

**STATE OF NORTH CAROLINA**  
**COUNTY OF WAKE**

**BEFORE THE**  
**SECRETARY OF REVENUE**

**IN THE MATTER OF:**

The Proposed Assessments of Additional )  
Income Tax for the Taxable Years 2001 )  
and 2002 by the Secretary of Revenue )  
of North Carolina )  
vs. )  
[Taxpayer 1], Taxpayer )

**FINAL DECISION**  
Docket No. 2005-403

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, in the city of Raleigh on March 14, 2006, upon an application for hearing by [Taxpayer 1], hereinafter referred to as "Taxpayer," wherein she objected to the proposed assessments of additional income tax for the taxable years 2001 and 2002. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1 and was attended by Taxpayer; Taxpayer's attorney, hereinafter referred to as "Attorney;" Attorney's associate; Nancy R. Pomeranz, Director of the Personal Taxes Division; and Samuel L. McEwen, Assistant Director of the Personal Taxes Division.

Pursuant to G.S.105-241.1, assessments proposing additional tax, penalties, and interest for tax years 2001 and 2002 were mailed to Taxpayer. Taxpayer timely objected to the proposed assessments and requested a hearing before the Secretary of Revenue.

**ISSUE**

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

Are the assessments for additional income tax proposed against taxpayer for taxable years 2001 and 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. Taxpayer's North Carolina Individual Income Tax Return for taxable year 2001, a copy of which is designated as Exhibit PT-2.
3. Taxpayer's North Carolina Individual Income Tax Return for taxable year 2002, a copy of which is designated as Exhibit PT-3.
4. Notice of Individual Income Tax Assessment for taxable year 2001 dated September 7, 2005, a copy of which is designated as Exhibit PT-4.
5. Notice of Individual Income Tax Assessment for taxable year 2002 dated September 7, 2005, a copy of which is designated as Exhibit PT-5.
6. Certificate of Qualified Status for qualified business, and a canceled check dated August 7, 2000, payable to qualified business, copies of which are collectively designated as Exhibit PT-6.
7. Completed Form D-499, Application for Tax Credit for Qualified Business Investments, a copy of which is designated as Exhibit PT-7.
8. Letter from Attorney to the Department of Revenue dated September 23, 2005, a copy of which is designated as Exhibit PT-8.
9. Letter from Samuel L. McEwen, Assistant Director of the Personal Taxes Division, to Attorney dated November 8, 2005, a copy of which is designated as Exhibit PT-9.
10. Letter from Attorney to Samuel L. McEwen dated December 8, 2005, a copy of which is designated as Exhibit PT-10
11. Letter from Eugene J. Cella to Attorney dated December 13, 2005, a copy of which is designated as Exhibit PT-11.
12. Letter from Samuel L. McEwen to Attorney dated December 14, 2005, a copy of which is designated as Exhibit PT-12.
13. Letter from Attorney to Eugene J. Cella dated February 22, 2006, a copy of which is designated as Exhibit PT-13.

14. Letter from Eugene J. Cella to Attorney dated February 24, 2006, a copy of which is designated as Exhibit PT-14.

The evidence presented by Attorney at the hearing consisted of the following:

1. Notarized affidavit from Certified Public Accountant, dated February 21, 2006, a copy of which is designated as Exhibit TP-1.
2. Notarized affidavit from Taxpayer dated February 21, 2006, a copy of which is designated as Exhibit TP-2.

### **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 invested \$51,750 in calendar year 2000 in qualified business.
3. Taxpayer timely filed her 2001 and 2002 individual income tax returns under approved applications for extension.
4. Taxpayer did not file the required application (Form D-499) on or before April 15 of the year following the year the investment was made.
5. The Department never received any Form D-499 from Taxpayer prior to the Department's examination.
6. Taxpayer claimed tax credits for qualified business investments of \$12,500 on both the 2001 and 2002 tax returns. For 2001, the tax credit was limited on the return to the tax liability of \$8,087.
7. The 2002 return reflected a tax credit of \$12,500 plus a carryover of the unused credit from 2001 of \$4,413, for a total credit of \$16,913. The credit was limited on the return to the 2002 tax liability of \$14,472.
8. Upon examination, the Department disallowed the tax credits claimed on the returns because the Department had no record of receiving Form D-499, Application for Tax Credit for Qualified Business Investments, for either year.
9. Notices of Individual Income Tax Assessment proposing additional tax, penalty, and interest were mailed to Taxpayer on September 7, 2005.

10. Taxpayer objected to the proposed assessments and requested a hearing before the Secretary of Revenue.
11. Taxpayer's accountant provided copies of the following documents to the Department: Taxpayer's Form D-499; a canceled check for \$51,750 payable to qualified business; and the Certificate of Qualified Status for qualified business.
12. At the hearing, Attorney admitted that Taxpayer did not make a qualified business investment in 2001 and conceded that she is not entitled to the \$12,500 tax credit claimed on the 2002 return.
13. Taxpayer did not make a qualified business investment in 2001.
14. At the hearing, Attorney provided a notarized affidavit from Taxpayer in which she stated that she prepared Form D-499 for tax year 2001 and delivered the form to her accountant for mailing to the Department.
15. At the hearing, Attorney provided a notarized affidavit from Taxpayer's accountant stating that he researched the filing requirements regarding the qualified business tax credit and that "[m]y office mailed" the application for the credit along with supporting documentation to the address on the form. Taxpayer's accountant further stated that "I believe" the application was mailed.
16. Taxpayer failed to establish that Taxpayer or someone at Taxpayer's accountant's office mailed the application.
17. Taxpayer did not provide a certified or registered mail return receipt.

### **CONCLUSIONS OF LAW**

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

1. Pursuant to G.S. 105-163.011, an individual who invests in the equity securities or subordinated debt of a qualified business is allowed a tax credit of twenty-five percent of the amount invested, or \$50,000, whichever is less. The tax credit may not exceed the amount of the tax imposed for the taxable year. Any amount of unused credit may be carried forward for the next succeeding five years.
2. To be eligible for the qualified business investment tax credit, the individual must file an application for the credit with the Department by April 15 of the year following the calendar year in which the investment was made. For an investment made in calendar year 2000, the application was due to be filed by April 15, 2001.

3. The total amount of all tax credits allowed to taxpayers in a calendar year may not exceed \$6,000,000. If the total for the calendar year exceeds \$6,000,000, a portion of the credits claimed will be allowed by allocating the \$6,000,000 in proportion to the size of the credit claimed by each taxpayer.
4. The maximum credit amount of \$6,000,000 was exceeded in tax year 2001. Therefore, the credit claimed by each taxpayer was reduced by approximately 68 percent. If Taxpayer had filed the application form, the maximum credit to which the Taxpayer would have been entitled to claim on the 2001 return would have been \$3,948 instead of \$8,087.
5. Since the application form was never received by the Department, the affidavit filed by Taxpayer's accountant was insufficient to establish the application form was timely mailed.
6. For 2001, Taxpayer is not entitled to any credit because Taxpayer did not timely file the application form.
7. For 2002, Taxpayer is not entitled to any credit because Taxpayer did not make a qualifying investment in 2001.
8. The proposed assessments for the tax years 2001 and 2002, modified to exclude the ten percent late-payment penalties, are lawful and proper.
9. The Secretary of Revenue is authorized to waive or reduce penalties.

### **DECISION**

Based on the foregoing evidence of record, findings of fact, and conclusions of law, the Assistant Secretary finds the proposed assessments for the tax years 2001 and 2002, modified to exclude the ten percent late-payment penalties, to be lawful and proper. The assessments are, therefore, sustained in their entirety and are hereby finally due and collectible, together with interest as allowed by law.

Made and entered this 8th day of June, 2006

Signature \_\_\_\_\_  
Eugene J. Cella  
Assistant Secretary for Administrative Tax Hearings  
North Carolina Department of Revenue