

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
Tax for the period August 1, 1993 through)
June 30, 1996, by the Secretary of Revenue of)
North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2002-37

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on March 7, 2002, upon application for hearing by the Taxpayer wherein he protested our proposed assessment of tax, penalty, and interest for the period August 1, 1993 through June 30, 1996. The hearing was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Richard C. Stewart, Administration Officer. The Taxpayer was represented by [two Attorneys].

The Taxpayer is a corporation engaged in the business of operating a hotel and restaurant. On April 12, 2001, an auditor with the Department completed an examination of the taxpayer's records. The additional tax assessed resulted primarily from the Taxpayer's understating sales and use tax for the audit period.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment on May 16, 2001 to the Taxpayer, of penalty and interest in the amount of \$143,936.15. Prior to the issuance of the proposed assessment, the Taxpayer made a payment to the Department of \$168,280.05, an amount equal to the additional tax found to be due in the audit report. The Taxpayer objected to the assessment in a letter dated June 12, 2001 and timely requested a hearing before the Secretary of Revenue.

ISSUE

The issue to be decided in this matter is as follows:

Is the assessment correct and properly proposed against the Taxpayer based on the best information available?

EVIDENCE

The Sales and Use Tax Division presented the following items into evidence:

1. Copy of memorandum dated May 16, 2001 from Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-1.
2. Copy of the face sheet of the audit report dated April 12, 2001 and copy of audit remarks, designated Exhibit E-2.
3. Copy of letter dated April 16, 2001 from the Taxpayer's attorney to the Department of Revenue, designated Exhibit E-3.
4. Copy of Notice of Sales and Use Tax Assessment dated May 16, 2001, designated Exhibit E-4.
- 5a. Copy of letter dated June 12, 2001 from the Taxpayer to the Department of Revenue, designated Exhibit E-5a.
- 5b. Copy of letter dated June 12, 2001 from the Taxpayer to the Department of Revenue, designated Exhibit E-5b.
- 5c. Copy of letter dated June 12, 2001 from the Taxpayer's attorney to the Department of Revenue, designated Exhibit E-5c.
6. Copy of letter dated June 19, 2001 from the Sales and Use Tax Division to the Taxpayer's attorney, designated Exhibit E-6.
7. Copy of letter dated June 25, 2001 from the Taxpayer's attorney to the Sales and Use Tax Division, designated Exhibit E-7.
8. Copy of letter dated September 13, 2001 from the Sales and Use Tax Division to the Taxpayer's attorney, designated Exhibit E-8.
9. Copy of letter dated December 11, 2001, from the Assistant Secretary to the Taxpayer, designated Exhibit E-9.
10. Copy of letter dated December 13, 2001, from the Assistant Secretary to the Taxpayer, designated Exhibit E-10.
11. Copy of letter dated December 21, 2001 from the Taxpayer's attorney to the Assistant Secretary of Revenue, designated Exhibit E-11.
12. Copy of letter dated January 8, 2002, from the Assistant Secretary of Revenue to the Taxpayer's attorney, designated Exhibit E-12.
13. Copy of the Brief for Tax Hearing prepared by the Sales and Use Tax Division, designated Exhibit E-13.

FINDINGS OF FACT

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

1. The Taxpayer was engaged in business operating a restaurant and motel during the audit period.
2. The Taxpayer charged and collected sales tax on gross receipts from motel room rentals and on all sales of the restaurant and on banquet activities during the audit period.
3. The gross receipts or sales summarized in the Taxpayer's daily reports exceeded the gross sales reported on the Taxpayer's sales and use tax returns for corresponding periods during the audit period.
4. From February 1994 through February 1996, the Taxpayer charged patrons an additional 3% sales tax on sales invoices given to patrons of the inn which was accounted for as a marketing fee in the Taxpayer's internal revenue reports.
5. The president of the Corporation pled guilty to criminal charges for evasion of sales tax for the period August 1, 1993 through June 30, 1996.
6. The notice of assessment was mailed to the Taxpayer on May 16, 2001.
7. The Taxpayer protested the assessment and timely requested a hearing before the Secretary of Revenue.

CONCLUSIONS OF LAW

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

1. The Taxpayer was a retailer and at all material times was engaged in the business of renting lodging to transients subject to the gross receipts tax and making retail sales of tangible personal property subject to sales tax.
2. The Taxpayer is liable for the applicable State and county additional tax.
3. When tax collected for any period is in excess of the total amount that should have been collected, the total amount collected must be paid over to the Secretary of Revenue.
4. An assessment of tax is presumed to be correct.
5. The burden is upon a taxpayer who takes exception to an assessment to overcome that presumption.
6. No evidence was presented at the hearing that would tend to contradict the assessment or overcome the presumption of correctness.

7. The Notice of Proposed Assessment for the period of August 1, 1993 through June 30, 1996 was issued pursuant to G.S. 105-241.1.

DECISION

The taxpayer was engaged in the business of operating a motel and restaurant. For each business day, a night auditor for the corporation prepared a report of the business activity for the day and forwarded a copy of the information to the home office in [another state]. This report summarized each category of sales, such as the gross receipts from room rental, restaurant, banquet, beverage, and miscellaneous sales. When the daily reports maintained by the Taxpayer were compared to the sales reported on the Taxpayer's monthly sales and use tax returns a substantial underpayment was found. In addition, for the period of February 1994 through February 1996, the Taxpayer charged an additional three percent (3%) sales tax on the sales invoices given to patrons of the inn. This additional 3%, although presented to patrons as a sales tax, was accounted for as a marketing fee in the Taxpayer's internal revenue reports.

The Department assessed additional tax on the difference between the tax due shown on the Taxpayer's daily activity sheets and the amounts reported on the monthly sales and use tax returns. Tax was also assessed on the excessive and erroneous 3% sales tax the Taxpayer collected from patrons of the inn.

The Taxpayer objected to the assessment of additional tax, the fraud penalty, interest assessed, and accrued interest. However, the Taxpayer did not provide any basis for these objections and did not furnish any evidence that supported an adjustment to the amount of tax due.

I find, therefore, that the Taxpayer has provided no additional information upon which to base an amendment to the assessment and has not met its burden of overcoming the presumption of correctness of the assessment. Since the Taxpayer paid the tax prior to the issuance of the assessment, the proposed assessment of penalty and interest is deemed correct under the law and the facts and is hereby sustained.

Wherefore the assessment is sustained in its entirety, and is declared to be final and immediately due and collectible.

This 4th day of June, 2002.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings