

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

BEFORE THE  
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of Additional )  
Income Tax for the Taxable Year 2002 by )  
the Secretary of Revenue of North Carolina )  
vs. )  
Taxpayer 1, )  
Taxpayer )

**FINAL DECISION**  
Docket No. 2004-510

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, upon an application for hearing by Taxpayer 1, hereinafter referred to as "Taxpayer," wherein he objected to the proposed assessment of additional income tax for the taxable year 2002. At Taxpayer's request, the hearing was conducted via written communication and the Assistant Secretary allowed Taxpayer until March 16, 2005, to provide any arguments, documents, or other evidence in support of his objections to the assessment. The hearing was conducted by the Assistant Secretary under the provisions of G.S. 105-260.1.

Pursuant to G.S. 105-241.1, an assessment proposing additional tax, penalties, and interest for the tax year 2002 was mailed to Taxpayer on March 30, 2004. Taxpayer filed a timely objection to the proposed assessment and requested an administrative tax hearing before the Secretary of Revenue.

**ISSUE**

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

Is the assessment for additional income tax proposed against Taxpayer for the taxable year 2002 lawful and proper?

## EVIDENCE

The evidence presented by Nancy R. Pomeranz, Director of the Personal Taxes Division, consisted of the following:

1. Memorandum from E. Norris Tolson, Secretary of Revenue, to Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, dated May 16, 2001, a copy of which is designated as Exhibit PT-1.
2. Notice of Individual Income Tax Assessment for the taxable year 2002 dated March 30, 2004, a copy of which is designated as Exhibit PT-2.
3. Taxpayer's 2002 wage and tax information obtained from Employer, a copy of which is designated as Exhibit PT-3.
4. Letter from the Department of Revenue to Taxpayer dated December 23, 2003, a copy of which is designated as Exhibit PT-4.
5. Letter from Taxpayer to the Department of Revenue dated April 22, 2004, a copy of which is designated as Exhibit PT-5.
6. Letter from B. S. Blackmon, Revenue Tax Auditor, to Taxpayer dated October 13, 2004, a copy of which is designated as Exhibit PT-6.
7. Letter from Taxpayer to B. S. Blackmon dated November 9, 2004, a copy of which is designated as Exhibit PT-7.
8. Letter from Eugene J. Cella to Taxpayer dated December 16, 2004, a copy of which is designated as Exhibit PT-8.
9. Letter from Eugene J. Cella to Taxpayer dated December 20, 2004, a copy of which is designated as Exhibit PT-9.
10. Letter from Taxpayer to Eugene J. Cella dated December 28, 2004, a copy of which is designated as Exhibit PT-10.
11. Letter from Eugene J. Cella to Taxpayer dated January 3, 2005, a copy of which is designated as Exhibit PT-11.
12. Letter from Taxpayer to Eugene J. Cella dated January 30, 2005, a copy of which is designated as Exhibit PT-12.
13. Letter from Taxpayer to Eugene J. Cella dated February 14, 2005, a copy of which is designated as Exhibit PT-13.

Taxpayer submitted a Response to Brief For Tax Hearing to Eugene J. Cella dated March 15, 2005, a copy of which is designated as Exhibit TP-1.

### **FINDINGS OF FACT**

1. Taxpayer is and at all material times was a natural person, sui juris, and a citizen and resident of North Carolina.
2. Taxpayer did not file a North Carolina individual income tax return for the tax year 2002.
3. Wage and tax information obtained from Employer shows that Taxpayer had wages of at least \$63,640.00 during tax year 2002. No North Carolina income taxes were withheld from the wages.
4. Upon examination, the Department calculated Taxpayer's federal taxable income to be \$55,940.00, consisting of wages of \$63,640.00 from Employer; the standard deduction for the filing status of Single; and one personal exemption.
5. Taxpayer's North Carolina taxable income was determined to be \$58,640.00 by increasing Taxpayer's federal taxable income by \$2,700.00 for the difference between the amounts allowed for the federal standard deduction and personal exemption and the State standard deduction and personal exemption.
6. A Notice of Individual Income Tax Assessment proposing an assessment of additional income tax, a twenty-five percent failure to file penalty, a ten percent failure to pay penalty, a twenty-five percent negligence penalty, and accrued interest totaling \$6,576.16 was mailed to Taxpayer on March 30, 2004. Taxpayer objected to the proposed assessment and timely requested a hearing before the Secretary of Revenue.
7. Subsequent to receiving the hearing request, the Department determined that the fifty percent penalty provided under G.S. 105-163.5(f) for furnishing an employer with an improper exemption certificate was, in error, not included in the proposed assessment. The Department requests that an additional penalty of \$2,002.00 be asserted against Taxpayer.
8. Taxpayer has offered no defense directly addressing the calculation of the proposed assessment. Taxpayer contends that he is not required to file a North Carolina individual income tax return for 2002 since the district director of the Internal Revenue Service has never notified him that he is required to file a federal income tax return for 2002.
9. Taxpayer contends that the Department has never established that he is a "taxpayer."

10. Taxpayer attempts to dismiss the proposed assessment by arguing that the Department did not respond to his request for hearing within the time prescribed by statute. Taxpayer filed his request for a hearing on the 2002 proposed assessment on April 22, 2004. In a letter dated December 16, 2004, the Department notified Taxpayer that his administrative tax hearing had been scheduled for January 27, 2005.
11. When a taxpayer makes a timely request for a hearing, the Secretary of Revenue is required to set the time for the hearing and notify the taxpayer of the designated time within 60 days of the request and at least 10 days prior to the date set for the hearing. The date set for the hearing must be within 90 days after the timely request for a hearing was filed or at a later date mutually agreed upon by both parties. The Department does not dispute the fact that it did not meet the statutory timetable for scheduling the hearing or for notifying Taxpayer of the scheduled hearing date.

### **CONCLUSIONS OF LAW**

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

1. North Carolina imposes an individual income tax upon the taxable income of every resident of this State. For residents of this State, "North Carolina taxable income" is the taxpayer's taxable income as determined under the Internal Revenue Code, adjusted as statutorily mandated for differences in State and federal law.
2. Federal taxable income is defined by the Internal Revenue Code as gross income less deductions and personal exemptions. Gross income is defined as all income from whatever source derived unless specifically excepted. Gross income includes compensation for services rendered and gross income derived from business. Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, tips, and bonuses are all includable in gross income.
3. Additions to federal taxable income are required for the amount by which the taxpayer's standard deduction has been increased for inflation under the Code and the amount by which each of the taxpayer's personal exemptions has been increased for inflation under the Code. The increase in the personal exemption for inflation is reduced by \$500.00 if the taxpayer's federal adjusted gross income is below the applicable threshold for the taxpayer's filing status. Additions of \$2,700.00 were properly made for the tax year 2002.
4. A penalty is imposed for failure to file a return when due. The penalty is equal to five percent of the tax for each month, or fraction of a month, the return is late (minimum \$5.00, maximum twenty-five percent). Because Taxpayer did not file his income tax return when due, a penalty of \$994.00 has been properly imposed.

5. A penalty is imposed for failure to pay tax when due. The penalty is equal to ten percent of the tax (minimum \$5.00). Because Taxpayer did not pay the tax when due, a penalty of \$397.60 has been properly imposed.
6. A twenty-five percent negligence penalty is imposed for a large individual income tax deficiency. A large income tax deficiency exists when a taxpayer understates taxable income by an amount equal to twenty-five percent or more of gross income. Because Taxpayer understated taxable income by 25 percent or more of gross income, a penalty of \$994.00 has been properly imposed.
7. G.S. 105-163.5(f) provides that if an individual furnishes his or her employer with an exemption certificate that contains information which has no reasonable basis and that results in a lesser amount of tax being withheld than would have been withheld if the individual had furnished reasonable information, the individual is subject to a penalty of fifty percent (50%) of the amount not properly withheld. Because no North Carolina income tax was withheld from Taxpayer's wages of \$63,640.00, the Department presumed that Taxpayer furnished his employer with an improper exemption certificate. Taxpayer has not overcome that presumption. A penalty of \$2,002.00 should be imposed as provided under G.S. 105-163.5(f).
8. A "taxpayer" is an individual subject to the North Carolina individual income tax. An individual is a human being. Taxpayer is obviously a human being and based on the amount of wages earned during 2002, he is subject to the North Carolina individual income tax.
9. An individual is required to file a federal income tax return if his gross income for the year equals or exceeds the allowable exemption amount. A resident of this State is required to file a North Carolina individual income tax return if the individual is required to file a federal income tax return. The North Carolina return must show the taxable income and adjustments to federal taxable income required by statute. An income tax return must be filed as prescribed by the Secretary and in the form prescribed by the Secretary. Based on the amount of wages Taxpayer earned during tax year 2002, he was required to file a federal income tax return as well as a North Carolina income tax return.
10. The Secretary of Revenue has the power to examine any books, papers, records, or other relevant data for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the tax liability of a person, or collecting any such tax.
11. If a taxpayer does not provide adequate and reliable information upon which the Department can accurately compute his tax liability, an assessment may be made upon the basis of the best information available; and, in the absence of information to the contrary, such assessment is deemed to be correct.
12. There was no malicious intent on the part of the Department nor was any damage caused to Taxpayer because of the delay in processing Taxpayer's hearing request. The statutes provide no remedy to Taxpayer for the Department's failure to meet the timetable.

Moreover, even where actual damages are shown and a statutory remedy has been provided, absent malicious intent, the remedy is only commensurate to the actual prejudice established. Before a statutory violation can give rise to civil damages, the violation must be wrongful and prejudicial. Therefore, there is no basis to withdraw the assessment.

**DECISION**

Based on the foregoing evidence of record, findings of fact, and conclusions of law, the Assistant Secretary for Administrative Tax Hearings finds the proposed assessment to be lawful and proper. Therefore, the assessment for the tax year 2002, modified to include the penalty provided under G.S. 105-163.5(f), is hereby sustained in its entirety and is determined to be finally due and collectible.

Made and entered this 7th day of June, 2005.

Signature \_\_\_\_\_

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings  
North Carolina Department of Revenue