

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 period July 1, 1997 through)
October 31, 2000)
)
vs.)
)
[Taxpayer])

FINAL DECISION
Docket No. 2001-504

This matter was heard by the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh, upon application for hearing by [Taxpayer]. The "Taxpayer" waived its right to appear in person for the hearing, and the matter of the administrative tax hearing was conducted by a telephone conference between the Assistant Secretary; the Taxpayer's representatives, [a tax accountant], [a retail sales tax manager], and [a tax manager]; and the representatives for the Sales and Use Tax Division, Mr. W. Timothy Holmes, Assistant Director, and Ms. Amy A. McLemore, Administration Officer.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales And Use -- Audit Tax Assessment to the Taxpayer on March 15, 2001. The Taxpayer objected to the assessment in a letter dated April 11, 2001 and timely requested a hearing.

ISSUES

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

1. Are the Taxpayer's sales of the used manufactured homes that were previously taken in trade as a credit or part payment of the Taxpayer's sale of repossessed manufactured homes subject to the 2% State sales or use tax with a maximum tax of \$300.00 per article?
2. Is the Taxpayer entitled to any protection from the assessment because the issue of the tax due on the sales of used manufactured homes previously taken in trade as a credit or part payment of the Taxpayer's sale of repossessed manufactured homes was not addressed during the Department's previous audit?

EVIDENCE

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 dated March 8, 2001 and audit remarks, designated as Exhibit E-2.
3. Copy of Notice of Sales and Use – Audit Tax Assessment dated March 15, 2001, designated as Exhibit E-3.
4. Letter dated April 11, 2001 from the Taxpayer to the Department, designated as Exhibit E-4.
5. Letter dated May 24, 2001 from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-5.
6. Letter dated June 6, 2001 from the Taxpayer to the Sales and Use Tax Division, designated as Exhibit E-6.
7. Letter dated June 18, 2001 from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-7.
8. Letter dated July 20, 2001 from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-8.
9. Letter received by facsimile on July 24, 2001 from the Taxpayer to the Sales and Use Tax Division, designated as Exhibit E-9.
10. Letter dated July 27, 2001 from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-10.
11. Copy of Form E-505 issued by the Department to all taxpayers registered for sales and use tax purposes in September of 1999, designated as Exhibit E-11.
12. Copy of North Carolina Sales and Use Tax Technical Bulletin 40-A. and D., designated as Exhibit E-12.
13. Copy of letter dated August 12, 2001 from the Assistant Secretary of Revenue to the Taxpayer, designated as Exhibit E-13.
14. Copy of letter dated August 28, 2001 from the Taxpayer to the Assistant Secretary of Revenue.

FINDINGS OF FACT

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

1. The Taxpayer operates as a C corporation and is the retail arm of [a related corporation].

2. The Taxpayer is a retailer of manufactured homes.
3. During the audit period, the Taxpayer sold manufactured homes that had been repossessed to some of its customers. In many instances, these customers traded in used manufactured homes and received a credit or part payment against their purchases of the repossessed homes.
4. The Taxpayer failed to collect sales tax on its subsequent sales of the manufactured homes taken in trade on the sale of repossessed manufactured homes.
5. The Department assessed sales tax on the Taxpayer's sales of the manufactured homes taken in trade on the sale of repossessed manufactured homes.
6. A Notice of Sales and Use – Audit Tax Assessment was mailed to the Taxpayer on March 15, 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 sales tax on its sales of manufactured homes it had taken in trade pursuant to G.S. 105-164.4(a)(1a).
2. The repossessed manufactured homes the Taxpayer sold during the audit period are considered new articles; therefore, the exemption from sales tax on used articles taken in trade that was in effect prior to October 1, 1999 would not apply because no sales tax was paid on the new articles sold, in this case the repossessed homes.
3. Any used manufactured homes previously taken in trade and sold by the Taxpayer following the repeal of G.S. 105-164.13(16)(a) effective October 1, 1999 would be subject to sales or use tax regardless of whether or not they were taken in trade on the sale of a repossessed manufactured home.
4. The Department has no record of receipt of any written request from the Taxpayer for advice or written approval regarding the Taxpayer's treatment of used articles taken in trade for sales tax purposes; therefore the Taxpayer is not entitled to any protection from the assessment of additional taxes based on erroneous advice given by the Department as provided in G.S. 105-264.
5. The Department has no authority to relieve the Taxpayer from its sales tax liability on its sales of used manufactured homes taken in trade on the sale of repossessed homes merely because that issue was not addressed during the Department's previous audit.
6. A Notice of Sales and Use – Audit Tax Assessment for the period July 1, 1997 through October 31, 2000 was properly assessed pursuant to G.S. 105-241.1.
7. The Taxpayer timely protested the Notice of Sales and Use – Audit Tax Assessment dated March 15, 2001.

DECISION

The Taxpayer, a retailer of manufactured homes, sold manufactured homes that had been repossessed to some of its customers. Many of these customers traded in used manufactured homes and received credit or part payment against their purchases of the repossessed homes. The Taxpayer did not collect sales tax on its subsequent sales of the manufactured homes taken in trade.

The Department has now assessed the applicable State sales tax on these traded-in homes.

The Taxpayer contends that it was not liable for collecting tax on its sales of the used manufactured homes because, prior to the repeal of G.S. 105-164.13(16)(a) on October 1, 1999, the used homes would have been classified as used articles not subject to sales or use tax. The Taxpayer assumed it was correct in not taxing its sales of used manufactured homes taken in trade on the sales of repossessed homes because no assessment of additional tax was included in the Department's previous audit on the same type transaction.

Prior to October 1, 1999, G.S. 105-164.13(16)(a) did provide an exemption from tax on sales of used articles taken in trade as a credit or part payment on the sale of a new article if tax was paid on the sales price of the new article. A "new article" could include any item in a vendor's original stock and was not limited to newly manufactured articles. The repossessed manufactured homes the Taxpayer sold during the audit period are considered new articles. Therefore, the exemption from sales tax on used articles taken in trade provided by G.S. 105-164.13(16)(a) prior to October 1, 1999 would not apply because no sales tax was paid on the "new articles" being sold, in this case the repossessed homes. Any used manufactured homes previously taken in trade and sold by the Taxpayer on or after October 1, 1999 would be subject to sales or use tax regardless of whether or not they were taken in trade on the sale of a repossessed manufactured home.

The fact that the issue of the sales tax liability due on the Taxpayer's sales of used manufactured homes taken in trade on the sale of repossessed homes was not addressed during the Department's previous audit of the Taxpayer does not preclude the Department from assessing additional tax in subsequent audit periods, nor does it indicate the Department's approval of a particular practice or procedure. G.S. 105-264 provides taxpayers some protection from the assessment of additional taxes based on erroneous advice given by the Department. The advice must be issued in written form in response to a taxpayer's written request, and the taxpayer must furnish adequate and accurate information to the Department on which the advice is based. The Department has no record of receipt of any written request from the Taxpayer for advice or approval regarding the Taxpayer's treatment of the sales tax liability on used articles taken in trade.

Prior to the repeal of G.S 105-164.13(16)(a) on October 1, 1999, the Department mailed all taxpayers registered for sales and use tax purposes a Form E-505 dated September 1999 which summarized the repeal of the exemption from tax on used articles taken in trade. Although the Department regularly advises registered taxpayers of legislative and administrative changes, it is the primary responsibility of a taxpayer to avail himself of any such changes which affect his particular business.

Therefore, the assessment of tax, penalty, and interest is proper under the law and the facts and is hereby declared to be finally determined and immediately due and payable as allowed by law.

Made and entered this 14th day of January, 2002.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue