

STATE OF NORTH CAROLINA

**BEFORE THE
SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:

The Proposed Refund of Sales and Use)
Tax for the period June 1, 1997 through)
March 31, 2000, by the Secretary of Revenue)
)
vs.)
)
Taxpayer)

FINAL DECISION
Docket No. 2001-235

In its Administrative Decision Number 417, dated December 31, 2003, the Tax Review Board remanded the matter back to the Assistant Secretary of Revenue for a further proceeding. This final decision is in response to the questions raised in the Tax Review Board's administrative decision.

This matter was heard before the Assistant Secretary of Revenue, Mr. Eugene J. Cella in the City of Raleigh, on March 23, 2004, upon the second remand by the Tax Review Board. The Taxpayer was represented at the hearings by _____, President and General Manager for the Taxpayer, _____, Controller for the Taxpayer and _____, attorney and counsel for the Taxpayer. The Sales and Use Tax Division was represented by Mr. W. Timothy Holmes, Assistant Director and Mr. William C. Shelton, Administration Officer.

ISSUES

The original issues concerning the Taxpayer's refund to be decided in this matter are as follows:

- (1) Is the Taxpayer entitled to retain tax collected from customers which is an amount in excess of the amount of tax paid on the cost of the tangible personal property used in the performance of a contract?
- (2) Was the tax erroneously collected by the Taxpayer?

EVIDENCE

The following items were introduced into evidence by the parties.

1. Copy of the Taxpayer's AS/RP-1, Registration Application, designated Exhibit E-1.
2. Copy of the Taxpayer's claim for refund, Form E-588, Claim for Refund of State and County Sales and Use Taxes, and related backup documentation, dated May 5, 2000, designated Exhibit E-2.
3. Copy of letter dated July 13, 2000 from the Taxpayer's representative to the Department, designated Exhibit E-3.
4. Copy of letter dated August 10, 2000 from the Interstate Examination Division to the Taxpayer's representative, designated Exhibit E-4.
5. Copy of Power of Attorney dated September 5, 2000 from the Taxpayer's representative on behalf of the Taxpayer, designated Exhibit E-5.
6. Copy of letter and monthly sales and use tax report documentation dated November 2, 2000 from the Taxpayer's representative to the Interstate Examination Division, designated Exhibit E-6.
7. Copy of letter dated November 15, 2000 from the Taxpayer's representative to the Interstate Examination Division, designated Exhibit E-7.
8. Copy of the Taxpayer's procedures on lump sum contracts dated December 13, 2000, designated Exhibit E-8.
9. Copy of letter dated December 20, 2000 from the Interstate Examination Division to the Taxpayer's representative, designated Exhibit E-9.
10. Copy of letter dated January 2, 2001 from the Taxpayer's representative to the Secretary of Revenue, designated Exhibit E-10.
11. Copy of Facsimile transmittal sheet dated January 18, 2001 and refund summary sheet from the Taxpayer's representative to the Interstate Examination Division, designated Exhibit E-11.
12. Copy of letter dated February 5, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated Exhibit E-12.
13. Copy of Sales and Use Tax Bulletin No. 33 dated April 15, 1991, designated Exhibit E-13.

14. Copy of Sales and Use Tax Administrative Rule 07B .2608 dated June 28, 1996, designated Exhibit E-14.
15. Copy of Sales and Use Tax Technical Bulletin 31-1 dated October 15, 1998, designated Exhibit E-15.
16. Copy of Sales and Use Tax Technical Bulletin 31-2 dated October 15, 1998, designated Exhibit E-16.
17. Copy of Sales and Use Tax Technical Bulletin 31-3 dated October 15, 1998, designated Exhibit E-17.
18. Copy of redacted Final Decision, Docket No. 94-10 dated October 17, 1994, designated Exhibit E-18.
19. Copy of Memorandum dated March 13, 2001 from the Secretary of Revenue to the Acting Assistant Secretary of Tax Administration, designated Exhibit E-19.
20. Copy of letter dated March 26, 2001 from the Acting Assistant Secretary of Revenue to the Taxpayer's representative, designated Exhibit E-20.
21. Copy of Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-21.
22. Copy of letter and documentation dated May 26, 2001 from the Taxpayer's Vice President and General Manager to the Acting Assistant Secretary of Revenue, designated Exhibit E-22.
23. Copy of Memorandum dated June 8, 2001, and attached copies of various Taxpayer's invoices from the Sales and Use Tax Division to the Acting Assistant Secretary of Revenue, designated Exhibit E-23.

Exhibits submitted by the parties at or after the hearing held on May 15, 2001

24. Construction contract between the Taxpayer and a sub-contractor dated December 21, 1998, designated Exhibit TP-1.
25. Subcontract agreement between the Taxpayer and a sub-contractor dated October 7, 1999, designated Exhibit TP-2.
26. Subcontract agreement between the Taxpayer and a sub-contractor dated February 12, 2001, designated Exhibit TP-3.
27. Copy of letter dated June 26, 2001 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-24.

28. Copy of letter dated July 3, 2001 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-25.
29. Copy of Brief for Tax Hearing, Docket Number 2001-235, dated May 15, 2001, from the Sales and Use Tax Division, designated Exhibit E-26.
30. Copy of Brief for Tax Hearing, Docket Number 2001-235, dated July 16, 2001, from the Sales and Use Tax Division, designated Exhibit E-27.

Exhibits submitted by the parties after the hearing held on July 16, 2001.

31. Copy of Final Decision, Docket Number 2001-235 rendered on August 28, 2001, designated Exhibit E-28.
32. Copy of letter dated October 2, 2001 from the Tax Review Board, to the Taxpayer's representative, designated Exhibit E-29.
33. Copy of Petition For Review of Final Decision, docket Number 2001-235, dated November 20, 2001 submitted by the Taxpayer's representative to the Tax Review Board, designated Exhibit E-30.
34. Copy of letter dated November 27, 2001 from the Tax Review Board to the Taxpayer's representative, designated Exhibit E-31.
35. Copy of Notice of Hearing letter dated February 19, 2001 from the Tax Review Board to the Taxpayer's representative, designated Exhibit E-32.
36. Copy of Brief for Secretary of Revenue, Docket Number 2001-235, dated March 11, 2002 submitted by the Assistant Attorney General, Revenue Section to the Tax Review Board, designated Exhibit E-33.
37. Copy of Tax Review Board Administrative Decision 384, dated June 17, 2002, designated Exhibit E-34.

Exhibits submitted by the parties after the Tax Review board Administrative Decision Number 384 dated June 17, 2002.

38. Copy of Memorandum dated August 28, 2002 from the Sales and Use Tax Division to the Assistant Secretary of Revenue, designated Exhibit E-35.
39. Copy of Final Decision of The Assistant Secretary of Revenue, Docket Number 2001-235, dated October 21, 2002, designated Exhibit E-36.

Exhibits submitted by the parties after the Assistant Secretary's Final Decision, Docket Number 2001-235 dated October 21, 2002.

40. Copy of letter dated November 6, 2002 from the Taxpayer's representative to the Assistant Secretary of Revenue, designated Exhibit E-37.
41. Copy of letter dated November 13, 2002 from the Executive Secretary of the Tax Review Board to the Taxpayer's representative, designated Exhibit E-38.
42. Copy of Petition for Review of Final Decision dated January 7, 2003 submitted by the Taxpayer's representative to the Tax Review Board, designated Exhibit E-39.
43. Copy of letter dated January 9, 2003 from the Tax Review Board to the Taxpayer's representative, designated Exhibit E-40.
44. Copy of letter dated January 16, 2003 from the Director, Sales and Use Tax Division to the Tax Review Board, designated Exhibit E-41.
45. Copy of letter dated March 24, 2003 from the Tax Review Board to the Taxpayer's representative, designated Exhibit E-42.
46. Copy of letter dated March 27, 2003 from the Taxpayer's representative to the Tax Review Board, designated Exhibit E-43.
47. Copy of letter dated April 1, 2003 from the Tax Review Board to the Taxpayer's representative, designated Exhibit E-44.
48. Copy of letter dated May 16, 2003 from the Tax Review Board to the Taxpayer's representative, designated Exhibit E-45.
49. Copy of Brief for Secretary of Revenue, Docket Number 2001-235, dated June 17, 2003 submitted by the Assistant Attorney General, Revenue Section to the Tax Review Board, designated Exhibit E-46.
50. Copy of Administrative Decision Number 417 of the Tax Review Board, dated December 31, 2003, designated Exhibit E-47.

Exhibits submitted after the Tax Review board Administrative Decision Number 417 dated December 31, 2003.

51. Copy of letter dated January 21, 2004 from the Assistant Secretary of Revenue to the Taxpayer's representative, designated Exhibit E-48.
52. Copy of Brief for Tax Hearing, Docket Number 2001-235, dated March 23, 2004, from the Sales and Use Tax Division, designated Exhibit E-49.

Exhibits submitted by the Taxpayer at the Administrative Hearing conducted on March 23, 2004.

53. Copy of contract documentation for Job Number 97-476, dated September 29, 1997, Designated Exhibit TP-4.
54. Copy of contract documentation for Job Number 97-437, dated October 2, 1997, Designated Exhibit TP-5.
55. Copy of contract documentation for Job Number 00-016, dated May 11, 2000, Designated Exhibit TP-6.
56. Copy of contract documentation for Job Number 99-729, dated May 16, 2000, Designated Exhibit TP-7.
57. Copy of contract documentation for Job Number 98-603, dated June 20, 1998, Designated Exhibit TP-8.
58. Copy of contract documentation for Job Number 99-679, dated September 20, 1999, Designated Exhibit TP-9.
59. Copy of contract documentation for Job Number 98-565, dated October 26, 1998, Designated Exhibit TP-10.
60. Copy of contract documentation for Job Number 98-594, dated February 4, 1999, Designated Exhibit TP-11.
61. Copy of contract documentation for Job Number 98-595, dated March 24, 1999, Designated Exhibit TP-12.
62. Copy of contract documentation for Job Number 98-593, dated October 25, 1998, Designated Exhibit TP-13.
63. Copy of contract documentation for Job Number 98-596, dated April 29, 1999, designated Exhibit TP-14.

FINDINGS OF FACT

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

- (1) The Taxpayer is a contractor and subcontractor which constructs and erects customized concrete structures such as those used in buildings, stadiums and parking garages.

- (2) The Taxpayer's concrete products are produced at the Taxpayer's manufacturing facility in Atlanta, Georgia, and erected or installed at the customers' job sites in North Carolina pursuant to performance contracts.
- (3) The Taxpayer calculated "sales tax" on manufacturing labor and marked-up the cost of the tangible personal property used in their performance contracts. The sales tax was separately stated on the Taxpayer's invoices provided to its customers. Charges for erection labor were excluded from sales tax on the Taxpayer's invoices.
- (4) The charge labeled "sales tax" on the Taxpayer's invoices to its customers was equal to the amount of applicable State and local sales tax.
- (5) The Taxpayer collected no more money from their customers than the total fixed contract amount agreed upon by its customers.
- (6) The Taxpayer refused to refund its customers the amount of the sales tax charged on invoices and collected in excess of the actual use tax due on their cost of materials used in their performance contracts.
- (7) No written advice regarding the correct application of tax to the Taxpayer's business, in particular its billing practices, was sought by the Taxpayer or received from the Department.
- (8) Non-profit entities such as churches and certain governmental entities have applied for and received refunds in the amount of \$23,962.85 out of a possible \$26,468.25 tax remitted to the Department by the Taxpayer on its contracts during the audit period.
- (9) The Taxpayer's refund claim was timely filed pursuant to N.C.G.S. 105-266.1.
- (10) The dates of the Taxpayer's erroneously issued invoices match the dates on Application and Certificate for Payment requests for the performance contracts in question. However, the dollar amount for the erroneously issued invoices differs from the amounts shown on Applications for Payment since more erroneous invoices were mailed than Applications for Payment for a given job.
- (11) Based on an analysis of the Taxpayer's Corporate income tax return, it appears likely that the taxpayer deducted the amount of sales tax expense thereon.
- (12) If the Department refunded the sales tax to the Taxpayer, such amounts would be subject to corporate income tax in the year recovered.

CONCLUSIONS OF LAW

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

- (1) The Taxpayer did not request or receive written advice on his business and billing practices from the Department to protect him pursuant to G.S. 105-264.
- (2) The amount of sales tax collected by the Taxpayer from its customers in excess of the amount of use tax due on its purchases of materials used in its performance contracts represents an erroneous collection pursuant to G.S. 105-164.11.
- (3) \$23,962.85 of the amount of refund claimed by the Taxpayer has already been refunded to a church or governmental entity pursuant to G.S. 105-164.14.
- (4) The refund claim was timely filed pursuant to G.S. 105-266.1.

DECISION

In its Administrative Decision Number 384, dated June 17, 2002, and Administrative Decision Number 417, dated December 31, 2003, the Tax Review Board ("Board") remanded the matter back to the Assistant Secretary of Revenue to respond to questions relating to the Taxpayer's billing procedure for the refund period. In both Administrative Decisions, the Board stated that the Assistant Secretary should determine: (1) If the Taxpayer issued the specific invoices simultaneously with the applications for payment when it billed its customers under the performance contracts? (2) The specific amount that the Department of Revenue has already refunded to the non-profits in this matter? and (3) The income tax consequences of the amount of refund claimed by the Taxpayer for the period at issue? By virtue of the present remand, the Board grants the Taxpayer an opportunity to present evidence regarding the above issues and allows the Taxpayer an opportunity to review and respond to the

documentation that the Assistant Secretary received and considered prior to issuing the October 21, 2002 final decision.

The dates on the Taxpayer's invoices which were erroneously issued match the Application and Certificate for Payment for the performance contracts in question. With rare exception, the invoices were issued simultaneously with the applications for payment. However, the dollar amount on the applications for payment were often different from the amounts on the invoices since there were generally only a few requests for payment but several invoices for each job.

The invoices issued by the Taxpayer have been analyzed pursuant to jobs for the non-profit or governmental entities eligible for refund and it has been determined that \$26,468.25 in sales tax was included thereon. With one exception, the eligible governmental and non-profit entities have filed claims for refund with the Department and have been refunded for the applicable periods in amounts exceeding the amounts shown on the Taxpayer's invoices. The exception is \$2,505.40 in tax paid by a church in western North Carolina to the Taxpayer's customer contractor and no refund claim appears to have been filed in that name. Thus, a total of \$23,962.85 has been refunded to the governmental and non-profit entities on which jobs the Taxpayer issued the erroneous invoices to its clients.

Pursuant to the Internal Revenue Code, Section 111, the recovery (refund) of taxes deducted in an earlier tax year is includable in gross income in the year recovered

except to the extent the deduction did not provide a tax benefit. The Taxpayer would not be required to amend the returns for the earlier years to increase net income by the amount of sales tax refunded. While it cannot be determined that the Taxpayer claimed a deduction for these specific taxes on its 1997-2000 corporate income tax returns, it appears likely from the information on the returns that the taxpayer did deduct these amounts and did receive a tax benefit from the deduction. Therefore it is my conclusion that the taxpayer would be required to include the refund of the taxes at issue in its corporate net income in the year of refund.

In view of the conclusions noted above, I am again compelled to sustain the Sales and Use Tax Division's position and deny the Taxpayer's refund claimed. The aforementioned non-profit and governmental entities ultimately relied upon the erroneous invoices mailed to the Taxpayer's contractors who used them to complete summaries which were sent to the non-profit and governmental entities for use in completing their refund claims. To refund the Taxpayer the amount requested, which includes contracts with contractors building structures for profit as well as non-profit enterprises, would be to administratively treat purchasers differently because of the nature of their operations. Further, to refund the Taxpayer would mean that the Department would be paying the Taxpayer funds which have already been refunded to non-profits and governmental entities.

The fact that the Taxpayer issued the invoices in error is uncontested and the Taxpayer should gain no benefit whatsoever as a result of its error. Equally important: is the sound and practical postulate that the State should not have to modify its sound

administrative provisions for the refund of sales and use taxes for non-profit and governmental organizations versus private enterprises simply because this particular Taxpayer issued erroneous invoices. For these reasons, I must again sustain the Sales and Use Tax Division's position and deny the refund claimed.

This 7th day of June 2004.

Eugene J. Cella
Assistant Secretary of Administrative Hearings