

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 periods August 1, 2000 through)
November 30, 2000 and January 1, 2001)
Through May 31, 2001)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2001-458

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh on August 8, 2001, upon application for hearing by [Taxpayer, a corporation]. The Taxpayer protested proposed assessments of tax, penalty, and interest for the periods August 1, 2000 through November 30, 2000 and January 1, 2001 through May 31, 2001. The hearing was held before the Assistant Secretary pursuant to G.S. 105-260.1. The Taxpayer was represented by [Taxpayer's President and her daughter] 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 Notices Of Sales & Use Tax – Immediate Jeopardy Tax Assessment to the Taxpayer on June 15, 2001, and the Taxpayer timely requested a hearing with a letter dated July 13, 2001.

ISSUES

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

Are the assessments correct and properly proposed against the Taxpayer based on the best information available?

EVIDENCE

1. Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-1.
2. Copy of the Taxpayer's Registration Application Sales and Use Tax and/or Income Tax Withholding dated February 16, 1999, designated Exhibit E-2

3. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period August 1, 2000 through August 31, 2000 dated June 15, 2001, designated Exhibit E-3.
4. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period September 1, 2000 through September 30, 2000 dated June 15, 2001, designated Exhibit E-4.
5. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period October 1, 2000 through October 31, 2000 dated June 15, 2001, designated Exhibit E-5.
6. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period November 1, 2000 through November 30, 2000 dated June 15, 2001, designated Exhibit E-6.
7. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period January 1, 2001 through January 31, 2001 dated June 15, 2001, designated Exhibit E-7.
8. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period February 1, 2001 through February 28, 2001 dated June 15, 2001, designated Exhibit E-8.
9. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period March 1, 2001 through March 31, 2001 dated June 15, 2001, designated Exhibit E-9.
10. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period April 1, 2001 through April 30, 2001 dated June 15, 2001, designated Exhibit E-10.
11. Copy of Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period May 1, 2001 through May 31, 2001 dated June 15, 2001, designated Exhibit E-11.
12. Copy of letter dated July 13, 2001 from the Taxpayer to the Department, designated Exhibit E-12.
13. Copy of letter dated July 19, 2001 from the Department to the Taxpayer, designated Exhibit E-13.
14. Copy of E-mail message dated July 25, 2001 from a Revenue Officer to a Revenue Office Manager, designated Exhibit E-14.
15. Copy of letter dated July 26, 2001 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-15.

Evidence presented by the Taxpayer during and after the hearing held on August 8, 2001 consisted of:

16. Copies of sales and use tax reports for the periods August 1, 2000 through November 30, 2000 and January 1, 2001 through May 31, 2001, designated Exhibit TP-1.
17. Copy of the Taxpayer's letter to the Assistant Secretary of Revenue dated August 10, 2001 and attached sales and use tax reports, designated Exhibit TP-2.

Evidence presented by the Sales and Use Tax Division after the hearing held on August 8, 2001 consisted of:

18. Memorandum from the Sales and Use Tax Division to the Assistant Secretary of Revenue dated August 16, 2001 and attachments, designated 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 was engaged in business as a tavern.
2. The Taxpayer was delinquent in filing sales and use tax reports for the periods August 1, 2000 through November 30, 2000 and January 1, 2001 through May 31, 2001.
3. In August 2000, the Taxpayer was sentenced to one year of jail time for failure to file and remit sales tax for periods prior to the periods covered in this hearing. This sentence was suspended, and the Taxpayer was placed on supervised probation and ordered to pay \$200.00 per month through the clerk of court.
4. The Department made a payment arrangement with the Taxpayer for the sales tax periods that were not included in the court case but for which the Taxpayer had not filed reports or remitted any tax. The Taxpayer remitted only one check for \$350.00, which was returned for insufficient funds.
5. On June 15, 2001, the Department issued assessments in jeopardy to the Taxpayer for the periods August 1, 2000 through November 30, 2000 and January 1, 2001 through May 31, 2001. The sales tax liability included in the assessments was computed based on the approximate average of sales tax by the Taxpayer for previous periods.
6. The Department docketed but did not execute on the Certificate of Tax Liability for the tax the Taxpayer owes with the Clerk of Superior Court in [a county in North Carolina].
7. The Taxpayer's place of business was officially padlocked on July 13, 2001 by [a Sheriff's Office] due to a tax warrant. The tax warrant was erroneously issued to the Sheriff's Office and was recalled by the Department on July 20, 2001.

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 collecting the applicable State and local sales tax on its sales of beer and liquor pursuant to G.S. 105-164.4, G.S. 105-467, G.S. 105-483, and G.S. 105-498.
2. The Taxpayer was delinquent in filing sales and use tax reports for the periods in question; therefore, the Department's Collection Division was correct in issuing assessments for those periods pursuant to G.S. 105-241.1(a).
3. Based on the Taxpayer's history of failing to file and remit sales tax, the Department determined that collection of the tax was in jeopardy, and it issued assessments in jeopardy to the Taxpayer for the periods August 1, 2000 through November 30, 2000 and January 1, 2001 through May 31, 2001 pursuant to G.S. 105-241.1(g).
4. The Taxpayer timely protested the Notices of Sales & Use Tax - Immediate Jeopardy Tax Assessment dated June 15, 2001.

DECISION

The Taxpayer, engaged in business as a tavern, was delinquent in filing sales and use tax reports and remitting the sales tax it collected from its customers for the periods in question. The Department took the Taxpayer to court for failure to file and remit sales tax for prior periods, and the Taxpayer pled guilty to those charges. When the Department contacted the Taxpayer to arrange for the payment of the Taxpayer's sales tax liability for the periods following those included in the court case, the Taxpayer made only one payment, which was returned for insufficient funds. The Department's Collection Division's attempts to have the Taxpayer satisfy its legal responsibility to file sales and use tax reports and to remit the sales tax it collected from its customers were unsuccessful. The Department determined that it was necessary to jeopardy assess the Taxpayer for the delinquent periods covered by this decision. The assessments were based on the approximate average of sales tax filed by the Taxpayer for prior periods, which was the only information available to the Department at the time they were issued. The assessments were issued in jeopardy because the Taxpayer's history of

noncompliance suggested that the Taxpayer's funds for paying the assessment were in question.

At the hearing held on August 8, 2001, the Taxpayer presented actual sales and use tax reports for the periods August 1, 2000 through November 30, 2000 and January 1, 2001 through May 31, 2001. The Department amended the assessments using the Taxpayer's figures and withdrew the jeopardy assessments against the Taxpayer. Notices of Amended Tax Assessment-Sales & Use, which are based on the reports filed by the Taxpayer, were issued to the Taxpayer on August 15, 2001. Therefore, the assessments as amended are sustained in their entirety and are declared to be final and immediately due and collectible.

Made and entered this 28th day of September 2001.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue