

IN THE MATTER OF:)
)
The Proposed Assessment of Unauthorized)
Substance Tax dated November 25, 2002)
by the Secretary of Revenue of the)
State of North Carolina)
)
against)
)
[Taxpayer])
)

FINAL DECISION

Docket No. 2003-61

AN XXXXXX

Upon the Taxpayer's timely written request for an administrative tax hearing, and pursuant to N.C.G.S. 105-260.1, this matter came before the Assistant Secretary of Revenue, Eugene J. Cella, who conducted a hearing in the City of Raleigh, North Carolina. At the Taxpayer's request, the hearing was conducted by written communication in lieu of meeting in person. For purposes of N.C.G.S. 105-241.1, the hearing concluded on May 21, 2003.

Pursuant to N.C.G.S. 105-113.111 and N.C.G.S. 105-241.1(a)&(b), a notice of proposed assessment was delivered to the Taxpayer by U.S. Mail sent to the Taxpayer at her last known address of [street, city, state zip]. Based on the Taxpayer's unauthorized possession of 20.5 grams of cocaine on [Date], to which no tax stamps were affixed, the notice proposed an assessment comprised of excise tax in the amount of \$1,050.00, penalties totaling \$420.00, and interest in the amount of \$5.25, for a total proposed tax liability of \$1,475.25.

Two questions are at issue: (1) Did the Taxpayer have actual and/or constructive possession of cocaine without proper tax stamps affixed, and (2) Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

EVIDENCE

A Brief for Tax Hearing was submitted by the Unauthorized Substances Tax Division and was accepted into the record of the hearing. The Brief's exhibits were accepted into the record as evidence and are incorporated herein by reference. One exhibit was the law enforcement incident report, which stated the following:

On [Date] at [Time], Officers [Officer 1] and [Officer 2] with the [City] Police Department investigated the occupants of a suspicious vehicle coming from behind a business under construction. The vehicle was driven by the Taxpayer, and [Officer 1] recognized the passenger from previous arrests as a known drug offender. That individual exited the car from the passenger's side and approached the officers. Both

officers conducted a pat down of that individual for their safety due to ammunition to a handgun being visible in a baggie in his coat pocket. The pat down escalated into a scuffle with officers as this individual attempted to flee from the scene several different times while being handcuffed. This individual had claimed to be the Taxpayer's boyfriend; however, the Taxpayer told police that she did not know him that well. He was arrested for assault on law enforcement officers and placed in a patrol car. Officers asked the Taxpayer for consent to search the vehicle since she was the owner and the person in apparent control. She was asked if anything illegal was present in the vehicle and she replied, "No, I don't think so." The search revealed 20.5 grams of cocaine packaged for sale under a plastic bag in the front passenger floorboard and a stolen handgun under that seat.

The following exhibits were attached to the Division's brief:

- US-1 Form BD-10, "Notice of Unauthorized Substance Tax Assessment," dated November 25, 2002.
- US-2 Letter from the Taxpayer's attorney, dated December 17, 2002, requesting a hearing.
- US-3 Letter to the Taxpayer's attorney, dated January 03, 2003, advising that her client's Administrative Tax Hearing would be held March 12, 2003.
- US-4 Letter from the Taxpayer's attorney, dated January 13, 2003, requesting that the hearing be conducted via written communication.
- US-5 Form BD-4, "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Controlled Substances," which names the Taxpayer as the possessor of the controlled substance.
- US-6 Incident report by the [City] Police Department.
- US-7 A general vehicle detail list.
- US-8 Memorandum from E. Norris Tolson, Secretary of Revenue, dated May 16, 2001, delegating to Eugene J. Cella, Assistant Secretary of Administrative Hearings, the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.

On April 21, 2003, a copy of the brief and its exhibits were mailed to the Taxpayer's attorney, [Attorney] of [City], North Carolina. [Attorney] was given until May 21, 2003, to respond. [Attorney], on behalf of the Taxpayer, submitted a brief in opposition of the tax assessment and introduced court dispositions from the Taxpayer and Co-Taxpayer's criminal cases. In the brief, the Taxpayer argues that she could not have constructive possession of the cocaine when another individual, the Co-Taxpayer, admitted to having actual possession thereof. She contends that any tax liability should

fall solely upon the Co-Taxpayer. In support of her position, she posits that constructive possession only occurs when actual possession cannot be determined. The court dispositions do indicate that all but one of the criminal charges, (the paraphernalia charge), related to this incident, were dismissed against the Taxpayer and that the Co-Taxpayer did plead guilty to possession of 20.5 grams of cocaine.

FINDINGS OF FACT

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

1. On [Date] officers with the [City] Police Department investigated a vehicle, operated by the Taxpayer, because of the suspicious nature of its location and the early hour.
2. Officers recognized the passenger of the Taxpayer's vehicle as a known drug offender.
3. The Taxpayer gave officers consent to search the vehicle and the officers subsequently located 20.5 grams of cocaine, packaged for sale, as well as a stolen firearm.
4. The Taxpayer was the operator of the vehicle, of which she was the sole registered owner. The Taxpayer's control of the vehicle, however, was non-exclusive since there was another passenger in the vehicle.
5. There are other circumstances which establish the Taxpayer as possessor of the powder cocaine: (1) As the driver of the vehicle, the Taxpayer was in close proximity to the powder cocaine which was on the passenger side floorboard; (2) the Taxpayer and Co-Taxpayer were driving about at approximately 4:00AM in the morning and were seen by an officer emerging from a reconstruction site at which they had no business; (3) the Taxpayer pled guilty to criminal charges of possessing drug paraphernalia, said paraphernalia consisting of 25 clear plastic baggies intended to store and conceal controlled substances; and (4) the powder cocaine at issue was contained within clear plastic baggies.
6. On November 25, 2002, an assessment of unauthorized substance tax was made against the Taxpayer comprised of excise tax in the amount of \$1,050.00, penalties totaling \$420.00, and interest in the amount of \$5.25, for a total proposed tax liability of \$1,475.75, based upon the Taxpayer's possession of 20.5 grams of cocaine. Notice of said assessment was sent to the Taxpayer by U.S. Mail.
7. Upon being assessed, and in a timely manner, the Taxpayer requested in writing an administrative tax hearing. She subsequently requested that the hearing be conducted by written communication and she waived her right to appear in person.

8. No tax stamps were purchased for or affixed to the cocaine as required by law.

CONCLUSIONS OF LAW

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

1. A preponderance of the evidence supports the foregoing findings of fact, therefore the Taxpayer is subject to an assessment of unauthorized substances tax.
2. The driver of a car has the power to control the contents of the car. Where contraband is under the control of a taxpayer, this fact is sufficient to give rise to an inference of knowledge and possession. Taking both the fact that the powder cocaine was found in the Taxpayer's car in close proximity to the Taxpayer and the other circumstances into account, the Assistant Secretary concludes that the Taxpayer was in constructive possession of the powder cocaine.
3. That the Taxpayer's Co-Taxpayer claims to have been in actual possession of powder cocaine which was not seized from the Co-Taxpayer's person but rather was found in the Taxpayer's vehicle in close proximity to the Taxpayer does not bar the Assistant Secretary from concluding that the Taxpayer was in constructive possession of the powder cocaine under the theory that the two were acting in concert.
4. That the criminal charges against the Taxpayer which are related to the powder cocaine were dismissed does not bar the Assistant Secretary from concluding that the Taxpayer was in possession of the powder cocaine for civil tax purposes, especially where the dismissals of the criminal charges are not stated to be based on insufficient evidence against the Taxpayer.
5. Without authorization, the Taxpayer had constructive possession of 20.5 grams of cocaine on [Date] and was therefore a "dealer" as that term is defined in N.C.G.S. 105-113.106(3).
6. The Taxpayer is liable for excise tax in the amount of \$1,050.00, penalties totaling \$420.00, and interest until date of full payment.

DECISION

Wherefore, an assessment based on possession of 20.5 grams of cocaine, comprised of excise tax in the amount of \$1,050.00 and penalties totaling \$420.00 is deemed to be proper under the law and the facts, and is sustained and declared to be final and immediately due and collectible, together with such interest as allowed by law.

This the 26th day of August, 2003.

Eugene J. Cella
Assistant Secretary of Revenue