following attachments:
 - a. Purchases made during the period March 2003 through June 2004 that indicate merchandise was delivered to an out of state location.
 - b. Purchases made during the period January 2003 through May 2004 that indicate merchandise was picked up at the Taxpayer's North Carolina location.
4. Copy of Notice of Sales and Use Tax Assessment dated January 25, 2005, designated Exhibit E-4.
5. Copy of letter dated February 22, 2005 from the Taxpayer to the Sales and Use Tax Division (Division) covering the period January 1, 2003 through June 30, 2004, designated Exhibit E-5.
6. Copy of letter dated March 17, 2005 from the Division to the Taxpayer, designated Exhibit E-6.
7. Copy of letter dated June 1, 2005 from the Division to the Taxpayer, designated Exhibit E-7.
8. Copy of letter dated July 1, 2005 from the Division to the Taxpayer, designated Exhibit E-8.
9. Copy of undated letter postmarked August 5, 2005 from the Taxpayer to the Division, designated Exhibit E-9.
10. Copy of letter dated September 7, 2005 from the Division to the Taxpayer, designated Exhibit E-10.
11. Copy of letter dated December 2, 2005 from the Division to the Taxpayer, designated Exhibit E-11.

12. Copy of letter dated April 28, 2006 from the Division to the Taxpayer, designated Exhibit E-12.
13. Copy of Sales and Use Tax Technical Bulletin 42-1 A. dated July 1, 2005, designated Exhibit E-13.
14. Copy of letter dated July 14, 2006 from the Assistant Secretary of Administrative Hearings to the Taxpayer, designated Exhibit E-14.

The Taxpayer introduced the following items into evidence at the hearing:

15. Copy of Taxpayer's form entitled "Sales Use Tax Notification," designated Exhibit TP-1.
16. Copies of letters from the Taxpayer to the Department and a Memo to Managers of the company, designated as Exhibit TP-2, with the following attachments:
 - a. Copy of letter dated January 23, 2004 from the Taxpayer to the Department.
 - b. Copy of letter dated January 23, 2004 from the Taxpayer to the Department.
 - c. Copy of Memo dated February 23, 2004 from the Office Manager to all Managers.
17. Copy of Taxpayer's form entitled "Certification of Transportation and Delivery," designated Exhibit TP-3.
18. Copy of Taxpayer's form entitled "Certificate of Delivery of Vehicle" dated October 21, 2003 signed by customer, designated as Exhibit TP-4, with the following attachments:
 - a. Copy of Bill of Sale dated October 9, 2003 signed by customer.
 - b. Copy of customer's North Carolina Motorcycle Learner Permit.
19. Copy of Taxpayer's form entitled "Certificate of Delivery of Vehicle" dated September 22, 2003 signed by customer, designated as Exhibit TP-5, with the following attachments:
 - a. Copy of Bill of Sale dated September 20, 2003 signed by customer.
 - b. Copy of customer's [another state] Driver's License.

20. Copy of Taxpayer's form entitled "Certificate of Delivery of Vehicle" dated December 12, 2003 signed by customer, designated as Exhibit TP-6, with the following attachments:
 - a. Copy of Bill of Sale dated December 12, 2003 signed by customer.
 - b. Copy of customer's [another state] Driver's License.
21. Copy of Taxpayer's form entitled "Certificate of Delivery of Vehicle" dated September 26, 2003 signed by customer, designated as Exhibit TP-7, with the following attachments:
 - a. Copy of Bill of Sale dated September 26, 2003 signed by customer.
 - b. Copy of customer's [another state] Driver's License.
22. Copy of Taxpayer's form entitled "Sales Use Tax Notification" dated January 11, 2003 signed by customer, designated as Exhibit TP-8, with the following attachments:
 - a. Copy of Bill of Sale dated January 11, 2003 signed by customer.
 - b. Copy of customer's [another state] Driver's License.
23. Copy of Taxpayer's form entitled "Sales Use Tax Notification" dated February 12, 2003 signed by customer, designated as Exhibit TP-9, with the following attachments:
 - a. Copy of Bill of Sale dated February 12, 2003 signed by customer.
 - b. Copy of customer's [another state] Driver's License.
24. Copy of Taxpayer's form entitled "Sales Use Tax Notification" dated February 15, 2003 signed by customer, designated as Exhibit TP-10, with the following attachments:
 - a. Copy of Bill of Sale dated February 15, 2003 signed by customer.
 - b. Copy of customer's [another state] Driver's License.
25. Copy of Taxpayer's form entitled "Sales Use Tax Notification" dated February 04, 2003 signed by customer, designated as Exhibit TP-11, with the following attachments:
 - a. Copy of Bill of Sale dated February 04, 2003 signed by customer.

- b. Copy of customer's [another state] Driver's License.
- 26. Copy of Taxpayer's form entitled "Sales Use Tax Notification" dated January 11, 2003 signed by customer, designated as Exhibit TP-12, with the following attachments:
 - a. Copy of Bill of Sale dated January 11, 2003 signed by customer.
 - b. Copy of customer's [another] Driver's License.
- 27. Copy of Taxpayer's form entitled "Sales Use Tax Notification" dated February 15, 2003 signed by customer and a copy of Bill of Sale dated February 15, 2003 signed by customer, designated Exhibit TP-13.
- 28. Copy of Taxpayer's Sales Tax Audit Analysis Schedule for tax assessed per initial report from Schedule E-1 of the auditor's report, designated Exhibit TP-14.

FINDINGS OF FACT

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

- 1. During the audit period the Taxpayer at all material times was engaged in business as a retailer whose principal business activity was the retail sale of street bikes, dirt bikes, and all-terrain vehicles (ATVs).
- 2. The Taxpayer made sales of tangible personal property at the Taxpayer's place of business in North Carolina.
- 3. The Taxpayer made sales of tangible personal property in interstate commerce.
- 4. Additional tax was assessed against the Taxpayer for the audit period based on the Taxpayer's failure to collect and remit sales tax on claimed out-of-state sales which were actually delivered in North Carolina.
- 5. The Taxpayer required customers who lived outside North Carolina to complete a form entitled "Sales Use Tax Notification." This form stated that North Carolina sales tax had not been paid and that the customer would be responsible for the applicable tax in his state.
- 6. The Taxpayer did not collect or remit sales tax on the sales to customers who filled out the Taxpayer's form entitled "Sales Use Tax Notification."

7. The Taxpayer produced "Sales Use Tax Notification" forms for tangible personal property delivered in North Carolina and tangible personal property delivered out of North Carolina.
8. The Department did not accept the Taxpayer's "Sales Use Tax Notification" form as adequate documentation to exempt sales to out-of state residents because some customers actually picked up the unit at the dealer's North Carolina location.
9. The Department assessed sales tax on motorcycles and ATVs sold to out of state residents who actually picked up the unit at the dealer's North Carolina location.
10. The auditors mailed certified letters (Exhibit E-3) to out of state customers to determine where they took possession of their purchase of any off road vehicle from the Taxpayer. If the customer returned the letter and stated that the merchandise purchased was delivered to the customer out of state, the sale was exempted as a sale in interstate commerce and not taxed in the audit report. If the customer returned the letter and stated that the merchandise was picked up at the Taxpayer's business location in North Carolina, the sales was included in the audit report as a taxable sale. If no response was received from the customer, the sale was considered delivered in North Carolina and taxable.
11. The Taxpayer has not shown adequate documentation of out-of-state deliveries for the sales which were assessed.
12. A Notice of Proposed Assessment was mailed to the Taxpayer on January 25, 2005.
13. The Taxpayer notified the Department that it protested the assessment and requested a hearing.
14. The Taxpayer argues it should not be held liable for sales tax it did not charge or collect from the out of state customers because it was not aware of the proper paperwork needed to validate deliveries to customers out of state.
15. The Taxpayer's General Manager stated in a letter to the Department (Exhibit E-9) that they were not contesting the fact that they were wrong. He asked for the Departments' consideration since they were trying to do the right thing.

CONCLUSIONS OF LAW

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

1. The Taxpayer was engaged in business during the audit period as a retailer as defined in G.S. 105-164.3(35).
2. Sale and Use Tax Technical Bulletin 42-1 A. provides a definition of out of state sales and provides a list of the acceptable documentation to verify proof of transportation and delivery to a point outside the state. In order for an exemption for a sale in interstate commerce to apply there must be acceptable proof of transportation and delivery to a point outside the State.
3. The taxable event for assessment of the sales tax occurs at the time of sales and purchase within the State.
4. Where the delivery of goods sold is in the taxing state and is accepted within the taxing state, a sales tax may lawfully be imposed upon the transaction.
5. The Taxpayer did not maintain adequate shipping documentation for the sales where the Department assessed sales tax.
6. The sales in question were subject to the general rate of State and applicable local sales and use tax. The Taxpayer is liable for the 4½% State and applicable local sales and use tax which should have been collected and remitted to the Department.
7. A notice of proposed assessment was issued to the Taxpayer pursuant to G.S. 105-241.1.

DECISION

Therefore the proposed assessment of tax and interest is deemed correct under the law and the facts and is hereby sustained. Because the failure to pay the tax was not the result of a negligent or 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.

Made and entered this 10th day of January, 2007.

Eugene J. Cella
Assistant Secretary of Revenue For
Administrative Tax Hearings