

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

BEFORE THE  
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessments of Sales and Use )  
Tax for the period November 1, 1995 through )  
February 29, 2000 )  
 )  
vs. )  
 )  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2001-405

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh on August 14, 2001, upon application for hearing by [Taxpayer, a corporation]. The Taxpayer protested the proposed assessment of tax, penalty, and interest for the period November 1, 1995 through February 29, 2000. The hearing was held before the Assistant Secretary pursuant to G.S. 105-260.1. The Taxpayer was represented by [Taxpayer's Attorney], and [a Certified Public Accountant], and representing the Sales and Use Tax Division were Ms. Amy A. McLemore, Administration Officer, and Mr. W. Timothy Holmes, Assistant Director.

Pursuant to G.S. 105-241.1, the Department mailed a Notice Of Tax Assessment Sales & Use Tax to the Taxpayer on May 21, 2000. The Taxpayer objected to the assessment in a letter dated June 5, 2000 and timely requested a hearing.

**ISSUES**

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

1. Are the Taxpayer's purchases of tangible personal property purchased from out-of-state vendors that it used in fulfilling performance contracts subject to the use tax?
2. Are the delivery charges associated with the Taxpayer's out-of-state taxable purchases of tangible personal property subject to use tax?

**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 as Exhibit E-1.

2. Copy of face sheet of audit report and audit remarks dated May 9, 2000, designated as Exhibit E-2.
3. Copy of Notice of Tax Assessment Sales & Use dated May 21, 2000, designated as Exhibit E-3.
4. Letter dated June 5, 2000 from the Taxpayer to the Department, designated as Exhibit E-4.
5. Letter dated July 11, 2000 from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-5.
6. Letter dated July 18, 2000 from the Taxpayer's representative, a Certified Public Accountant, to the Sales and Use Tax Division, designated as Exhibit E-6.
7. Letter dated July 24, 2000 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-7.
8. Letter dated September 27, 2000 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-8.
9. Letter dated October 17, 2000 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-9.
10. Letter dated November 17, 2000 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-10.
11. Letter dated December 12, 2000 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-11.
12. Letter dated January 5, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-12.
13. Letter dated January 12, 2001 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-13.
14. Letter dated February 13, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-14.
15. Letter dated February 22, 2001 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-15.
16. Letter dated March 12, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-16.
17. Letter dated March 31, 2001 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-17.
18. Letter dated April 3, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-18.

19. Letter dated May 11, 2001 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-19.
20. Letter dated May 29, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-20.
21. Copy of Section 31-1 of the North Carolina Sales and Use Tax Technical Bulletins, designated as Exhibit E-21.
22. Copy of Section 38-1 of the North Carolina Sales and Use Tax Technical Bulletins, designated as Exhibit E-22.
23. Copy of one of the Taxpayer's sales agreements dated February 24, 2000, designated as Exhibit E-23.
24. Letter dated June 21, 2001 from Assistant Secretary of Revenue to the Taxpayer's representative, designated as Exhibit E-24.

Evidence presented by the Taxpayer during and after the hearing held on August 14, 2001 consisted of:

25. Letter dated December 4, 2000 from the Taxpayer's franchiser to the Taxpayer, designated as Exhibit TP-1.
26. Copy of the first and last pages of the Taxpayer's franchiser's catalog, designated as Exhibit TP-2.
27. Letter dated September 13, 2001 from the Taxpayer's representative to the Assistant Secretary of Revenue, designated as Exhibit TP-3.

Evidence presented by the Sales and Use Tax Division after the hearing held on August 14, 2001 consisted of:

28. Memorandum from the Sales and Use Tax Division to the Assistant Secretary of Revenue dated September 25, 2001, designated as Exhibit ST-1.

### **FINDINGS OF FACT**

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

1. The Taxpayer is a C Corporation engaged in business as a hurricane shutter and a general home improvement contractor.
2. As a performance contractor, the Taxpayer is liable for sales and use tax on the cost price of the materials it purchases and uses in its jobs.
3. Prior to the Department's audit, the Taxpayer was not registered with the Department for sales and use tax purposes.

4. The Taxpayer made numerous purchases of hurricane shutters and accessories from its [franchiser], located [out-of-state], and tangible personal property from several other vendors located outside this State.
5. The tangible personal property purchased from the Taxpayer's out-of-state vendors was delivered to the Taxpayer in North Carolina by common carriers.
6. The Taxpayer did not pay North Carolina tax to its out-of-state vendors or accrue and remit tax to the Department on its purchases of tangible personal property for use in the performance of its contracts.
7. The Department assessed use tax on the tangible personal property the Taxpayer purchased from its out-of-state vendors for use in fulfilling its performance contracts, including the freight and delivery charges.
8. A Notice of Tax Assessment-Sales & Use was mailed to the Taxpayer on May 21, 2000.

### **CONCLUSIONS OF LAW**

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

1. The Taxpayer was liable for accruing the applicable State and local use tax on its purchases of tangible personal property for use in fulfilling its performance contracts, including the freight and delivery charges, pursuant to G.S. 105-164.6, G.S. 105-164.12, G.S. 105-468, G.S. 105-483, and G.S. 105-498.
2. The Department has not been furnished with any information that verifies that the Taxpayer's out-of-state vendors were engaged in business in this State within the meaning of G.S. 105-164.3(5).
3. The Department has no authority for relieving the Taxpayer from its use tax liability merely because its out-of-state vendors failed to collect and remit North Carolina tax.
4. Pursuant to G.S. 105-164.6(d), the Taxpayer's use tax liability is not extinguished until the tax has been paid to this State.
5. A Notice of Tax Assessment-Sales & Use for the period November 1, 1995 through February 29, 2000 was properly issued pursuant to G.S. 105-241.1.
6. The Taxpayer timely protested the Notice of Tax Assessment-Sales & Use dated May 21, 2000.

### **DECISION**

The Taxpayer, operating as a hurricane shutter and a general home improvement contractor, purchased tangible personal property from its franchiser and from several other

vendors located outside this State. The property was delivered into North Carolina by common carriers and used by the Taxpayer in the performance of its contracts. The Taxpayer did not pay any North Carolina tax to its vendors, nor did the Taxpayer accrue and remit tax to the Department for these purchases.

The Department assessed use tax on the property purchased from its out-of-state vendors for use in fulfilling its performance contracts, including the freight and delivery charges.

The Taxpayer contends that it was not liable for accruing the use tax on its purchases of tangible personal property from out-of-state vendors because these vendors were engaged in business in North Carolina since they solicited in this State and delivered their goods into the State. It is the Taxpayer's position that use tax is not due on the freight and delivery charges made by common carriers since title passed at the point of origin.

In this case, the Department has not been furnished with any information that verifies that the Taxpayer's out-of-state vendors were engaged in business in this State and liable to collect and remit the use tax. The fact that the vendors delivered the tangible personal property to the Taxpayer in North Carolina in a few isolated cases would not, in itself, mean that the vendors were engaged in business within the meaning of G.S. 105-164.3(5).

Failure of a vendor to collect the tax does not relieve the purchaser from the liability for the use tax since the use tax liability is not extinguished until the tax has been paid to this State. While the Department can require that a vendor collect and remit the use tax, under the provisions of G.S. 105-164.6, the ultimate liability rests with the purchaser. The Department has no authority for relieving the Taxpayer from its use tax liability merely because its out-of-state vendors failed to collect and remit the tax. It is the Department's opinion that the Taxpayer's out-of-state vendors were not engaged in business in North Carolina and that ultimate liability for the use tax rests with the Taxpayer.

G.S. 105-164.6(c) does provide that the Department can give a purchaser credit for any retail sales tax that was legally due and paid to another state on purchases of tangible personal

property on which North Carolina use tax is also due. However, the Taxpayer has not provided any documentation which verifies that it paid any sales or use tax to any other state on the purchases of property included in the Department's proposed assessment, nor has the Taxpayer provided any information verifying that any other state's sales or use tax was legally due on these purchases. The majority of these purchases were made [out-of-state] and delivered by common carriers into North Carolina; therefore, they represent sales in interstate commerce that would not be subject to [another state's] sales or use tax and would only be subject to North Carolina use tax, regardless of the time and place title passed. The Taxpayer, as a contractor, is the consumer of the tangible personal property it used in fulfilling its construction contracts and is liable for use tax on the cost of the property purchased from out-of-state vendors that did not collect the use tax as well as on the freight or delivery charges associated with these purchases.

Therefore, the assessment of tax is proper under the law and the facts and is hereby declared to be finally determined and immediately due and payable together with interest as allowed by law. Because the failure to pay the tax was not the result of an intentional disregard of the law, the penalties proposed to be assessed are hereby waived.

Made and entered this 12<sup>th</sup> day of October, 2001.

Signature \_\_\_\_\_

Eugene J. Cella  
Assistant Secretary of Revenue