



- D-4 North Carolina Department of Revenue Waiver of Time Limitation signed by [an Officer of Taxpayer] on November 28, 2000.
- D-5 Letter dated April 26, 2001 from Kim E. Greenwald, Auditor, to [another representative of the Taxpayer].
- D-6 North Carolina Department of Revenue Preliminary Field Auditor's Report dated May 15, 2001 and attachments.
- D-7 Letter dated June 8, 2001 from [Taxpayer's Assistant Vice President] to Sabra Faires, Assistant Secretary of Tax Administration.
- D-8 North Carolina Department of Revenue Waiver of Time Limitation signed by [Taxpayer's Assistant Vice President] on June 27, 2001.
- D-9 Letter dated July 16, 2001 from Bobby L Weaver, Jr., Administrative Officer, to [Taxpayer's Assistant Vice President].
- D-10 North Carolina Department of Revenue Hearing Information Sheet signed by [Taxpayer's Assistant Vice President] on July 30, 2001.
- D-11 North Carolina Department of Revenue Power of Attorney and Declaration of Representative signed by [three representatives of the consulting firm] on July 31, 2001.
- D-12 North Carolina Department of Revenue Final Field Auditor's Report dated August 14, 2001 and attachments.
- D-13 Letter dated August 14, 2001 from Alexander J. Milak, Revenue Field Auditor II, to [representative of the Taxpayer].
- D-14 Letter dated September 12, 2001 from [Taxpayer's Assistant Vice President] to Mr. Greg Radford, Director of Corporate, Excise and Insurance Tax.
- D-15 Letter dated September 19, 2001 from Eugene J. Cella, Assistant Secretary of Revenue, to [Taxpayer's Assistant Vice President].
- D-16 Copies of Taxpayer's Installment Paper Tax Returns with Summaries of Installment Paper Dealt in by Office Location for the Quarters ending December 31, 1998, June 1999 and June 2000.
- D-17 Copy of Decision rendered by North Carolina Court of Appeals in the case of Chrysler Financial Company LLC.
- D-18 Copy of North Carolina Franchise and Corporate Income Tax Return for the Tax Year Ending December 31, 1997.
- D-19 Copy of North Carolina Franchise and Corporate Income Tax Return for the Tax Year Ending June 30, 1998.

D-20 Copy of North Carolina Franchise and Corporate Income Tax Return for the Tax Year Ending December 31, 1998.

D-21 Copy of North Carolina Franchise and Corporate Income Tax Return for the Tax Year Ending December 31, 1999.

*Submitted by the Taxpayer:*

T-1 Taxpayer's Hearing Brief submitted by [one of the representatives] of [the consulting firm] to Eugene J. Cella, Assistant Secretary of Revenue on December 4, 2001.

T-2 Exhibit A – Completed Power of Attorney and Declaration of Representative.

T-3 Exhibit B – Excerpts of Decision rendered by North Carolina Court of Appeals in the case of Chrysler Financial Company LLC.

T-4 Exhibit C - Excerpts of Motion of Ford Motor Credit Company for Summary Judgment Under Rule 56 of the North Carolina Rules of Civil Procedures.

T-5 Exhibit D - Excerpts of Order on Motions for Summary Judgment issued in the case of Ford Motor Credit Company.

T-6 Exhibit E - Schedule of volume of contracts with respect to out-of-state dealers and North Carolina customers.

T-7 Exhibit F - Sample of contracts between out-of-state dealers and North Carolina customers.

T-8 Copy of Letter from [one of the representatives] of [the consulting firm] to Eugene J. Cella, Assistant Secretary of Revenue Dated January 2, 2002.

### **FINDINGS OF FACT**

Based on the foregoing evidence of record, the Assistant Secretary for Administrative Tax Hearings makes the following findings of fact:

1. Taxpayer (*f/k/a* [old name]) is [an out-of-state] corporation engaged in the business of financing and leasing various types of tangible personal property, and purchasing installment paper.
2. Taxpayer is a subsidiary of [a related corporation], which is in the business of financing mobile homes and other tangible personal property.
3. Taxpayer has several offices in North Carolina, including [four cities].
4. The Department conducted an audit at the corporate headquarters of [Taxpayer] in [a city located in another state].
5. During the audit, Taxpayer provided copies of its Installment Paper Dealer Tax returns for the quarters ending September 1997 through June 2000 along with the details for the

tax returns including: listing region, territory, account number, state code, date of transaction, loan type, proceeds, and total amount financed.

6. Taxpayer also submitted two claims for a partial refund of taxes paid during the period beginning July 1, 1997 through September 30, 1997 and the period beginning October 1, 1997 through June 30, 2000 in the amount of \$21,367.60 and \$292,058.08, respectively, pursuant to G.S. 105-266.1.
7. Taxpayer claimed there were three categories of overpayment and provided the auditor with three separate schedules (A, B, and C) for each category, described as follows:

Schedule A lists payments of tax on contracts in which the buyer resided outside of North Carolina (property must be located in this State to be subject to the Installment Paper Dealer tax on the contract for the property);

Schedule B lists payments of tax on contracts with no dealer involvement (refinancing of existing contracts, where no third party from whom contract is purchased exists); and

Schedule C lists payments of tax on the finance charges on the installment contract (finance charges are not part of the face value or amount financed, upon which tax is due).
8. The auditors requested a sample of contracts to confirm which type of overpayment was represented and examined the original installment paper tax returns to verify that the value of the installment paper had actually been included in those returns.
9. The auditors also examined motor vehicle titles registered with the North Carolina Division of Motor Vehicles (DMV). These motor vehicle titles showed the existence of a lien on the tangible personal property, and their title numbers were used to obtain names and dates of liens in order to request additional contracts to examine.
10. During the examination, the auditors determined that some of the installment paper in Taxpayer's Schedule A had been included in that refund category in error, since examination of the relevant documents showed that the purchaser had a North Carolina address.
11. An additional sample of that type of contract was requested and examined, and an error rate was determined on the basis of the errors found in the sample. The rate was applied to that refund category and the refund was reduced by \$5,201.37.
12. The auditors also discovered a number of liens associated with installment paper which had not been reported on any of Taxpayer's installment paper tax returns. The installment paper in this group involved property purchased by North Carolina residents from out-of-state dealers.
13. The auditors concluded that the unreported installment paper should have been included in Taxpayer's return since the property upon which the lien is taken was located in this State.

14. The auditors then further reduced the refund by \$129,220.67, the amount of the computed tax on the improperly excluded contracts.
15. In the final audit report dated August 14, 2001, the claim for refund was partially denied in the total amount of \$134,422.04.
16. Taxpayer accepted the \$5,201.37 adjustment, but timely protested the adjustment of \$129,220.67 in its letter dated September 12, 2001.

### **CONCLUSIONS OF LAW**

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

1. G.S. 105-83 states: "Every person engaged in the business of dealing in, buying, or discounting installment paper, notes, bonds, contracts, or evidences of debt for which, at the time of or in connection with the execution of the instruments, a lien is reserved or taken upon personal property located in this State to secure the payment of the obligations, shall submit to the Secretary...a full, accurate, and complete statement, verified by the officer, agent, or person making the statement, of the total face value of the obligations dealt in, bought, or discounted within the preceding three calendar months and, at the same time, shall pay a tax of two hundred seventy-seven thousandths of one percent (.277%) of the face value of these obligations."
2. Pursuant to G.S. 105-33(a), taxes imposed under Article 2 are imposed for the privilege of carrying on the business, exercising the privilege, or doing the act named.
3. The installment paper dealer tax levied under G.S. 105-83 is a privilege tax imposed upon persons engaged in the business of dealing in, buying, or discounting installment paper for the privilege of engaging in such business.
4. The business of "dealing in, buying, or discounting installment paper" neither begins nor ends with Taxpayer's formal acceptance of the installment paper. Instead, it encompasses the entire range of conduct in furtherance of Taxpayer's financing business.
5. The installment paper dealer tax is not a transactional tax.
6. Neither the underlying consumer purchase or the purchase of installment paper is the incidence of the tax.
7. The imposition of the privilege tax must be upheld if activity incident to and in furtherance of the business is conducted within the State notwithstanding that documents necessary to the business are executed, accepted, or transferred elsewhere.
8. G.S. 105-83 does not require that the property securing the obligation be purchased in North Carolina.

9. Taxpayer is engaged in the business of dealing in, buying, or discounting installment paper in North Carolina.
10. At the time of or in connection with the execution of all of the instruments included in the calculation of the tax, a lien was reserved or taken upon personal property located in this State to secure the payment of the obligations.
11. Taxpayer is subject to the installment paper dealer tax under G.S. 105-183.
12. Taxpayer is required to include the total face value of all obligations bought which are secured by property located in this State in the calculation of the installment paper dealer tax.
13. A finding that Taxpayer is entitled to a refund of taxes paid on installment paper purchased from out-of-state dealers because the tax violates the Commerce Clause requires a ruling or declaration by the Secretary that G.S. 105-83 operates in an unconstitutional manner as to Taxpayer.
14. The Secretary has no authority under G.S. 105-266.1 to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts.
15. G.S. 105-266.1 does not provide an exception to the general rule that voluntary payments of unconstitutional tax are not refundable.
16. The only remedy for challenging a tax provision as being unlawful or invalid as opposed to being excessive or incorrect, is found in G.S. 105-267.
17. Taxpayer has the burden of establishing that its claim for refund under G.S. 105-266.1 results from paying an incorrect or excessive tax computed in accordance with the applicable statutory provisions.
18. Taxpayer has not established that the auditors' \$129,220.67 reduction of the refund claim was incorrect.
19. The auditors properly adjusted the refund claim to include installment paper purchased from out-of-state dealers secured by property located in North Carolina.

### **DECISION**

This case involves the question of whether the face value of installment paper on property located in North Carolina and secured by a lien in this State is includible in the calculation of the installment paper dealer tax imposed under G.S. 105-83 if the property is purchased from an out-of-state retailer.

Taxpayer is in the business of financing and leasing various types of tangible personal property, and purchasing installment paper. Taxpayer has several offices in North Carolina,

including [four cities]. At the hearing and in its brief, Taxpayer presented an argument that when a North Carolina customer travels outside North Carolina to purchase tangible personal property from an out-of-state dealer, the value of the installment paper is not included in the calculation of the installment paper dealer tax imposed under G.S. 105-83 because the “taxable transaction” occurred outside North Carolina when the out-of-state dealer assigned the contract. The Division rejected this argument, however, and asserted that even if the property is purchased from an out-of-state dealer, the face value of an installment paper contract is included in the computation of the tax imposed under G.S. 105-83 if a lien is reserved or taken upon personal property located in North Carolina at the time of or in connection with the execution of the installment paper.

After considering these arguments and the evidence presented at the hearing and subsequently, I am unpersuaded by Taxpayer’s position. Although Taxpayer contends that the assignment of the contract is the “taxable transaction,” this is not the case. The installment paper dealer tax is not a transactional tax. It is a privilege tax that is imposed upon persons who deal in or buy installment paper “for the privilege of engaging in such business.” The business of “dealing in, buying, or discounting installment paper” neither begins nor ends with Taxpayer’s formal acceptance of the installment paper. Instead, it encompasses the entire range of conduct in furtherance of Taxpayer’s financing business. And where any part of the activity related to the prosecution of that business occurs in North Carolina, as is the case here, the statute is applicable, and the taxpayer is required to pay the tax.

The language of G.S. 105-83 imposes the tax where either “at the time of or in connection with” the execution of the installment paper “a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations.” Here, in connection with the execution of the installment paper, a lien is reserved or taken upon property located in this State to secure the payment of the obligation. Contrary to Taxpayer’s contention, the statute does not require that the property be purchased in North Carolina because neither

the underlying consumer purchase nor the purchase of installment paper is the incidence of the tax. Instead, the face value of the obligations purchased serves as the measure of the incidence actually being taxed--the privilege of carrying on the business of an installment paper dealer. The record establishes that Taxpayer is engaged in business as an installment paper tax dealer in North Carolina and, at the time of or in connection with the execution of the installment paper purchased from the out-of-state dealers, liens are reserved or taken upon personal property located in this State to secure the payment of such obligations.

Regarding Taxpayer's argument that it is entitled to a refund of taxes paid on installment paper purchased from out-of-state dealers because the tax violates the Commerce Clause, this argument is constitutional in nature and outside the authority of the Department of Revenue to address. The Secretary has no authority under G.S. 105-266.1 to order the refund of an invalid or illegal tax since questions of constitutionality are for the courts. *Coca Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

In conclusion, I find that Taxpayer is subject to the installment paper dealer tax levied in G.S. 105-83 and is required to include the total face value of all obligations bought in the calculation of the tax, including those obligations purchased from out-of-state dealers where liens are secured or taken on tangible personal property located in North Carolina to secure payment of the obligations. Therefore, I am sustaining the auditors' adjustment of the refund claimed on installment paper purchased from out-of-state dealers.

Made and entered this 4<sup>th</sup> day of April, 2002.

Signature\_\_\_\_\_

Eugene J. Cella



Assistant Secretary of Revenue