

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
Tax for the periods January 1, 1996 through)
December 31, 2000)
)
vs.)
)
[Taxpayer])

FINAL DECISION
Docket No. 2001-503

This matter was reviewed by the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh, upon application for hearing by [Taxpayer]. The "Taxpayer" waived his right to appear in person for the hearing, and the matter of the administrative tax hearing was handled by written communications between the Assistant Secretary and the Taxpayer's representative, [an Attorney at Law].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment to the Taxpayer on July 18, 2001, and the Taxpayer's attorney timely requested a hearing by letter dated July 27, 2001.

ISSUES

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

1. Did the Department act reasonably in making the jeopardy assessment against the Taxpayer under the circumstances?
2. Is the amount of use tax assessed reasonable under the circumstances?

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 Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment for the period January 1, 1996 through December 31, 2000 dated July 18, 2001, designated Exhibit E-2.
3. Copy of Field Audit Worksheet, designated Exhibit E-3.

4. Copy of statement of record by Revenue Officer dated July 10, 2001, designated Exhibit E-4.
5. Copy of Revenue Officer's Affidavit received by facsimile on August 21, 2001, designated Exhibit E-5.
6. Copies of the Taxpayer's classified advertisements in the yellow pages of [a city located in] North Carolina telephone book, designated Exhibit E-6.
7. Copy of articles of incorporation filed with the Department of the Secretary of State on December 14, 2000, designated Exhibit E-7.
8. Copy of Section VIII, Jeopardy Assessments, taken from the North Carolina Department of Revenue Field Bulletin 205 – Civil Collection Procedures, dated March 1998, designated Exhibit E-8.
9. Copy of letter dated July 27, 2001 from Taxpayer's Representative to the Department, designated Exhibit E-9.
10. Copy of letter dated August 17, 2001 from the Sales & Use Tax Division to the Taxpayer's Representative, designated Exhibit E-10.
11. Copy of letter dated August 20, 2001 from the Sales & Use Tax Division to the Taxpayer's Representative, designated Exhibit E-11.
12. Copy of letter dated August 20, 2001 from the Taxpayer's Representative to the Assistant Secretary of Revenue, designated Exhibit E-12.
13. Copy of letter dated August 20, 2001 from the Assistant Secretary of Revenue to the Taxpayer's Representative, designated Exhibit E-13.
14. Copy of undated letter from a Revenue Office Manager to the Clerk of Superior Court of [a County located in] North Carolina, designated Exhibit E-14.
15. Copy of undated letter from a Revenue Office Manager to the Sheriff of [a County located in] North Carolina, designated Exhibit E-15.
16. Copy of undated letter and exhibit from a Revenue Office Manager to the Sheriff of [a County located in] North Carolina, designated Exhibit E-16.

Evidence presented by the Taxpayer during the course of the written correspondence to resolve the administrative hearing consisting of:

1. Copy of Taxpayer's Brief for Tax Hearing, designated as Exhibit TP-1.
2. Copy of letter dated January 17, 2002 and attached documentation from the Taxpayer's Representative to the Sales & Use Tax Division, designated Exhibit TP-2.

Evidence presented by the Sales and Use Tax Division in response to the Taxpayer's brief consisting of:

1. Memorandum from the Sales and Use Tax Division to the Assistant Secretary of Revenue dated November 28, 2001, designated Exhibit ST-1.
2. Copy of letter dated January 11, 2002 from the Sales & Use Tax Division to the Taxpayer's Representative, designated Exhibit ST-2.
3. Memorandum from the Sales and Use Tax Division to the Assistant Secretary of Revenue dated January 31, 2002, and the attached schedule of the Taxpayer's amended sales and use tax liability, designated Exhibit ST-3 (a) and (b).

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 contractor and operated [a business] as a sole proprietorship from January 1, 1996 through December 31, 2000, at which time the business was incorporated.
2. In July 2001, the Department discovered that the Taxpayer had been operating since January 1, 1996 and had not registered for sales and use tax purposes.
3. During the assessment period, the Taxpayer had obtained materials from out-of-state vendors that he used in performance contracts and had paid no sales or use tax thereon.
4. On July 18, 2001, the Department issued an assessment in jeopardy to the Taxpayer for the period January 1, 1996 through December 31, 2000. The use tax liability included in the assessment was computed based on the cost of goods sold information included on the Taxpayer's federal income tax returns for the period in question.
5. On January 17, 2002, the Taxpayer's representative provided additional documentation, and the assessment was amended to reflect the following:
 - a. the lower cost of goods sold figure from the Taxpayer's amended 2000 federal income tax return and
 - b. a credit in the amount of \$3,706.73 for the North Carolina tax the Taxpayer paid on materials purchased during the period in question.

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 remitting the applicable State and local use tax on his purchases of materials from out-of-state vendors for his use in performance contracts pursuant to G.S. 105-164.6, G.S. 105-468, G.S. 105-483, and G.S. 105-498.
2. The Taxpayer had failed to register with the Department for sales and use tax purposes and had not reported or remitted any use tax he owed on his purchases of tangible personal property for his use in fulfilling performance contracts; therefore the Department was correct in issuing an assessment for the period in question. The use tax liability assessed was based on the cost of goods sold information included on the Taxpayer's federal income tax returns, which was the best information available to the Department, pursuant to G.S. 105-241.1(a).
3. As the Taxpayer was not registered for sales and use tax purposes, likely owed use tax on the cost of materials he used in performing his contracts, and was preparing to leave the country for an undetermined amount of time, the Department determined that collection of the tax was in jeopardy, and it issued an assessment in jeopardy to the Taxpayer for the period January 1, 1996 through December 31, 2000, pursuant to G.S. 105-241.1(g).
4. The Taxpayer timely protested the Notice of Sales & Use Tax – Immediate Jeopardy Tax Assessment dated July 18, 2001.

DECISION

The Taxpayer, engaged in business as a contractor, failed to register with the Department for sales and use tax purposes and did not report and remit any sales or use tax for the period in question. The Taxpayer advised a Revenue Officer that he purchased some of his supplies from states other than North Carolina and imported some from Italy. The Revenue Officer determined that the Taxpayer likely owed use tax on the cost of the materials purchased outside this State and used in performing contracts. The Taxpayer then informed the Revenue Officer that he would soon be leaving the State for [another country], and he would not commit to a return date. He indicated that his wife was already in [another country] staying with relatives. The Revenue Officer could not be assured from her conversation with the Taxpayer that the Taxpayer definitely intended to return to this State. As the Taxpayer owned no real property in the county in which he had been residing and was preparing to leave the country

with a large amount of cash for an undetermined amount of time, it appeared that the Taxpayer was at immediate risk of flight from this State; therefore, the Department was correct in issuing an assessment in jeopardy for the period in question.

At the time the assessment was issued, the only information available to the Department with respect to the Taxpayer's use tax liability was the cost of goods sold information obtained from his federal income tax returns. The amount of use tax assessed was based on the best information available to the Department. The Taxpayer has since provided a copy of his 2000 amended federal income tax return, which supports an adjustment to the amount of use tax assessed for the year 2000. He has also provided copies of receipts verifying that he paid North Carolina sales tax during the period in question on some of the tangible personal property upon which the Department has assessed the use tax.

The assessment has been amended to reflect the amended cost of goods sold figure from the Taxpayer's amended 2000 federal income tax return as provided by the Taxpayer (Exhibit TP-1). The assessment has further been amended to allow the Taxpayer credit for any North Carolina sales tax paid on materials purchased during the period in question as provided in the documentation furnished by the Taxpayer (Exhibit TP-2).

Hence, the assessment of tax and interest in the amount of \$12,282.01, as amended, is deemed correct under the law and the facts and is hereby sustained. The penalties are hereby waived. After crediting the Taxpayer's payment in the amount of \$14,892 on July 19, 2001, an overpayment results. The Sales & Use Tax Division will forward a refund voucher to the Taxpayer for the overpayment of tax plus applicable interest.

Made and entered this 7th day of February, 2002.

Signature _____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue