

**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, 1997 through )  
September 30, 2000, by the Secretary of )  
Revenue of North Carolina )  
 )  
 )  
vs. )  
 )  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2001-544

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on December 18, 2001, upon application for hearing by the taxpayer wherein it protested the proposed assessment of tax, penalty, and interest for the period January 1, 1997 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 M. D. Stephenson, Administration Officer. The Taxpayer was represented by [an enrolled agent] and [the son of the Taxpayer's corporate president].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment to the Taxpayer on November 9, 2000 assessing tax, penalty, and interest in the amount of \$19,503.53. The Taxpayer objected to the proposed assessment in a letter dated December 5, 2000 and timely requested a hearing.

**ISSUES**

The issues to be decided are:

1. Is the amount of the assessment correct?
2. Was the Taxpayer "engaged in business" as a retailer in North Carolina and liable for collecting sales or use tax on the sales of automotive parts to customers in this State?

## EVIDENCE

The following items were introduced into evidence:

1. Copy of 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 the audit report and auditor's comments dated October 27, 2000, designated as Exhibit E-2.
3. Copy of Notice of Sales and Use Tax Assessment dated November 7, 2000, designated as Exhibit E-3.
4. Copy of undated note from the Taxpayer's representative on a copy of the Final Notice of Tax Assessment received by the Department on February 26, 2001, designated as Exhibit E-4.
5. Copy of letter dated December 5, 2000 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-5.
6. Copy of power of Attorney dated June 27, 2000 from the Taxpayer's representative, designated as Exhibit E-6.
7. Copy of letter dated April 2, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-7.
8. Copy of letter dated April 10, 2001 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-8.
9. Copy of letter dated April 11, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-9.
10. Copy of letter dated April 19, 2001 from the Taxpayer's representative to the Sales and Use Tax Division, designated as Exhibit E-10.
11. Copy of letter dated May 2, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-11.
12. Copy of letter dated June 13, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated as Exhibit E-12.
13. Copy of letter dated August 30, 2001 from the Assistant Secretary for Administrative Hearings to the Taxpayer, designated as Exhibit E-13.
14. Copy of letter dated October 2, 2001 from the Assistant Secretary for Administrative Hearings to the Taxpayer, designated as Exhibit E-14.

The following evidence was presented by the Taxpayer's representative at the hearing:

15. Copy of G.S. 105-164.13(17), designated as TP-1.

16. Copy of affidavit issued by [the son of the Taxpayer's corporate president], designated as TP-2.

The following additional information was presented by the Sales and Use Tax Division after the scheduled hearing date:

17. Copy of Memorandum dated January 8, 2002 from the examining auditor to the Assistant Director of the Sales and Use Tax Division, designated as Exhibit S-1.
18. Copy of Memorandum dated January 16, 2002 from the Assistant Director of the Sales and Use Tax Division to the Assistant Secretary of Administrative Hearings, designated as Exhibit S-2.
19. Copy of Memorandum dated January 30, 2002 from the Assistant Director of the Sales and Use Tax Division to the Assistant Secretary of Administrative Hearings, designated as Exhibit S-3.
20. Copy of the Amended Sales and Use Tax Audit report for the period January 1, 1997 through September 30, 2000 dated March 8, 2002, designated as Exhibit S-4.
21. Copy of the amended Notice of Sales and Use- Audit Tax Assessment dated March 19, 2002, designated as Exhibit S-5.
22. Copy of the Brief For Tax Hearing prepared by the Sales and Use Tax Division, designated as Exhibit S-6.

### **FINDINGS OF FACT**

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

1. The Taxpayer sold complete automobile racing transmissions during the audit period.
2. The Taxpayer primarily received orders from customers in North Carolina for specialty transmissions that were used by customers in automobile races.
3. The Taxpayer purchased complete transmissions and transmission parts exempt from sales or use tax in [another state].
4. When the Taxpayer sold transmissions in North Carolina, it shipped complete transmissions and/or transmission parts to transmission builders (subcontractors) in North Carolina who assembled or modified the transmissions to meet the customers' specifications.
5. The Taxpayer had ownership of property (stock transmissions and parts) consigned to its subcontractors for assembly, repair, or modification in this State throughout the audit period. The property held by the subcontractors for and on behalf of the Taxpayer is construed as inventory the Taxpayer stored temporarily, directly, or indirectly at locations for distribution in this State.

6. One of the Taxpayer's subcontractors is [a proprietorship] operated by [the son of Taxpayer's corporate president].
7. After the subcontractors finished their work, the completed transmissions were distributed from their locations. The customers either picked up the transmissions at the subcontractors' places of business or the subcontractors delivered the transmissions to the customers' locations.
8. The Taxpayer mailed invoices from its [out of state] location to customers who had taken delivery of the completed transmissions in North Carolina from the Taxpayer's subcontractors.
9. The Taxpayer did not charge, collect, or remit North Carolina State or local sales or use tax on invoices issued to customers in North Carolina during the audit period.
10. The customers mailed their payments directly to the Taxpayer in [another state].
11. The Department assessed tax on the Taxpayer's sales of transmissions to customers in North Carolina.
12. The Notice of Proposed assessment was mailed to the Taxpayer on November 7, 2000.
13. The Taxpayer notified the Department that it objected to the assessment on December 5, 2000 and timely requested a hearing.

### **CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, the Assistant Secretary of Revenue makes the following 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 or use tax.
2. The Taxpayer's North Carolina subcontractors, including [a proprietorship], acted as the Taxpayer's representatives by delivering property on behalf of the Taxpayer that it had agreed to sell to customers in North Carolina. Therefore, the Taxpayer's subcontractors/representatives "transacted business" on its behalf in this State within the purview of G.S. 105-164.8(b)(3).
3. Whereas the Taxpayer's representatives transacted business on its behalf in North Carolina; the Taxpayer held inventory stored at its subcontractors' locations which functioned as temporary storage places in this State; and the Taxpayer's subcontractors delivered transmissions sold to customers from the subcontractors' locations functioning as places of distribution for the Taxpayer in this State; the Taxpayer was "engaged in business" in North Carolina within G.S. 105-164.3(5).
4. The general rate of state tax and the applicable local tax is due on the Taxpayer's sales of transmissions delivered by its representatives to customers in North Carolina under G.S. 105-164.4.

5. The additional tax assessed is presumed to be correct under G.S. 105-241.1(a), and the burden is upon the Taxpayer to overcome the presumption of correctness.

### **DECISION**

The Taxpayer was engaged in the business of making retail sales of racecar transmissions during the audit period. The Taxpayer purchased complete stock transmissions and transmission parts exempt from sales or use tax from vendors who delivered these items to the Taxpayer in [another state]. The Taxpayer accepted orders for transmissions at its location in [another state] and shipped stock transmissions and/or necessary parts to subcontractors in North Carolina who built or modified the transmissions to meet the Taxpayer's customers' specifications. The subcontractors then delivered the completed transmissions directly to the Taxpayer's customers in this State. The Taxpayer billed its North Carolina customers from [out of state] and those customers remitted payment directly to the Taxpayer's [out of state] location. The Taxpayer's retail sales of transmissions were subject to tax; however, the Taxpayer did not collect and remit the tax due.

The Department's examining auditor reviewed sales summaries furnished by the Taxpayer or its accountant and determined the additional taxable retail sales for the audit period. Because the Taxpayer did not charge, collect, or remit the appropriate tax due on its taxable retail sales, the tax was assessed on the sales amounts shown in the sales summaries. The Taxpayer argues that it did not have "nexus" and was not required to collect and remit the North Carolina State and local sales tax. I disagree. The Taxpayer owned property, which is construed as inventory, consigned it to its subcontractors in North Carolina for further assembly, modification, or repair and ultimately for distribution to the Taxpayer's customers. These subcontractors' locations served as places of storage and distribution of property the Taxpayer sold to customers in North Carolina, and the subcontractors transacted business on the Taxpayer's behalf in this State. These factors are fatal to the Taxpayer's position that it had no nexus.

The additional issue raised at the hearing involves the value on which the tax was assessed. The Taxpayer's representative furnished a revised sales summary for the audit period which reflects separately stated labor charges billed to customers. After the hearing was held, the Assistant Secretary directed the examining auditor to verify the labor charges on the Taxpayer's revised sales summary. The labor charges were verified; therefore, an amended audit report was prepared deleting the labor charges from taxable sales for the audit period.

I find, therefore, that the proposed assessment of additional sales tax as amended plus accrued interest is deemed to be correct under the law and the facts and is hereby sustained. Because the failure to pay the tax was not the result of intentional disregard of the North Carolina statutes, I find reasonable cause to waive the penalties.

Therefore, the assessment of tax and interest, per the Notice of Amended Sales and Use Tax Assessment, is sustained, and declared to be final and immediately due and collectible.

This 2<sup>nd</sup> day of April, 2002.

Signature \_\_\_\_\_

Eugene J. Cella  
Assistant Secretary of Administrative Tax Hearings