

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Denial of a Claim for Refund for the Period)
October 1, 1997 through December 31, 2000)
by the Secretary of Revenue of North Carolina)
vs.)
)
)
[Taxpayer])

FINAL DECISION
Docket No. 2001-276

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh on January 25, 2002, upon application for hearing by Taxpayer wherein it protested the denial of a claim for refund of tax for the period October 1, 1997 through December 31, 2000. The hearing was held before the Assistant Secretary pursuant to G.S. 105-260.1. At the request of Taxpayer's representative, [a CPA], the hearing was to be held by teleconference. Neither Taxpayer nor Taxpayer's representative were present at the designated time and telephone number for the teleconference call. Andrew Sabol, Assistant Director, represented the Sales and Use Tax Division.

ISSUE

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

Is Taxpayer entitled to a refund of sales or use tax remitted to the Department by retailers on accounts receivable that Taxpayer purchased from the retailers and that Taxpayer found to be worthless and which were charged off for income tax purposes?

EVIDENCE

The following items were introduced into evidence by the parties:

1. Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-1.
2. Claim for refund of sales and use tax dated January 26, 2001, designated Exhibit E-2.
3. Letter dated March 22, 2001 from the Division to Taxpayer's representative, designated Exhibit E-3.

4. Letter dated May 9, 2001 from the Acting Assistant Secretary of Revenue to Taxpayer's representative, designated Exhibit E-4.
5. Correspondence dated May 18, 2001 from Taxpayer's representative to the Acting Assistant Secretary of Revenue, designated Exhibit E-5.
6. Letter dated May 30, 2001 from the Assistant Secretary of Revenue to Taxpayer's representative, designated Exhibit E-6.
7. Memorandum dated July 17, 1997 from the Attorney General's office to the Division, including a copy of G.S. 143-3.3, designated Exhibit E-7.
8. Department of Revenue v. Bank of America, designated Exhibit E-8.
9. SunTrust Bank, Nashville v. Johnson, designated Exhibit E-9.
10. Puget Sound National Bank v. State of Washington Department of Revenue, designated Exhibit E-10.
11. Memorandum dated July 20, 2001 from the Division to the Assistant Secretary, designated Exhibit E-11.
12. Letter dated July 20, 2001 from the Assistant Secretary to Taxpayer's representative, designated Exhibit E-12.
13. Letter dated July 31, 2001 from the Assistant Secretary to Taxpayer's representative, designated Exhibit E-13.
14. Letter dated August 2, 2001 from Taxpayer's representative to the Assistant Secretary, designated Exhibit E-14.
15. Letter dated August 17, 2001 from the Assistant Secretary to Taxpayer's representative, designated Exhibit E-15.
16. Letter dated September 18, 2001 from Taxpayer's representative to the Assistant Secretary, designated Exhibit E-16.
17. Letter dated October 23, 2001 from the Assistant Secretary to Taxpayer's representative, designated Exhibit E-17.
18. Letter dated November 20, 2001 from the Assistant Secretary to Taxpayer's representative, designated Exhibit E-18.
19. Letter dated December 11, 2001 from the Assistant Secretary to Taxpayer's representative, designated Exhibit E-19.
20. Department's Brief for Tax Hearing, designated Exhibit E-20.
21. Letter dated February 21, 2002 from the Assistant Secretary to Taxpayer's representative, designated Exhibit S-1.

FINDINGS OF FACT

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

1. Taxpayer at all material times was engaged in business as a finance company.
2. Taxpayer entered into agreements with retailers whereby Taxpayer purchased installment sales contracts entered into between the retailers and their customers for the sale of tangible personal property. The contracts were assigned to Taxpayer without recourse.
3. The retailers transferred title of the property to their customers upon completion of a sale; at no time did Taxpayer have title to property sold by retailers.
4. Taxpayer had authority to approve sales contracts entered into by retailers and customers.
5. Taxpayer took a security interest in the property sold once Taxpayer acquired accounts receivables from retailers.
6. Retailers collected sales or use tax from customers and remitted the tax collected to the Department.
7. In acquiring the installment sales contracts from retailers, the amounts paid by Taxpayer to retailers included the amounts financed by customers and the amount of sales tax collected on these amounts.
8. Some of the accounts receivable acquired by Taxpayer from retailers were not collected from debtors. Taxpayer charged these amounts off as worthless accounts for income tax purposes.
9. Taxpayer is not registered with the Department for sales and use tax purposes and paid no sales or use tax to the Department for the period of the demand for refund.
10. Except as specifically provided in G.S. 143-3.3, G.S. 143-3.3(b) provides that the State is not to issue a warrant to an assignee of a claim against the State. There are no provisions in G.S. 143-3.3 that authorize payment of an overpayment of sales or use tax or any other tax to an assignee.
11. Taxpayer filed a timely claim for refund for the period October 1, 1997 through December 31, 2000. The Department denied the demand for refund and Taxpayer requested a hearing before the Secretary.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Assistant Secretary makes the following conclusions of law:

1. Taxpayer is not a retailer as provided under G.S. 105-164.13(14).
2. Taxpayer did not make retail sales of tangible personal property; Taxpayer purchased intangible property, installment sales contracts.
3. Taxpayer is not entitled to the exemption provided under G.S. 105-164.13(15) for worthless accounts.
4. Taxpayer did not remit any sales or use tax to the Department; therefore, it is not a taxpayer to whom a refund can be issued pursuant to G.S. 105-266.
5. G.S. 143-3.3 prohibits the payment of a warrant to Taxpayer in the capacity of an assignee.
6. Taxpayer is not entitled to a refund of sales and use tax for amounts representing tax remitted to the Department by retailers from whom Taxpayer purchased accounts receivable, that were subsequently determined to be uncollectible and charged off for income tax purposes.

DECISION

Sales tax is a transactional tax and the event that triggers the imposition of the sales tax is the retail sale by a retailer to a customer. The tax is imposed on the retailer and the retailer is authorized to add the amount of tax due to the amount charged a purchaser for property sold. The exemption provided under G.S. 105-164.13(15) gives a retailer the opportunity to recoup tax that it has paid the State if the retailer cannot collect the amount owed for property sold on account from a purchaser. A retailer is authorized to reduce its taxable sales by the amount of the sale on which it cannot collect once the account has been charged off for income tax purposes.

When it sells its accounts receivable to Taxpayer, a retailer has received full consideration for the amount of a sale including the amount of sales tax that the retailer remitted to the State. Taxpayer operates as a finance company and transacts business with intangible property. One of the risks of a lender is the occurrence of uncollected debts;

presumably, Taxpayer has factored these risks into financial arrangements it makes when acquiring accounts receivable.

Taxpayer cannot reduce gross sales as provided under G.S. 105-164.13(15) since it does not remit any tax to the Department. It is not a taxpayer as provided under G.S. 105-266 who has made an overpayment of tax for any return.

Taxpayer has raised constitutional issues with regard to the Commerce Clause. It is not within the Secretary's power to decide a constitutional issue. However, the provisions of G.S. 105-164.13(15) apply similarly to resident and nonresident finance companies, and it does not appear that the statute is a detriment to interstate commerce compared to intrastate commerce.

The decisions rendered in other states offer mixed opinions in this area and are, of course, based on differing statutes. I am more persuaded by the decisions denying an exemption to a third-party lender in transactions similar to those engaged in by Taxpayer.

None of the states in the cases presented referenced an "anti-assignment" provision such as found in G.S. 143-3.3. This statute bars the assignment of a claim against the State to a third party except for those actions specifically cited. An overpayment of tax is not one of the exceptions set out.

I find that Taxpayer is not entitled to the exemption from sales or use tax under G.S. 105-164.13(15). The Department's denial of Taxpayer's demand for refund is hereby sustained.

Made and entered this 28th day of February, 2002.

Signature _____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue