

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Denial of Partnership Income Tax)
Refund for the Taxable Year Ending)
June 30, 1999 by the Secretary of Revenue)
of North Carolina)
)
vs.)
)
)
Taxpayer)

FINAL DECISION
Docket No. 2004-80

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, upon an application for hearing by Taxpayer, hereinafter referred to as "Taxpayer," wherein Taxpayer's accountant, hereinafter referred to as "Accountant," protested the denial of refund of partnership income tax for the taxable year ending June 30, 1999. At Accountant's request, the hearing was conducted via written communication and the Assistant Secretary allowed Accountant until July 6, 2004, to provide any arguments, documents, or other evidence in support of his objections to the refund denial. The hearing was conducted by the Assistant Secretary under the provisions of G.S. 105-260.1.

The Department received Taxpayer's North Carolina partnership income tax return for the taxable year ending June 30, 1999, on August 25, 2003. The return reflected an overpayment of \$69,746.

By letter dated December 18, 2003, the Department notified Taxpayer that the overpayment of \$69,746 could not be refunded because Taxpayer's return was not filed within three years from the date set by statute for filing the return. Accountant objected to the denial of refund and requested a hearing before the Secretary of Revenue.

ISSUE

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

1. Is the Secretary of Revenue authorized to refund an overpayment of tax demanded on a return not received by the Department within three years after the due date of the return?
2. Is the denial of refund for the taxable year ending June 30, 1999 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. Taxpayer's North Carolina partnership income tax return for the taxable year ending June 30, 1999, a copy of which is designated as Exhibit PT-2.
3. Copy of 1998 Form 1099-MISC obtained from the a business reflecting North Carolina income tax withheld of \$45,932, a copy of which is designated as Exhibit PT-3.
4. Microfilm copy of Taxpayer's application for automatic six-month extension of time to file its North Carolina partnership tax return for the taxable year ending June 30, 1999, a copy of which is designated as Exhibit PT-4.
5. Letter from Michael D. Wall, Revenue Tax Auditor, to Taxpayer dated December 18, 2003, a copy of which is designated as Exhibit PT-5.
6. Letter from Accountant to Michael D. Wall dated January 16, 2004 with related attachments, copies of which are collectively designated as Exhibit PT-6.
7. Letter from Eugene J. Cella to Accountant dated February 26, 2004, a copy of which is designated as Exhibit PT-7.
8. Letter from Eugene J. Cella to Accountant dated May 5, 2004, a copy of which is designated as Exhibit PT-8.
9. Facsimile letter from Accountant to Eugene J. Cella dated May 13, 2004, a copy of which is designated as Exhibit PT-9.
10. Letter from Eugene J. Cella to Accountant dated June 7, 2004, a copy of which is designated as Exhibit PT-10.

Accountant submitted a letter dated July 1, 2004, with related enclosures to Eugene J. Cella, copies of which are collectively designated as Exhibit TP-1.

FINDINGS OF FACT

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

1. During Taxpayer's taxable year ending June 30, 1999, Taxpayer received compensation of at least \$1,743,674 for shows performed in North Carolina, of which \$69,746 was withheld for North Carolina income taxes.
2. Taxpayer claims exemption from federal and State income tax under Articles 5 and 7 of the United States – Ireland Tax Treaty.
3. Taxpayer's North Carolina partnership income tax return for the taxable year ending June 30, 1999, was originally due to be filed by October 15, 1999.
4. On October 15, 1999, Taxpayer filed an application for an automatic six-month extension of time to file the partnership income tax return, thereby extending the due date for filing the return to April 15, 2000.
5. Taxpayer's partnership return for the taxable year ending June 30, 1999, was received by the Department on August 25, 2003. The return reflected an overpayment of \$69,746. Preparer signed return on August 6, 2003, and the managing partner signed return on August 11, 2003.
6. In a letter dated December 18, 2003, the Department notified Taxpayer that the overpayment could not be refunded because the partnership income tax return was not filed within three years from the date set by statute for filing the return.
7. Accountant objected to the denial of refund 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. Taxpayer is exempt from North Carolina income tax under Articles 5 and 7 of the United States – Ireland Tax Treaty.
2. The Secretary of Revenue has the authority to issue a refund if it is requested within three years from the date set by statute for the filing of the return, or within six months of the actual payment of the tax sought to be refunded.
3. Income taxes withheld from the compensation paid to a nonresident entity for personal services performed in North Carolina are considered paid during the taxable year in which they were withheld.

4. If an extension of time to file a return has been granted, the three-year refund period is three years from the extended due date or the date the return is filed, whichever is earlier.
5. Taxpayer was granted an automatic six-month extension of time to file the North Carolina partnership income tax return for the taxable year ending June 30, 1999; therefore, the last date on which Taxpayer could file the return and receive any refund requested on the return was April 15, 2003.
6. Because Taxpayer's partnership income tax return requesting a refund of \$69,746 was not filed until August 25, 2003, the Department properly denied the refund.
7. North Carolina General Statute § 105-266(c)(1) states that "No overpayment shall be refunded, whether upon discovery or receipt of written demand, if the discovery is not made or the demand is not received within three years after the date set by the statute for the filing of the return or within six months after the payment of the tax alleged to be an overpayment, whichever is later.
8. The statutory provisions for filing refund claims are mandatory and do not afford the Secretary of Revenue any administrative discretion with respect to their application.

DECISION

Accountant initially contended that Taxpayer's partnership income tax return for the taxable year ending June 30, 1999 was filed in March 2003, within the statute of limitations for refunds. However, the evidence, particularly the signature dates of the preparer and the managing partner found on page 2 of the partnership return, contradicts Accountant's contention and supports the Department's receipt date of August 25, 2003. The Assistant Secretary finds that the refund demand was not received within three years of the extended due date for filing the return and is therefore barred by the statute of limitations for refunding overpayments of income tax.

Accountant now requests that the Assistant Secretary consider administrative relief for Taxpayer under any equity considerations that may be available. Accountant explains that Taxpayer was not prepared for the volume of record keeping necessary to maintain proper books of account during Taxpayer's rapid expansion during the late 1990's. Taxpayer hired an Irish

accounting firm to get their records in order and to prepare financial statements. Because of many difficulties encountered during this endeavor, the financial statements for the fiscal year ending June 30, 1999, were not issued until August 2002. Once the financial statements were completed, Accountant had difficulty obtaining and assembling essential information required to prepare a complete and accurate income tax return. Accountant requests that these mitigating factors and circumstances be considered to allow the overpayment requested to be refunded to Taxpayer.

The Secretary of Revenue's duties include administering the laws enacted by the General Assembly. The General Assembly has unequivocally preconditioned the refund provisions of The Revenue Act upon the satisfaction of certain time limitations and there is simply no authority of any kind which would permit the Secretary of Revenue to supersede or waive, for whatever reason, otherwise applicable statutes of limitations. Therefore, it is the decision of the Assistant Secretary for Administrative Tax Hearings that the denial of the refund requested for the taxable year ending June 30, 1999, is lawful and proper and must be sustained.

Made and entered this 4th day of October, 2004.

Signature _____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue