

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 January 1, 1998 through)
September 30, 2000, by the Secretary of)
Revenue of North Carolina)
)
vs.)
)
[Taxpayer])

FINAL DECISION
Docket No. 2001-507

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on September 18, 2001, upon application for hearing by the taxpayer wherein he protested the proposed assessment of tax, penalty, and interest for the period January 1, 1998 through September 30, 2000. The hearing was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Richard C. Stewart, Administration Officer. [Taxpayer] was present at the hearing and was represented by [an attorney].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment on December 19, 2000 to the Taxpayer, assessing tax, penalty, and interest in the amount of \$40,852.29. The Taxpayer's attorney objected to the basis for the proposed assessment in a letter dated January 17, 2001 and timely requested a hearing.

ISSUE

The issue to be decided is:

Is the assessment correct and properly proposed against the Taxpayer based on the best information available?

EVIDENCE

The following items were introduced into evidence:

1. Copy of memorandum dated May 16, 2001 from the Secretary of Revenue, designated Exhibit E-1.
2. Copy of face sheet of audit report dated December 8, 2000, and Explanation of Changes, designated Exhibit E-2.

3. Copy of Notice of Sales and Use Tax Assessment dated December 19, 2000, designated Exhibit E-3.
4. Copy of letter dated January 17, 2001 from the Taxpayer's attorney to the Department of Revenue, designated Exhibit E-4.
5. Copy of letter dated February 12, 2001 from the Sales and Use Tax Division to the Taxpayer's attorney, designated Exhibit E-5.
6. Copy of letter dated February 26, 2001 from the Taxpayer's attorney to the Department of Revenue, designated Exhibit E-6.
7. Copy of letter dated April 11, 2001 from the Sales and Use Tax Division to the Taxpayer's attorney, designated Exhibit E-7.
8. Copy of letter dated April 26, 2001 from the Taxpayer's attorney to the Department of Revenue, designated Exhibit E-8.
9. Copy of letter dated May 7, 2001 from the Sales and Use Tax Division to the Taxpayer's attorney, designated Exhibit E-9.
10. Copy of letter dated June 6, 2001 from the Sales and Use Tax Division to the Taxpayer's attorney, designated Exhibit E-10.
11. Copy of letter dated August 28, 2001 from the Assistant Secretary of Revenue to the Taxpayer's attorney, designated Exhibit E-11.

Evidence presented by the Taxpayer at the Hearing on September 18, 2001, consisted of the following:

12. Copy of Power of Attorney dated September 18, 2001, designated Exhibit TP-1.
13. Copy of the Taxpayer's bank statements, deposit slips, loan statement, and home equity credit line letter, designated Exhibit TP-2.
14. Copy of letter dated September 18, 2001, from the Taxpayer's attorney to the Assistant Secretary of Revenue, designated Exhibit TP-3.

Evidence presented by both parties after the Hearing consisted of the following:

15. Copy of letter and attachments dated October 10, 2001, from the Taxpayer's attorney to the Assistant Secretary of Revenue, designated Exhibit TP-4.
16. Copy of Memorandum dated October 24, 2001, from the Sales and Use Tax Division to the Assistant Secretary of Revenue, designated Exhibit S-1.

FINDINGS OF FACT

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

1. Taxpayer operated as [a retailer] during the audit period.
2. The gross receipts or sales on Schedule C of the Taxpayer's Federal individual income tax returns for 1998 and 1999 exceeded the gross sales reported on his sales and use tax returns for corresponding periods.
3. The Taxpayer provided no information which conclusively proved that non-sales amounts were included in gross sales of the Taxpayer's 1998 and 1999 Federal individual income tax returns.
4. The notice of assessment was mailed to the Taxpayer on December 19, 2001.
5. The Taxpayer protested the assessment and timely requested a hearing before the Secretary of Revenue.

CONCLUSIONS OF LAW

1. The Taxpayer was, at all material times, a retailer engaged in the business of making retail sales of tangible personal property subject to sales tax.
2. All gross receipts of retailers are presumed to be subject to the retail sales tax until otherwise established.
3. In the absence of adequate records disclosing gross sales it shall be the duty of the Secretary to assess a tax upon an estimation of sales based on the best information available.
4. A proposed assessment of the Secretary of Revenue is presumed to be correct.

DECISION

The Taxpayer is engaged in the business of [making retail sales].

The Department's examining auditor reviewed the Taxpayer's purchase and sales records and determined that these records were insufficient to determine the correct taxable sales. In the absence of credible sales or purchase records, the examining auditor used the gross receipts or sales information from Schedule C of the Taxpayer's 1998 and 1999 Federal individual income tax returns. The Taxpayer objected to the assessment based on the belief that the accounting firm that prepared his personal Federal income tax returns for 1998 and

1999 erroneously included bank loans and other non-taxable deposits in the gross receipts or sales figures.

Clearly, in G.S. 105-164.22, G.S. 105-164.26 and G.S. 105-241.1, the Legislature intended that retailers keep suitable records to determine their sales tax liability and that failure to do so should not benefit the Taxpayer. Given that the records kept by the Taxpayer were not credible, I find that the use of the gross receipts or sales figures listed on the Taxpayer's income tax returns constitutes the best information available as a basis for a proposed assessment.

With regard to the additional information submitted by the Taxpayer's attorney, I cannot agree that the Taxpayer has sufficiently proved that any of the documents submitted, including checking deposit slips, teller's check receipts, receipts for payment of teller's checks, airline ticket receipts, hotel receipts, line of credit summary sheet, car rental receipts, a first mortgage summary sheet, mortgage interest statement, credit card account information, and muffler repair receipts, are included in the gross receipts or sales figures on the Taxpayer's income tax returns for 1998 and 1999.

I find, therefore, that the Taxpayer has provided no additional information upon which to base an amendment to the assessment and has not met his burden of overcoming the presumption of correctness of the assessment. Hence, the proposed assessment of tax, penalty, and interest is deemed correct under the law and the facts and is hereby sustained.

Wherefore the assessment is sustained in its entirety, and is declared to be final and immediately due and collectible.

This 7th day of November, 2001.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings