

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of Additional)
Withholding Tax for the Taxable Period)
January 1, 1993 through June 30, 1996 by the)
Secretary of Revenue of North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2002-38

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, in the city of Raleigh on March 7, 2002, upon an application for hearing by [Taxpayer], hereinafter referred to as "Corporation," wherein Corporation protested the proposed assessment of additional withholding tax for the taxable period January 1, 1993 through June 30, 1996. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1 and was attended by Nancy R. Pomeranz, Director of the Personal Taxes Division; Angela C. Quinn, Administration Officer in the Personal Taxes Division; Kathy W. Seawell, Special Agent in the Criminal Investigations Division; Rudy E. Renfer, Assistant Attorney General; and [two Attorneys] representing Corporation.

Pursuant to G.S. 105-241.1, an assessment proposing additional tax, penalty, and accrued interest for the period January 1, 1993 through June 30, 1996 was mailed to Corporation on June 27, 2001. Corporation objected to the proposed assessment and timely requested a hearing before the Secretary of Revenue.

ISSUE

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

Is the assessment for additional withholding tax proposed against Corporation for the period January 1, 1993 through June 30, 1996 lawful and proper?

EVIDENCE

The evidence presented by Nancy R. Pomeranz, Director of the Personal Taxes Division, consisted of the following:

1. Notice of Individual Income Tax Assessment for the taxable period January 1, 1993 through June 30, 1996 dated June 27, 2001, a copy of which is designated as Exhibit PT-1.
2. Revenue Field Auditor's Report for the taxable period January 1, 1993 through June 30, 1996, dated April 10, 2001, a copy of which is designated as Exhibit PT-2.
3. Annual reconciliation worksheets reflecting North Carolina tax withheld, copies of which are designated as Exhibit PT-3.
4. Payroll reports reflecting amount of North Carolina tax withheld, copies of which are designated as Exhibit PT-4.
5. Letter from [an Attorney] to the Department of Revenue dated February 25, 1999, a copy of which is designated as Exhibit PT-5.
6. Letter from [one of Taxpayer's Attorneys] to the Department of Revenue dated April 16, 2001, a copy of which is designated as Exhibit PT-6.
7. Letter from [the President of Corporation] to the Department of Revenue dated June 12, 2001, a copy of which is designated as Exhibit PT-7.
8. Letter from Richard C. Stewart, Administration Officer in the Sales and Use Tax Division, to [one of Taxpayer's Attorneys] dated June 19, 2001, a copy of which is designated as Exhibit PT-8.
9. Letter from [one of Taxpayer's Attorneys] to Richard C. Stewart dated June 25, 2001, a copy of which is designated as Exhibit PT-9.
10. Letter from Angela C. Quinn, Administration Officer, to [one of Taxpayer's Attorneys] dated July 16, 2001, a copy of which is designated as Exhibit PT-10.
11. Letter from [the President of Corporation] to the Department of Revenue dated July 19, 2001, a copy of which is designated as Exhibit PT-11.
12. Letter from Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, to [the President of Corporation] dated December 13, 2001, a copy of which is designated as Exhibit PT-12.
13. Letter from [one of Taxpayer's Attorneys] to Eugene J. Cella dated December 21, 2001, a copy of which is designated as Exhibit PT-13.
14. Letter from Eugene J. Cella to [the President of Corporation] dated January 8, 2002, a copy of which is designated as Exhibit PT-14.

FINDINGS OF FACT

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

1. Corporation was engaged in business and at all material times operated a restaurant and motel during the periods at issue and withheld State income tax from its employees.
2. Although Corporation's payroll service provided summary journals to Corporation clearly identifying the amount of State income tax withheld from its employees, Corporation substantially underreported these amounts for the periods at issue.
3. The president of Corporation pled guilty to criminal charges for evasion of withholding tax for the period August 1, 1993 through June 30, 1996.
4. The additional tax due for the periods January 1 through December 31, 1994; January 1 through December 31, 1995; and January 1 through June 30, 1996, totaling \$22,249.27, was paid to the Department on January 8, 1999. The Department asserted the fraud penalty and accrued interest through January 8, 1999, with respect to these periods.
5. The Department also proposed an assessment of additional tax, the fraud penalty, and accrued interest against Corporation for the period July 1 through December 31, 1993. The amount of tax proposed by the Department was based on the difference between the tax due shown on the payroll records and the amount of tax remitted by Corporation as shown on its monthly withholding tax reports.
6. A Notice of Individual Income Tax Assessment proposing an assessment of additional withholding tax; the fraud penalty; and accrued interest for the entire audit period was mailed to Corporation on June 27, 2001.
7. Corporation objected to the proposed assessment and timely requested an administrative tax hearing before the Secretary of Revenue.
8. Upon further review, the Department determined that the additional tax, penalty, and interest due was overstated on the original assessment notice and the assessment has been amended accordingly.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

1. An employer is required to deduct and withhold North Carolina income tax from wages paid to its employees. The amount of taxes withheld by an employer is held in trust for the Secretary. An employer who fails to withhold the proper amount of income taxes or pay the amount withheld to the Secretary is liable for the amount of tax not withheld or not paid.

2. There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if the taxpayer filed a false or fraudulent application or return or the taxpayer attempted in any manner to fraudulently evade or defeat the tax.
3. A penalty is imposed for a deficiency in payment of a tax because of fraud with intent to evade the tax. The penalty is equal to fifty percent of the total deficiency.

DECISION

Based on the foregoing evidence of record, the findings of fact, and the conclusions of law, the Assistant Secretary finds the proposed assessment for the taxable period January 1, 1993 through June 30, 1996 to be lawful and proper, and it is hereby affirmed.

For the audit period at issue, the tax withheld reported by Corporation was determined to be substantially understated based on Corporation's payroll records. Corporation has not presented any factual information to support its apparent contention that the tax withheld was not understated or that the amount of penalty and interest proposed is not applicable.

Therefore, the proposed assessment as amended is hereby sustained in its entirety and determined to be final and collectible, together with interest as allowed by law.

Made and entered this 4th day of June, 2002.

Signature_____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue