

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 February 1, 1997 through)
November 30 1999, by the Secretary of)
Revenue of North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2002-410

This matter was heard by the Assistant Secretary of Administrative Hearings, Eugene J. Cella, upon application for hearing by the Taxpayer wherein it protested the Department's proposed assessment of tax and interest for the period February 1, 1997 through November 30, 1999. The hearing was held 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, and George Boylan Special Deputy Attorney General. The Taxpayer was represented by [Counsel for the Taxpayer, Company President, Company Vice-President, and Controller of the Corporation].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment dated February 7, 2000 to the Taxpayer, assessing tax and interest in the amount of \$295,637.72. The Taxpayer, in a letter dated March 3, 2000, objected to the assessment and timely requested a hearing before the Secretary of Revenue.

ISSUES

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

1. Are the parts and materials used by the Taxpayer in its optional maintenance contracts subject to use tax?
2. Do the Taxpayer's optional maintenance contracts constitute a sale of tangible personal property?
3. Is the Taxpayer's optional maintenance contract a bundled transaction?
4. Did the Department fail to respond timely to the Taxpayer's request for a hearing before the Secretary of Revenue as provided in G.S. 105-241.1? If it is determined that the Department failed to respond timely to the Taxpayer's request for hearing, should the assessment of tax and interest relating to the outstanding issues be cancelled?

EVIDENCE

The following items were introduced into evidence by the Department at the hearing:

1. Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-1.
2. Letter dated January 17, 2000 from the Taxpayer to the Revenue Field Auditor, designated Exhibit E-2.
3. Field Auditor's report dated February 3, 2000 for the audit period of February 1, 1997 through November 30, 1999, designated Exhibit E-3.
4. Notice of Sales and Use Tax Assessment dated February 7, 2000, designated Exhibit E-4.
5. Letter dated March 3, 2000 from the Taxpayer to the Secretary of Revenue, designated Exhibit E-5, and attachments as follow:
 - (a) Letter dated January 17, 2000 from the Taxpayer to the Revenue Field Auditor, designated Exhibit E-5(a).
 - (b) Letter dated June 11, 1990 from the Taxpayer to Governor Jim Martin, designated Exhibit E-5(b).
 - (c) Sales and Use Tax Technical Bulletin 41-5 issued June 1, 1996, designated Exhibit E-5(c).
 - (d) Taxpayer's lease agreement with [a corporation], designated Exhibit E-5(d).
 - (e) Letter, undated, from the Departments of the Army and Air Force, designated Exhibit E-5(e).
 - (f) A page from the Taxpayer's Sales and Order Procedure Manual, designated Exhibit E-5(f).
6. Letter dated March 29, 2000 from the Sales and Use Tax Division ("Division") to the Taxpayer, designated Exhibit E-6.
7. Letter dated May 19, 2000 from the Division to the Taxpayer, designated Exhibit E-7.
8. Letter dated June 8, 2000 from the Taxpayer to the Division, designated Exhibit E-8, and the following attachments:
 - (a) Taxpayer's lease agreement with [a church], designated Exhibit E-8(a).
 - (b) Taxpayer's lease agreement with [an agency], designated Exhibit E-8(b).
 - (c) Taxpayer's lease agreement with [a company], designated Exhibit E-8(c).
 - (d) Taxpayer's lease agreement with [a transportation company], designated Exhibit E-8(d).
9. Letter dated June 23, 2000 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-9, and the following attachments:
 - (a) Taxpayer's lease agreement and proposal with [a North Carolina County], designated Exhibit E-9(a) .

- (b) Taxpayer's proposal for [a company], designated Exhibit E-9(b).
- (c) Taxpayer's proposal for [an individual], designated Exhibit E-9(c).
- (d) Taxpayer's proposal for [a school], designated Exhibit E-9(d).
- (e) Taxpayer's proposal for [a company], designated Exhibit E-9(e).
- (f) Taxpayer's field order form, designated Exhibit E-9(f).
- (g) Taxpayer's equipment lease agreement, designated Exhibit E-9(g).
- (h) Taxpayer's 1996 audited financial statements, designated Exhibit E-9(h).
- (i) Taxpayer's lease agreement with [a North Carolina County's hospitals], designated Exhibit E-9(i).
- (j) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(j).
- (k) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(k).
- (l) Taxpayer's maintenance agreement with [a community college], designated Exhibit E-9(l).
- (m) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(m).
- (n) Taxpayer's maintenance agreement with [a communication company], designated Exhibit E-9(n).
- (o) Taxpayer's maintenance agreement with [a communication company], designated Exhibit E-9(o).
- (p) Taxpayer's maintenance agreement with [a corporation], designated Exhibit E-9(p).
- (q) Taxpayer's maintenance agreement with [a furniture company], designated Exhibit E-9(q).
- (r) Taxpayer's maintenance agreement with [a furniture company], designated Exhibit E-9(r).
- (s) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(s).
- (t) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(t).
- (u) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(u).
- (v) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(v).
- (w) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(w).
- (x) Taxpayer's maintenance agreement with [an individual], designated Exhibit E-9(x).
- (y) Taxpayer's maintenance agreement with [a church], designated Exhibit E-9(y).
- (z) Taxpayer's maintenance agreement with [a corporation], designated Exhibit E-9(z).
- (aa) Taxpayer's maintenance agreement [with a company], designated Exhibit E-9(aa).
- (bb) Order installer shipment notification from [a corporation], designated Exhibit E-9(bb).
- (cc) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(cc).
- (dd) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(dd).
- (ee) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(ee).
- (ff) Taxpayer's maintenance agreement with [a company], designated Exhibit E-9(ff).
- (gg) [Equipment lease agreement], designated Exhibit E-9(gg).
- (hh) [Equipment lease agreement], designated Exhibit E-9(hh).
- (ii) Taxpayer's lease agreement with [a North Carolina County], designated Exhibit E-9(ii).

10. Letter dated September 25, 2000 from the Division to the Taxpayer, designated Exhibit E-10.
11. Letter dated December 5, 2000 from the Division to the Taxpayer, designated Exhibit E-11.
12. Amended Field Auditor's Report for the period of February 1, 1997 through November 30, 1999, dated January 24, 2001, designated Exhibit E-12.
13. Notice of Amended of Sales and Use Tax Assessment dated February 12, 2001, designated Exhibit E-13.
14. Letter dated March 2, 2001 from the Division to the Taxpayer, designated Exhibit E-14.
15. Letter dated March 27, 2001 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-15.
16. Letter dated June 28, 2001 from the Taxpayer to the Attorney General's office, designated Exhibit E-16, and the following attachments:
 - (a) Letter dated June 27, 2001 from a Certified Public Accountant and former employee of the Department to the Taxpayer, designated Exhibit E-16(a).
 - (b) Article from [a company], designated Exhibit E-16(b).
 - (c) Article from [a company], designated Exhibit E-16(c).
 - (d) Page from [a company], designated Exhibit E-16(d).
 - (e) Article from [a company], designated Exhibit E-16(e).
17. Letter dated July 24, 2001 from the Taxpayer to the Division, designated Exhibit E-17.
18. Letter dated August 6, 2001 from the Taxpayer to the Division and the attached letter dated June 27, 2001 from a Certified Public Accountant to the Taxpayer, designated Exhibit E-18.
19. Notice of Sales and Use Audit Tax Assessment - Uncontested Issues, dated September 6, 2001, designated Exhibit E-19.
20. Letter dated September 6, 2001 from the Division to the Taxpayer, designated Exhibit E-20.
21. Letter dated September 10, 2001 from the Taxpayer to the Division, designated Exhibit E-21.
22. Letter dated September 17, 2001 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-22.
23. Letter dated November 7, 2001 from the Attorney General's Office to the Taxpayer, designated Exhibit E-23.
24. Letter dated December 4, 2001 from the Division to the Taxpayer, designated Exhibit E-24.

25. Letter dated December 17, 2001 from the Taxpayer to the Division and attached letter dated June 27, 2001 from a Certified Public Accountant, designated Exhibit E-25.
26. Second Amended Audit Report dated January 14, 2002 for the period February 1, 1997 through November 30, 1999, designated Exhibit E-26.
27. Letter dated January 22, 2002 from the Division to the Taxpayer, designated Exhibit E-27.
28. Notice of Amended Sales and Use Tax Assessment dated January 30, 2002, designated Exhibit E-28.
29. Letter from the Taxpayer dated February 20, 2002 to the Division, designated Exhibit E-29, and the following attachments:
 - (a) Notice of Sales and Use Tax Assessment dated January 30, 2002, designated Exhibit E-29(a).
 - (b) Letter dated December 17, 2001 from the Taxpayer to the Sales and use Tax Division, designated Exhibit E-29(b).
 - (c) Letter dated June 27, 2001 from a Certified Public Accountant, designated Exhibit E-29(c).
30. Letter dated July 9, 2002, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-30.
31. Taxpayer's Business Claim for Refund State and County Sales and Use Taxes, dated February 7, 2000, designated Exhibit E-31.
32. Letter dated July 17, 2002 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-32.
33. Letter dated July 30, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-33.
34. Administrative Decision Number 331 dated July 8, 1997, designated Exhibit E-34.
35. Final Decision Docket No. 96-237 dated October 9, 1996, designated Exhibit E-35.
36. Letter dated August 2, 2002 from the Taxpayer to the Special Deputy Attorney General, designated Exhibit E-36.
37. Letter dated August 2, 2002 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-37.
38. Letter dated August 14, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-38.
39. Letter dated August 15, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-39.
40. Sales and Use Tax Bulletin 41-5, designated Exhibit E-40.

41. Sales and Use Tax Regulation 40, designated Exhibit E-41.
42. Field Audit Report dated June 14, 1985 for the period June 1, 1982 through April 30, 1985, designated Exhibit E-42.
43. Field Audit Report dated July 12, 1989 for the period of July 1, 1986 through May 31, 1989, designated Exhibit E-43.
44. Amended Field Audit Report dated November 17, 1989 for the period of July 1, 1986 through May 31, 1989, designated Exhibit E-44.
45. Letter dated January 30, 1990 from the Taxpayer to [a North Carolina University], designated Exhibit E-45.
46. Letter dated April 12, 1990 from the Division to [a North Carolina University], designated Exhibit E-46.
47. Letter dated May 14, 1990 from [a North Carolina University], designated Exhibit E-47.
48. Letter dated May 24, 1990 from the Taxpayer to Division of Purchase and Contracting, designated Exhibit E-48.
49. Brief for Tax Hearing prepared by the Division, designated Exhibit E-49.

The Taxpayer presented the following evidence at the hearing:

50. Composite of slide show presentation, designated Exhibit TP-1.

The following additional information was presented into evidence by the parties post-hearing:

51. Letter dated December 4, 2002 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit TP-2, and the following attachments:
 - (a) Taxpayer's maintenance agreement with [a mortgage company], designated Exhibit TP-2(a).
 - (b) Affidavit of [a CPA Firm], designated Exhibit TP-2(b).
 - (c) Taxpayer's maintenance agreement with [a CPA firm], designated Exhibit TP-2(c).
 - (d) Affidavit of [a company], designated Exhibit TP-2(d)
 - (e) Taxpayer's maintenance agreement with [a company], designated Exhibit TP-2(e).
 - (f) Taxpayer's maintenance agreement with [a company], designated Exhibit TP-2(f)
 - (g) Affidavit of [a company], designated Exhibit TP-2(g).
 - (h) Taxpayer's maintenance agreement with [a company], designated Exhibit TP-2(h).
 - (i) Affidavit of [a company], designated Exhibit TP-2(i).
 - (j) Taxpayer maintenance agreement with [a company], designated Exhibit TP-2(j).

52. Memorandum dated December 20, 2002 from the Division to the Assistant Secretary of Revenue, designated Exhibit E-50.
53. Sales and Use Tax Technical Bulletin 23-5 designated Exhibit E-51.

FINDINGS OF FACT

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

1. The Taxpayer is engaged in the business of selling, leasing and servicing copying machines.
2. The Taxpayer entered into contracts with customers to provide parts, consumables and repair or service labor on copying machines that were not owned or leased by the Taxpayer during the audit period.
3. The Taxpayer's customers who owned copiers or leased copiers from lessors other than the Taxpayer were not obligated to enter into a service contract with the Taxpayer.
4. The Taxpayer charged, collected and remitted sales tax on its fees for all maintenance agreements, both mandatory and optional.
5. Under the Division's administrative rules, in an "optional maintenance agreement" the lessor is required to remit use tax upon all repair parts and supplies used completing the agreement.
6. The Taxpayer charged, collected and remitted sales tax on its fees for all maintenance agreements, both mandatory and optional.
7. For the Taxpayer's optional service agreements, the Taxpayer charged its customers fees based on a cost-per-copy arrangement.
8. The Taxpayer did not pay sales tax or accrue use tax on parts and materials used in fulfilling its optional maintenance agreements.
9. The maintenance contracts Taxpayer executed with customers who owned their copiers or leased them from third parties were "optional maintenance agreements."
10. The "Guaranteed Maintenance Agreement" between the Taxpayer and [a mortgage company] dated April 22, 2002 is representative of the Agreements Taxpayer utilized throughout the audit period and for which the Division assessed use taxes upon the personal property consumed thereunder.
 - (a) The Agreement covers all parts, labor and travel necessary for Taxpayer to service identified equipment.
 - (b) The Agreement requires Taxpayer to furnish various supplies and parts at no charge, as determined by Taxpayer, as necessary to service the equipment, and without regard to quantity, or their brand or manufacturer.

- (c) The cost to the customer regardless of the quality or quantity of repair parts or supplies used by Taxpayer in fulfilling the Agreement is a flat monthly or periodic charge and specified excessive copy rate.
 - (d) The customer must provide minimum advance notice to the Taxpayer before requesting to change to other service plans.
11. The Taxpayer was assessed use tax on its property used in its optional maintenance agreements.
 12. The "Guaranteed Maintenance Agreement" the Taxpayer uses with its customers provides in part, that "This agreement covers all parts, labor and travel to service the following equipment at the location indicated."
 13. The Taxpayer has filed a protective claim for refund, in the event that it was ultimately determined that its optional maintenance agreements were not taxable, for sales tax erroneously charged to and collected from its customers and remitted to the Department.
 14. The Taxpayer has not refunded its customers sales tax it collected on its fees for optional maintenance agreements.
 15. The Department by letter stated that it mutually agreed to postpone the administrative hearing and requested that the Taxpayer advise the Department if it objected to the postponement of the administrative hearing. The Taxpayer did not respond that it objected to the postponement of an administrative hearing. The Taxpayer provided no indication that it had withdrawn its mutual agreement to postpone the hearing.
 16. The original sales and use tax audit report was amended on February 12, 2001 and again on January 30, 2002.
 17. The Taxpayer's service agreements do not require the customer to enter into an agreement to purchase services on an ongoing basis for a minimum period of at least six months.
 18. The Taxpayer's service agreements do not require the customer to pay a cancellation fee to the service provider if the customer cancels the contract for services within the minimum period.
 19. The Taxpayer made a payment on September 10, 2001 to the Department for tax and interest in the amount of \$16,650.49 for the uncontested portion of the assessment.
 20. The only objection remaining to the second amended audit report dated January 14, 2002 for the period of July 1, 1997 through November 30, 1999 is the use tax assessed on parts and supplies used by the Taxpayer in fulfilling optional maintenance contracts for machines owned by its customers or leased by its customers from another company.
 21. A Notice of Sales and Use Tax Assessment was mailed to the Taxpayer by the Department on February 7, 2000.
 22. The Taxpayer protested the assessment and, by letter dated March 3, 2000, timely requested a hearing before the Secretary of Revenue.

CONCLUSIONS OF LAW

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

1. The fees charged by the Taxpayer for the cost-per-copy arrangement do not constitute a sale of tangible personal property and are not subject to sales tax.
2. Taxpayer's charges based upon copies produced is merely a billing practice, and it cannot change the essential nature of the agreements as contracts for the delivery of services.
3. The optional maintenance agreements used by the Taxpayer constitute the furnishing of services, and not the sale of any tangible personal property transferred or consumed in fulfilling the agreements.
4. Parts and supplies used by the Taxpayer to fulfill the optional maintenance agreements are subject to State and local use tax.
5. As there is no requirement of the Taxpayer's customer to purchase a taxable service for a minimum period of six months and no cancellation fee for termination of the contract within the six month period, the provisions of G.S. 105-164.12B for bundled transactions do not apply to the Taxpayer's maintenance contracts.
6. G.S. 105-241.1(c) requires that a hearing be scheduled within 60 days of the timely request for hearing by the Taxpayer, but provides that the hearing may be scheduled for a later date mutually agreed upon by the Taxpayer and the Secretary.
7. Even though an affirmative duty is placed on the Secretary of Revenue to comply with G.S. 105-241.1(c), the legislature has not authorized the imposition of any sanctions against the Department for a failure to meet the timetable for scheduling a hearing.
8. The Taxpayer failed to provide any evidence of bad faith on the part of the Department regarding the delay in the hearing.
9. The delay caused no harm or prejudice to the Taxpayer.
10. Issues of constitutionality cannot be decided at administrative tax hearings.
11. The Notice of Sales and Use Tax Assessment for the period of February 1, 1997 through November 30, 1999 was issued pursuant to G.S. 105-241.1.

DECISION

The Taxpayer is engaged in the business of selling, leasing and servicing copying machines. At issue is the application of tax to transactions involving maintenance contracts for customers that own copiers or lease copiers from a lessor other than the Taxpayer. The

Taxpayer collected and remitted tax on the fees it charged its customers for optional maintenance agreements, contending that the arrangement constituted a retail sale. The Department has responded that the arrangement is not a retail sale, the fees the Taxpayer charges its customer for the optional maintenance agreements are not taxable and the Taxpayer owes use tax on its cost of any tangible personal property used to fulfill its optional maintenance agreement.

The Taxpayer has taken the position that the cost-per-copy agreements it offers its customers are substantially different from traditional optional maintenance agreements. In the cost-per-copy agreements, the Taxpayer agrees to keep the customer's copier in good working order for a fee based on the number of copies made using the machine. The Taxpayer will provide tangible personal property in the form of repair parts, materials and consumables as well as labor to repair or maintain the copiers.

In support of its position the Taxpayer cites the statutory definition of sales price, which provides in part that sale or selling includes "The transfer or possession of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, for a consideration paid or to be paid." The Taxpayer also points to Sales and Use Tax Technical Bulletin 41-5A, which provides that where there is a sale of tangible personal property and repair or installation labor, sales tax is due on the total charge if the repair or installation labor is not stated separately.

The Taxpayer has gone to great lengths to characterize its agreement with customers to maintain copying machines as a sale of the tangible personal property used by the Taxpayer to fulfill its agreement. Subsequent to the hearing the Taxpayer submitted several affidavits from customers attesting that they viewed the Taxpayer's agreement with them as a sales contract rather than a "maintenance agreement".

The Taxpayer seems to be doing everything it can to distance itself from the term "maintenance agreement" but the actual contract it uses with its customers is titled "Guaranteed

Maintenance Agreement.” The terms provide that the agreement covers all parts, labor and travel to service the copy machines. There is insufficient language in these documents provided by the Taxpayer that would lead to the conclusion that it is a retail sales contract. The opposite, in fact, is true. It is an agreement by the Taxpayer that it will keep the customer’s machine functioning for an agreed upon amount for a specified period of time. Customers simply do not care how that is accomplished, much less what identifiable property the Taxpayer provides to keep their equipment operating properly.

For a “sale” to occur as anticipated by the statutes, there must be a discrete sale of tangible personal property. I do not find this to be the case. The Taxpayer’s representative cites Bicycle Transit Authority, Inc. v Bell, 314 N.C. 219, 227,333 S.E.2d, 299, 305 (1985) with the quotation “It is elementary that when interpreting a contract the intent of the parties is our polar star.” In support the Taxpayer has submitted four affidavits from customers avowing that they viewed the agreement as a sale of consumable goods by the Taxpayer rather than a maintenance agreement. Notwithstanding these affidavits, I am not convinced that the “intent of the parties” is a purchase of parts and supplies. The “true object” of the transactions is that the Taxpayer’s customers are not, in fact, buying individual copies, but rather the Taxpayer is providing a turn-key service for consideration based on the number of copies produced. There is no individualized sale each time the button is pushed where a little toner is consumed or a roller or belt is one use closer to the scrap bin. Logically, the gist and true object of the agreement is that the Taxpayer’s customers desire a resource available that will produce a good copy each time the customer wants a good copy, and the customer doesn’t want to be bothered with the details or means to accomplish that. The cost-per-copy payment structure is the Taxpayer’s method of billing its customer and the method of billing the customer does not control the essence of the agreement. The contract is labeled a maintenance agreement, the terms of the contract are of a maintenance agreement and, in my opinion, the true objective of

the arrangement is that the Taxpayer agrees to maintain the customers' copiers with parts, materials and labor as it alone decides.

The Taxpayer has also argued the contracts should be considered bundled transactions and should be taxed subject to the provisions of G.S. 105-164.12B. However, this statute provides that a bundled transaction must meet all of the following conditions:

1. A seller transfers an item of tangible personal property to a consumer on the condition that the consumer enters into an agreement to purchase services on an ongoing basis for a minimum of at least six months.
2. The agreement requires the consumer to pay a cancellation fee to the service provider if the consumer cancels the contract for services within the minimum period.
3. For the item transferred, the seller:
 - (a) does not charge the consumer; or
 - (b) charges the consumer a price that, after any discount or rebate the seller gives the consumer, is below the cost price the seller paid for them.

I do not find that the contracts the Taxpayer has with its customers to maintain their copiers meet any of the conditions required for a bundled transaction.

The Taxpayer contends that the Department did not schedule a hearing and notify the Taxpayer within the 60 days from the Taxpayer's request for hearing as required in G.S. 241.1(c). The statute also provides that the hearing may be delayed if both the Taxpayer and the Department mutually agree to a postponement. The Department has provided evidence to show that it mutually agreed to delay the hearing to allow time to resolve the disputed issues. The Department asked the Taxpayer to advise if it did not agree to mutually delay the hearing and it did not receive any objection to the postponement of the hearing from the Taxpayer. The original audit report has been amended twice and many of the issues protested in the original assessment have been resolved through negotiation. It is clear that the Department has made a good faith effort in its numerous letters and meetings with the Taxpayer to attempt to reach an agreement. Also, the Taxpayer makes no showing how a delay in the hearing process has caused it any prejudice whatsoever. In any event, the matter of canceling an assessment on

the basis that a hearing was not scheduled within the time prescribed has been addressed by the Tax Review Board, Final Decision Docket No. 96-237. The Board found while there is an affirmative duty on the Department to satisfy the statute's guidelines, the legislature specifically elected not to couple this requirement with sanctions. The Board held that the Department did not err in refusing to cancel an assessment because the hearing was not timely.

Finally, the Taxpayer takes exception to the "true object" arguments made by the Department, although the transcript of the hearings evinces that that argument was put forth first by the Taxpayer's representative. The Taxpayer contends it was denied due process by "surprising" the Taxpayer with "true objective" test and not allowing the Taxpayer an opportunity to compel testimony from third parties through subpoena and then limiting its appeal on review of the record from the hearing. The Taxpayer further contends that it is unfair to impose on the Taxpayer the burden of proof and then deprive the Taxpayer the means to gather evidence to satisfy the burden of proof. As a matter of record, the record was left open for thirty days after the date of hearing, affording the Taxpayer any opportunity to submit any additional information it wished to have considered. The Taxpayer in fact did submit affidavits from customers indicating their intent when entering into these contracts. Further, G.S. 105-241.1 specifically provides that the rules of evidence do not apply at the hearing. Finally, it is well established that administrative agencies cannot address constitutional questions.

It is the decision of the Assistant Secretary of Administrative Hearings that the proposed assessment of tax and interest be sustained in its entirety.

Made and entered this 18th day of March, 2003.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings